GRADING THE CONSTITUTIONAL CONVENTION ON SLAVERY

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ABSTRACT

The US Constitution bends toward justice on slavery although it is not triumphant. This paper looks at 11 separate issues affecting slavery. The three-fifths rule is a pro-Northern rule measuring the contribution of slave labor to wealth. A more accurate measure of slave labor's contribution to wealth would have given the South the majority in the House. The power of Congress to suppress insurrections, to return fugitive slaves, and to ban tax on exports arise from unrelated principles that could not have been reasonably distinguished as to slavery. The deferral of the ban on slave imports for twenty years is either a half loaf or a failure to reach a goal they should have reached. The Constitution gave a toolbox of ways to reach abolition through ordinary legislation, including enacting a prohibitive tax on slaves, drafting slaves, banning interstate commerce in slaves, and declaring slavery to be against the general welfare. Despite Chief Justice Roger Taney, the Constitution allowed Congress to ban slavery in the territories. Despite Taney, slaves are not property under the logic of the Constitution.

KEYWORDS: *Slavery, three-fifths clause, fugitive slave act, ban on export taxes, tax slaves to manumission, free slaves by drafting, ban on slavery in territories, slaves as property*

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On slavery, the 1787 Constitution, to paraphrase Martin Luther King Jr., "bends toward justice,"[2] though it is not triumphant. On a scale of +10 (triumphant abolition) to −10 (Dante's nineth circle of Hell), I would grade the Constitution on slavery at a +3.9. I have no confidence in the specific number, as will be explained in this paper, but the prose evaluation "constructive, but not triumphant" is consistent and seems about right. Others have called the US Constitution "a covenant with death,"[3] which perhaps gives the Constitution too little credit for its steps forward. This grading will probably not settle the bigger question of whether we should now be singing "God Bless America" with Kate Smith[4] or preaching "God Damn America" with Rev. Jeremiah Wright.[5] Still, whether on the God-bless or God-damn side, we should address the question with a valid intellectual history of the founders' 1787 decisions.

This paper looks at eleven issues affecting slavery, averaging the grades given for each, treating all as of equal weight. The most prominent indictment of the Constitution on the issue of slavery is the three-fifths clause, which determines votes in the House of Representatives by state population but counts only three-fifths of the slave population.[6] I rate the three-fifths clause at +4 because it gives the nonslave states of the North a majority in the House, although the better measure of slave contribution to wealth would have given the slave-state South a majority at 56 percent. The Fugitive Slave Act and the calling forth of the army to quell rebellions hurt slaves (and each is therefore graded at −2), but both were adopted as convincing principles from nonslave issues that did not distinguish between slaves

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2. Martin Luther King Jr., speech at the National Cathedral, March 31, 1968, saying the arc of *history* is long, but it bends toward justice.

3. The literature on slavery is large. Various centers at the University of Virginia have collaborated on a searchable data base of 25,000 scholarly works on slavery (http://www2.vcdh.virginia.edu/bib). While I cite some relevant to specific points that follow, this paper is primarily my fresh reaction to primary sources—the letters, speeches, and newspapers mostly of 1787. It is not a general review of the secondary literature nor a history of the subsequent evolution of attitudes toward slavery or the Constitution.

4. There is an extraordinarily effective 1943 propaganda film, starring Kate Smith, that can leave no throat unchoked. See https://www.youtube.com/watch?v=TmfeNq5x5aQ.

5. Both the clip and longer sermon are at https://www.youtube.com/watch?v=TYqrXVNfYUI. The Reverend Jeremiah Wright is an extraordinary fiery Protestant preacher. The "God Damn America" line is well within the Protestant tradition that Man is damned by original sin, but there is the possibility of redemption and salvation but only if *we* will amend our sinful ways.

6. US Constitution, art. 1, sec. 2. Section 2 also requires direct tax to be apportioned by population counting slaves at three-fifths, but apportionment made such direct tax unworkable. See text following *infra* n. 54.

and other members of the population. The combination of monopolies for American shipping and a ban on taxing the export of slave-raised commodities offset each other (graded 0). Congress could have abolished slavery through ordinary legislation by drafting slaves, taxing them to manumission, or declaring slavery to be against the general welfare (+8 each), or it could have constrained the expansion of slavery by banning interstate commerce in slaves (+4). The framers of the Constitution allowed the slave trade to be banned after twenty years, thereby losing half the full value of an immediate ban, but that was an improvement over the Articles of Confederation, which allowed no ban. Notwithstanding Chief Justice Roger Taney's interpretation in *Dred Scott*, the Constitution allows Congress to ban slaves in territories (+8), and the Constitutional Convention resisted calls to give any protection to slave property (+2). The sum of the grades for eleven issues is 42, and the average is 3.9.

I. CONSTRUCTIVE WITHIN THE POSSIBLE

Slavery was an issue missing on the Constitutional Convention delegates' initial agenda as they came together. It was not included in the documents that empowered them. Dealing with slavery was less important than forming a new sovereign national government and giving it power to collect its own taxes. The first purpose of the US Constitution was to give the federal government a taxing power sufficient to make payments on the debts incurred during the Revolutionary War. In the coming inevitable war, the federal government would need to borrow again and the federal government with the obligation to defend in war had no viable tax source nor the ability to borrow (Johnson 2005, at 1–6, 15–39). The Virginia Plan, voted for at the start of the Constitutional Convention and framing the debates, proposed a strong sovereign national government with its own tax power and able to enact federal law supreme over the states. The Constitution *is* the Virginia Plan, with subsequent tinkering on administrative details ((Johnson 2005, 40). The grand blueprint, the Virginia Plan, did not touch on slavery. Slavery issues mostly arose only late in the convention because delegates focused first on what they saw as other, more important issues.

Politics is the art of the possible, and abolition was not a goal the Constitutional Convention could have reached. Slavery was a critical issue to the South. In the North the prevailing attitude was let us "leave matters as we find [them]" and "dispatch to our business" (Farrand 1937, 2:369–70). The important, even leading delegates Benjamin Franklin, Alexander Hamilton, James Wilson, James Madison, and Gouverneur Morris joined abolition societies, but even they probably

measured maintaining payments on the war debts and strengthening the federal government as more important than the slavery issue. Although abolition societies in Pennsylvania and New York petitioned the delegates, (Wilentz 2018, 53–56), the groups had small membership and no substantial political influence. There was no up-and-down vote at the convention on whether slavery should be abolished; but had there been, immediate abolition would not have received many votes. Abolition was simply beyond the art of the possible, even within a convention that took overall constructive steps restricting slavery. In politics the perfect cannot be used as the enemy of the good. It is not unreasonable to say, as judged by eternal morality, that the Constitution needed to abolish slavery. Anything less is damnable. Yet this view treats everything the convention did as negative, as short of triumph, and misses the constructive steps the Constitution achieved, bending toward justice.

Refusing union with slaveholders also would not have accomplished much. The remedy implied by labeling the Constitution a "covenant with death"[7] is that the Northern states should not have entered into union with slave states in 1787–1788. Slavery ended in America almost eighty years later because Union troops invaded the South, destroyed the Confederate white armies, and enabled the victorious Union government to impose a Thirteenth Amendment on a conquered South. Letting the South assert its own independence from the federal union at any point might well have allowed some modest number of more fugitives to flee north, but the numbers would not have reached those the Union's Civil War victory achieved, resulting in the abolition of slavery for all. Union proved to be better for slaves than disunion would have.

II. THE THREE-FIFTHS CLAUSE

The US Constitution provides that votes in the House of Representatives and direct tax must both be allocated among the states according to population, but counting slaves at three-fifths of the value of free labor (US Constitution, art 1, sec. 2, cl 3; sec. 9, cl. 4) . The proposal to count slaves at three-fifths was settled in the 1783 debates on determining the requisition quota required of states, four years before the Constitutional Convention. Three-fifths was always a wealth issue, measuring wealth by the contribution of slave labor to state wealth. Three-fifths understates the contribution of slave labor to wealth, however. Nonetheless, this formula gave the Northern states a majority in the House—a constructive step (+4 in my grading)—whereas a more accurate measure would have given the South a majority, most plausibly a

7. See, e.g., Finkelman, *supra* n. 4.

57 percent majority. Three-fifths is positive but not triumphant because it had no effect on the Senate nor on the seventy-three years under pro-slavery presidents.

The Articles of Confederation as adopted in 1781 had required that a state's requisition quota be determined by the value of real estate and improvements in the state. Under the Articles, Congress could raise tax revenue only by requisitions—that is, direct taxes on states. Pennsylvania, however, had put in appraisals of its real estate that would have reduced its share of a requisition to half of what other states considered to be true value. Indeed, all requisitions were treated as provisional, pending a correction of the appraisals, which never happened. Congress had no employees who could reappraise the relative value of real estate once it was given a state's submission. (Johnson 1998, 131–44).

The formula allocating tax by population was an attempt to ascertain the relative wealth of a state once appraisal of real estate proved inadministrable. In the 1787 Constitutional Convention, both Nathaniel Ghorum and James Wilson said that it made no material difference as to whether state tax was allocated by population or by wealth in their states, Massachusetts and Pennsylvania, respectively (Farrand 1937, 1:587). James Madison generalized that as long as migration was free, the people would move to the richer lands and cities, so population would always be a fair measure of wealth (Farrand 1937, 1:587).[8] The convention delegates returned to their state ratifying conventions, where they consistently explained that the wealth of a state was best calculated by the labor of it population, given the absence of the ability to do any better.[9]

Slave labor's contribution to wealth was a contested issue in 1783 when it was still just a tax issue. The North argued that slaves contributed at least as much to wealth as free labor. Dismiss your slaves, as James Wilson of Pennsylvania put it, "& freemen will take their places" (Smith 1976–2000, 4:439). The South claimed

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8. See also Madison (Farrand 1937, 1:585), saying the value of labor might be considered as the principal criterion of wealth and ability to support taxes .

9. Charles Pinckney, speech in South Carolina House of Representatives, January 1788 (Farrand 1937, 1:587, 3:253), saying that we were at a loss for a rule to ascertain the proportionate wealth of the states and at last thought that the productive labor of the inhabitants was the best rule for ascertaining their wealth, counting the whole number of free persons plus three-fifths of the slaves; Rufus King, speech to the Massachusetts Ratification Convention, January 17, 1788 (Farrand 1937, 3:255), explaining apportionment of votes and taxes as arising because Congress could never ascertain value of surveyed lands and improvements; William Davie, Speech to the North Carolina Ratification Convention, July 24, 1788 (Elliot 1941, 3:31), where representation was attempted from a compound ratio of wealth and population, but it was found impracticable to determine the comparative value of lands and other property, in so extensive a territory; and population alone was adopted as the only practicable rule or criterion of representation; slaves were represented because their labor contributed to general wealth.

that slaves contributed only half as much to wealth as free labor, as evidenced by Southern wage rates that, competing with slaves, were half of the North's,[10] so slaves should count only at one-half. Congress settled at three- fifths, closer to the South's one-half than to the whole for taxation, with "despair on both sides of a more favorable rate of the slaves" (Smith 1976–2000, 20:128). Once fixed by hard debate, and despair, the settlement at three-fifths had a magnetism for both sides.

The 1783 proposal never became an amendment to the Articles of Confederation because the Articles themselves required unanimity for amendments. New York vetoed the whole package because it included a federal tax on imports, and New York wanted the tax on imports through New York Harbor to be exclusively for use by New York State (Johnson 2017). Still, three-fifths was the "federal ratio," part of a more workable rule for measuring wealth than taking state self-appraisals of wealth.

The three-fifths ratio came into the Constitution as a voting rule because of the decidedly undemocratic principle that votes should be allocated by wealth. There were many proponents, in the North and in the South, for measuring votes by wealth because property was the great means of carrying on war and because protection of property was the primary object of government.[11] Voting weight should be accorded to wealth, *The Federalist* states, because "[g]overnment is instituted no less for protection of the property, than of . . . individuals" (Cooke 1961, 278). Madison's Virginia Plan, which set the agenda for the Constitutional Convention at its outset, ducked the great issue as to whether votes in the national legislature should be determined by population or by tax contributions, allowing either rule "as may seem best to different cases" (Farrand 1937, 1:20). There were, however, also delegates who argued that votes should represent people (Elliot 1941, 2:433, 497–98, 502). Hamilton in *The Federalist* said that people (not wealth) are the "pure original fountain of legitimate authority" (Cooke 1961, 146). Still, the conflict

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10. Benjamin Harrison (VA), Continental Congress (Ford 1907–1937. 6:1100), revealing that the cost of labor in the South was £8– £12 a year and cost of labor in the North was £24; Abraham Clark (NJ) (Ford 1907–1937, 25:948), saying South had argued for slave labor at half of free labor; cf. George Mason (Farrand 1937, 1:581), saying slaves were not the equal of free men but contributed to the wealth of a state; William Hooper (NC) (Ford 1907–1937, 5:1099), declaring Southern labor to be worth far less than Northern free labor.

11. Rufus King (MA) (Farrand 1937, 1:541), saying that property was the primary object of government; Pierce Butler (SC) (Farrand 1937, 1:529, 540, 542, 562); Gouverneur Morris (PA) (Farrand 1937, 1:533), noting that property is the main object of government, not people; Charles Pinckney (SC) (Farrand 1937, 1:566) dwelling on the superior wealth of the Southern states and insisted on its having its due weight in the government.

between voting by wealth and voting by people did not need to be resolved if population was the available measure of wealth. As Rev. William Samuel Johnson of Connecticut put it, wealth and population were each the "true, equitable rule[s] of representation: but . . . these two principles resolved themselves into one; population being the best measure of wealth" (Farrand 1937, 1:593).[12] Three-fifths is not a statement that slaves have only 60 percent of a soul in the eyes of God. It is just a (mis)measure of the contribution of slave labor to wealth.

Allocation of votes in the House of Representatives by population counting slaves at three-fifths first appeared in the convention early in the proceedings under a motion by James Wilson, of all people. In the Pennsylvania Ratification Convention Wilson became the best advocate for the rule that votes must represent people. Wilson moved in the Federal Convention, however, that votes should be determined by "contributions"—that is, tax paid, and tax paid under a requisition was determined by wealth, still then the fair market value of real estate and improvements. Wilson's motion on June 11 carried over the 1783 requisition rule proposal, adopted, as Wilson put it, by eleven states (but which was not enough for adoption of the unanimous state votes under the Articles). When voting was first introduced in the Constitutional Convention, the Articles still technically said that requisitions were apportioned by fair market value of real estate and improvements, but the three-fifths idea was the remembered precedent because it was feasible to apply the rule. Appraisals and population, however, were parallel attempts to measure the same underlying wealth. Wilson's motion passed by 9 to 2, and the vote would apparently have been unanimous except that Delaware and New Jersey were small states still holding out for the equal votes per state, which would give them excess power wildly disproportionate to their populations or contributions (Farrand 1937, 1:201). Although the vote for votes by population with slaves at three-fifths was overwhelming, it did not have binding effect because the convention was meeting as a Committee of the Whole solely for discussion and under rules of order, votes in the Committee of the Whole are not binding.

When the convention arose from the Committee of the Whole, a report of a Grand Committee, chaired by Benjamin Franklin, again endorsed determining votes by population counting slaves at three-fifths (Farrand 1937, 1:526). The nearly unanimous accord for the three-fifths, however, thereafter broke down. The South demanded that slaves had to be counted at 100 percent for representation (Farrand 1937, 1:580),

12. *Accord* Roger Sherman (Farrand 1937, 1:582), saying that number of people is the best rule for measuring representation and that if the Congress "were to be governed by wealth, they would be obliged to estimate it by numbers."

and the North responded that slaves, if considered property, needed to be excluded in full (Farrand 1937, 1:561). On July 11 the convention defeated the three-fifths formula to allocate House votes, by 4 to 6, with opposition from both North and South looking to move the conclusion in their opposite directions. (Farrand 1937, 1:588).[13]

Then the next day, on July 12, Gouverneur Morris of Pennsylvania moved that taxes and votes should *both* be allocated by the same three-fifths formula and that motion was successful, 6 to 2, with two other states divided, and from there the formula became part of the final constitutional text. Tying the apportionment formula to direct tax as well as to votes shifted enough support both North and South to let the three-fifths measure of wealth govern votes. Pennsylvania and Maryland changed their votes from no to yes, and Massachusetts and South Carolina changed their votes from no to divided—enough change to make the difference between the 4 to 6 defeat on July 11 and the 6 to 2 success on July 12 (Farrand 1937, 1:566–67).

Morris amended his motion, receding from requiring all tax to be apportioned by population, so only direct taxes needed to be apportioned under his motion. *Direct tax* was a newly coined term in America and had a changing, elastic meaning. It started as a reference to taxing states directly through requisitions.[14] The tie-in between allocation by votes and taxes arose before the Constitutional Convention had given Congress any revenue source beyond requisitions, and the debate in 1783 had been only about requisitions; but the July 12 debates perhaps hint that they were thinking there would be other kinds of federal taxes besides requisitions that would also have to be apportioned, though no delegate could have known for sure what was to come. The convention ultimately gave Congress the power to mandate how a state would satisfy its quota and, indeed, gave the Congress the authority to tax individuals within a state by any tax without going through the states (Cooke 1961, 220). The constitutional language specifies that direct tax had to be apportioned *among the states*, so the delegates were still thinking of apportioning taxes on states, and not taxes on individuals as they would subsequently allow. The term *direct tax* was soon after applied to all the state taxes used to satisfy requisitions.[15] Direct tax also applied to dry land taxes, including excises and stamp taxes, which were impossible to allocate by population because the Constitution required excises to have a uniform rate, before

13. Voting no were Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, and South Carolina.

14. See, e.g., Eliphalet Dyer (CT delegate)) to Jonathan Trumbull Sr. (CT governor), March 18, 1783 (Smith, 1976–2000, 20:45), asking, What shall that be done by, "direct taxes on each state, justly proportioned"?

15. A 1796 Treasury inventory of direct taxes was nothing but an inventory of state taxes a state would use to satisfy a requisition (Wolcott 1796, 414).

the language saw the impossibility and stopped calling excises and stamp taxes direct tax (Johnson 2007). Morris later said his motion to tie the three-fifths apportionment to taxes was just a tactical bridge to get over a gulf to reach adoption of the rule for votes, but the tie-in tactic could not be undone once the connection between votes and tax had been made (Farrand 1937, 2:106).

While tying apportionment with the three-fifths to tax as well as to votes changed the result, the tax side proved unworkable where the tax base was not equal per capita in every state. During the Great Depression, for example, Mississippi's tax base per capita, measured by income, sales, wealth, or any reasonable measure of economic position and ability to pay, would be one-fourth of New York's (Gelman 2013). Apportionment by population would then require that tax rates in Mississippi be four times higher than tax rates in New York. For instance, tax rates at 20 percent in New York would require tax rates at 80 percent in Mississippi. Mississippi was a poor state with a small tax base over which to spread its quota. A decision to tax New Yorkers at 25 percent entails a tax in Mississippi at 100 percent, taking it all. The bizarre result is unavoidable, a necessary result of apportionment per capita on an unequal tax base.

Apportionment by population was not adopted to kill federal direct tax, though that was the effect. George Washington explained to Thomas Jefferson that the federal power over direct tax was the point of the whole Constitution, and if the national government did not have the power over direct tax to pay its debt, we might as well revert to the Articles of Confederation (Washington 1931–1944, 30:82–83). Yet when it came to it, the apportionment by population requirement made direct taxes absurd to use for any tax base that was not equal per capita across all the state. The three-fifths count for slaves would have made apportionment impossible. The assumption that population measured wealth and avoided conflict between those who rest votes on property and those who would rest votes on people made it impossible for the framers to see that the federal tax base could be uneven per capita in different states. It was a foul-up in the core of the Constitution, and the framers did not see it (Johnson 1998). The Supreme Court later allowed a workable federal tax system by holding that the Constitution evidently contemplated no taxes as apportionable "direct taxes," but only such as the rule of apportionment could reasonably be applied (*Hylton* v. *United States,* 3 U.S. 171 [1796], 174). Still, if we view Governeur Morris' tie in between votes and direct taxes as some kind of a quid pro quo bargain between two opposing sides, there was not much content on the pro-South, direct tax side of the exchange.

A better valuation of the contribution of slave labor to wealth would have treated slave labor as at least equal in value to free labor, indeed plausibly as twice as valuable as free labor. Take as given the assumption that wage rates per day were

twice as high in the North as in the South. Still, slaves could work all year, whereas the Northern workers left the fields in October with the first freeze and did not return until six months later with the last freeze in April.[16] Southern woman slaves worked the fields, whereas Northern women did not (Smith 1976–2000, 4:440). With the twice-as-long work-year in the fields and the South putting twice as many individuals in the field—both sexes—the accepted premise that Southern wage rates per day were half of Northern wage rates becomes a rule that slave labor is worth 200 percent of free labor. As calculated in Table 1, the three-fifths rule gave the South 47 percent of the votes in the House of Representatives, whereas counting slave at 100 percent meant the South would have 50.6 percent of the votes in the House, and counting slaves at 200 percent, as shown in Table 1A, would give the South a majority of 56 percent.[17]

Even the core measurement, that Southern wages were half of Northern wages, understates the best measurement of the contribution of slave labor to wealth. Slaves were given only subsistence, and they obviously could not negotiate or strike for higher wages or move to the better-paying jobs so that their cost reached their highest worth. Driving down the cost of slaves to bare subsistence meant that slaveholders would get a surplus value from the labor of their slaves not reflected in the competitive wage measurement. Free labor in the North would not work for mere subsistence. Northern farm labor also did not work under a whip. If we adjust the contribution of slaves to wealth to above 200 percent of the North's agricultural labor, then the percentage of Southern votes in the House would be higher than 56 percent. The three-fifths clause, accordingly, effectively keeping Southern votes to a minority in the House is a very pro-Northern rule. Undercounting the value of slaves had been a Southern victory in 1783 when the issue was the South's quota under tax requisitions, but victory became a loss for the South in 1787 when the important issue was determination of votes.

Slaves did not vote, of course, but then neither did woman and children, both groups being considered the wards of the male head of household and represented only by his votes at the ballot box. The status of women as property was closer to that of owned slaves than we would like to think—consider that the Hebrew word for "husband," *ha'ala*, translates literally as "my owner." Given the property requirements usually required for voting at the time, apprentices, artisans, and Northern field workers not owning land also could not vote, and they had no voting guardian

16. Last freeze to first freeze at Yale University, a center of observation, is 180 days (April 22–October 20), https://www.almanac.com/gardening/frostdates/CT/New%20Haven.

17. Columns (1) and (2) are from the 1790 Census, U.S. Census Department 3

TABLE 1. Slaves for the House Count, Three-Fifths, 100 Percent, 1790 Census

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
North	Slaves	Total Population	Nonslaves	3/5ths Slaves (3/5 of (1))	Consti. Count (3)+(4)	Vote % (5)/ sum (5)	Vote Slaves at 100% (2)/sum(2)	Advantage of 3/5th (7)-(6)
NY	21,193	340,241	319,048	12,716	331,764	9%	8.90%	-0.50%
NJ	11,423	184,139	172,716	6,854	179,570	5%	4.80%	-0.30%
PA	3,707	443,611	439,904	2,224	442,128	13%	11.70%	-0.90%
CT	2,648	237,655	235,007	1,589	236,596	7%	6.20%	-0.50%
RI	958	69,112	68,154	575	68,729	2%	1.80%	-0.10%
NH	157	141,899	141,742	94	141,836	4%	3.70%	-0.30%
MA	0	378,566	378,566	-	378,566	11%	9.90%	-0.80%
VT	0	85,341	85,341	-	85,341	2%	2.20%	-0.20%
Summary North	40,086	1,880,564	1,840,478	24,052	1,864,530	53%	49.40%	-3.40%
South								
VA	292,627	747,550	454,923	175,576	630,499	18%	19.60%	1.80%
NC	107,094	249,073	141,979	64,256	206,235	6%	6.50%	0.70%
MD	103,036	319,728	216,692	61,822	278,514	8%	8.40%	0.50%
NC	100,783	395,005	294,222	60,470	354,692	10%	10.40%	0.30%
GA	29,264	82,548	53,284	17,558	70,842	2%	2.20%	0.20%
KY	12,430	73,677	61,247	7,458	68,705	2%	1.90%	0.00%
DE	8,887	59,096	50,209	5,332	55,541	2%	1.60%	0.00%
Summary South	654,121	1,926,677	1,272,556	392,473	1,665,029	47%	50.60%	3.40%
Summary Whole Nation		3,807,241			3,529,558	100%	100%	

TABLE 1A. Slaves for the House Count, 1790 Census

		Slaves at 200% Free Labor		
	(9)	(10)	(11)	(12)
North	2x slave count. 2x(1)	Nonslave from (3)	House at 2x for Slaves (9)+(10)	% in House
NY	42,386	319,048	361,434	8%
NJ	22,846	172,716	195,562	4%
PA	7,414	439,904	447,318	10%
CT	5,296	235,007	240,303	5%
RI	1,916	68,154	70,070	2%
NH	314	141,742	142,056	3%
Mass	–	378,566	378,566	8%
VE	–	85,341	85,341	2%
Summary North	80,172	1,840,478	1,920,650	43%
South	–	0	–	0%
VA	585,254	454,923	1,040,177	23%
NC	214,188	141,979	356,167	8%
Md	206,072	216,692	422,764	9%
NC	201,566	294,222	495,788	11%
GA	58,528	53,284	111,812	2%
KY	24,860	61,247	86,107	2%
DE	17,774	50,209	67,983	2%
Summary South	1,308,242	1,272,556	2,580,798	57%
Whole Nation	–	0	4,501,448	

to look after them. Nonvoting persons were nonetheless included in the population count to measure a state's wealth and determine its number of House members. Some of this did not matter because age and sex—that is, the number of children, youth, and women—probably did not vary substantially North and South. While population size served as a measure of a state's wealth, moreover, not all people would have been considered to contribute the same to state wealth. Such variations (excepting for slaves) were ignored in favor of using a simple rule, the population size.

III. THE FUGITIVE SLAVE CLAUSE

The thirteen jealous colonies came together as a band of brothers to fight and win a long war against what was then the most powerful nation on earth, Great Britain, under the banner of "United we stand, divided we fall." The national motto continued the sentiment: *e pluribus unum*, "out of many, one." But if they were to join together in a union, the jealous states demanded respect from fellow states and the prohibition of advantages to them. The US Constitution for example, prohibits "port preferences," a rule requiring that shipping activity be confined to a specified port. That port can then charge monopoly profits, ostensibly to be used to improve the port's docks. Port preferences were the leading economic program of the constitutional movement as it got organized in Virginia, (Johnson 2004), but the program could not survive the jealousy of the states in a convention working hard toward "a more perfect Union" whose delegates feared a monopoly might be accorded to the port of some state other than their own.

Similarly, under the US Constitution, a state must enforce the civil judgment in property or contract of the court of another state. Felons fleeing across state lines must also be extradited by process of law. White indentured servants are to be returned when they flee before their seven years' indenture is up (US Constitution, art. 4, sec. 1 and 2). All these were rules required by mutual respect for a fellow state. The strong bonds of brotherhood reaching toward a more perfect union required it. Under the general heading of respect for a fellow state, the next on the list was the obligation to return fleeing slaves, at least as an obligation enforced by the ordinary process of law. Under the rule that felons and white indentured servants had to be returned, there is no comfortable distinction for not returning salves.

The Northwest Ordinance, passed as the Constitutional Convention was meeting, laudatorily banned slavery in the Northwest Territory, but it also provided that any "person from whom labor or service is lawfully claimed," having escaped into the territory, "may be reclaimed and conveyed back to the person claiming the labor (Ford 1904–1937, 32:343). Reasonable people follow precedent to reach settlements, especially precedents that served the convention's strong striving for a more perfect union.

The fugitive slave clause did hurt slaves, and it has to be categorized as an anti-slave feature of the Constitution, but within the important principle of respect for fellow states, the return of slaves could not comfortably be distinguished from the return of others. I grade the fugitive slave clause as −2, but not a much more negative number because the founders did not seem to have a viable intellectual distinction as to slaves.

IV. THE BAN ON TAXING EXPORTS AND THE MONOPOLY FOR AMERICAN SHIPPING

The US Constitution's banning of tax on exports is one of the counts of the indictment of the Constitution concerning slavery (Finkelman 1987, 191). The ban prevented tax on the slave-grown crops of tobacco and indigo, later of cotton, and prevented a reduction of the economic value of the slaves whose labor grew them. Had their value been reduced, we might have seen less expansion of slavery and more voluntary freeing of the slaves.

The ban on tax on exports was just routine application of the mercantilist economics dominant at the time (Johnson 2004, 28–33). Mercantilism set the duty of government to discourage imports, by implementing a tax or regulation that drained gold and silver away from domestic trades, or to allow domestic hoarding for war. Mercantilism also called for encouraging exports that gave the country more gold and silver. Adam Smith blew the attitude out of the water. The wealth of nations, he said, was diminished by hoarding gold and silver when it could be used to import cheaper, better goods. In 1787, at issue was cheap, high-quality machine-woven cloth from Great Britain, well worth its price when the United States had no machine-powered weaving. (Imports are typically better bargains available abroad than making the goods domestically.) Domestic trades could also have been carried out using paper money, as Alexander Hamilton later advocated. Mercantilism, nonetheless, remained the dominant thinking at the time, sufficiently strong to mandate the ban on export tax. Smith's arguments for free trade did not, in fact, become respectable in America until the turn of the next century. Mercantilism is, in short, another instance of the routine application of a settled principle that had implications for the issue of slavery—a wrong-headed principle, but settled.

The impact of the ban on export taxes on slave-grown crops was offset by allowing Congress a "Navigation Act" to give a monopoly to American shipping so they could charge more to export the slave crops. Giving monopoly or differential tax to favor American shippers was another standard tool of the then-dominant mercantilist economics (Johnson 2004, 25–28). Whether the combination of banning export tax and the Navigation Act would suppress or expand exports overall depended on whether the export tax rates avoided by one part of the deal or the monopoly premium added on to shipping costs on the other half of the deal would prove to be higher. Still, both granting protection or monopolies and encouraging exports—the ordinary applications of mercantilism—is sufficient to explain the result and without addressing attitudes on slavery. I grade the combined impact of no export tax but monopoly premiums on shipping as breakeven, with an unknowable impact above or below zero.

V. INSURRECTIONS

The US Constitution empowers Congress to call forth the state militias and a national army to quell insurrections. The insurrections clause could have been used to quell slave insurrections had a state not been able to handle them internally, but the immediate cause of the clause is Shays's Rebellion, a rising of stressed white farmers in Massachusetts that targeted tax collectors, judges who gave judgments on debt owed, and the general-store owners who had extended credit for seeds and plows. Extending the quelling of a rebellion like Shays's to slave uprisings, however, was another routine application of a general principle, accepted without dissent. Suppression of insurrection was also claimed by Abraham Lincoln as the justification to resist the secession of Southern states in 1861 and prosecute a war that ultimately freed the slaves,[18] so that quelling insurrections was also used in the war that ended slavery. I grade the Constitution's authorization to quell insurrection as −2, on the basis that it might have been used against slaves, even though it was in fact used in 1861 against slaveholders in the unknowable future.

VI. BANNING THE IMPORTATION OF SLAVES

The Constitution gave Congress the power to ban imports after twenty years (US Constitution, art. 1, sec. 9, cl. 9), which Congress did at first opportunity, under the instigation of a slaveholder president, Thomas Jefferson.[19] Banning the importation of slaves did not arise from any nonslave principle. At any discount rate above 3.5 percent, the first twenty years is more than half the value of forever.[20] The Articles of Confederation had not allowed banning importing slaves even deferred in time, so from a base of no ban possible, I grade the deferred ban a +5, halfway to triumph on the issue, an immediate ban.

Capturing and transporting Black people across the Atlantic was condemned as worse than just maintaining slavery where it existed. As Gouverneur Morris put it, slavers "go to the coast of Africa, and, in defiance of the most sacred laws of humanity, tears away [their] fellow-creatures from their dearest connections, and damns them to the most cruel bondage" in perpetuity (Farrand 1937, 1:393).

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18. Abraham Lincoln, Proclamation 88, August 15, 1861, authorizing termination of trade with a state in the state of insurrection.

19. An act prohibiting import of slaves of 1807, 2 Stat. 426 (March 2, 1807) to be effective January 1, 1808, the earliest year allowed.

20. At 3.5 percent, a perpetuity of $1 is worth $1/3.5%, or $28, and a twenty-year annuity is worth $14. (Calculation of annuity from standard annuity formula $PV = \$1*[\{1-(1+i)^{-n}]/I$.)

Support for banning slave imports was strong in the upper South. Anti-Federalist slaveholder George Mason of Virginia supported a ban on imports to prevent the increase of slavery that brought "the judgment of heaven on a Country" (Farrand 1937, 1:770). James Madison, a Virginia slaveholder, had drafted a constitution for Kentucky that prohibited the state from allowing the importation of slaves (Madison 1962–1991, 8:351). Anti-Federalist Luther Martin (Maryland) proposed banning imports that were contrary to the "principles of the revolution and dishonorable to the American character" (Farrand 1937, 2:364). James Iredell of North Carolina, later justice of the Supreme Court, regretted the twenty-year moratorium allowed by the US Constitution, but he allowed that the interests of humanity had gained something by the eventual prohibition of the inhuman trade, though through at a distance of twenty years (Iredell 1788). The Constitution of the Confederate States of America prevented its Congress from interfering in the rights in Negro property, but it did also forbid any imports of slaves.[21]

The Constitutional Convention as a whole apparently had the votes to end imports immediately, even under the convention's undemocratic principle of equal votes per state. The upper South expressed moral condemnation of importing slaves. Perhaps stated cynically, the moral outrage should be understood as backed by the economic advantage the upper South, with a surplus of slaves, could achieve by the increase in value their slaves already in the United States would have if imports were made illegal. But Georgia and South Carolina said they would not join the union with a ban on their slave imports (Farrand 1937, 2:371), and the rest of the convention caved halfway, deferring the ban for twenty years.

The convention as a whole should have told Georgia and South Carolina to walk. Georgia and South Carolina combined had only 9 percent of the population of the United States (author's calculations from US Census Bureau, 3). In a democracy a small minority—under 10 percent—cannot be entitled to impose a venal rule allowing new enslavements for twenty years, against a greater than 90 percent majority that opposed them and got the issue right. Even under the awful voting-by-state rule, two states do not make a majority. Two little states threatening to walk should not have gotten half the value of the issue.

The Articles of Confederation, however, did not allow its narrowly corralled Congress to ban imports ever, so from that starting point the Constitution improved things a bit, to a half loaf. From a moral standpoint, the Constitutional Convention should have done better.

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21. Constitution of the Confederate States of America, art. 1, sec. 9, cl. 1 (1861), https://avalon.law.yale.edu/19thhttps://avalon.law.yale.edu/19th_century/csa_csa.asp_century/csa_csa.asp.

VII. THE ABOLITIONIST CONSTITUTION

Patrick Henry led the Anti-Federalist opposition to ratification in Virginia on an overall platform that adopting this US Constitution, and the nonslave eastern states, could and surely would end slavery. Give Congress the power to tax, he said, and they would impose prohibitive taxes on slaves. Give Congress the power to raise an army, and they could draft the slaves and thereby allow them freedom by their musket. Give Congress the power to provide for the general welfare, and Congress could declare slavery to be against the general welfare and ban it (Farrand 1937, 3:456, 490). Patrick Henry is right on all counts, although Congress never exercised its given constitutional powers. I rate all three powers that allowed Congress to end slavery by ordinary legislation as virtues of the Constitution, a +8 in all three cases. Still, abolition, even if authorized by mere ordinary legislative votes, would have required violence to enforce, and violence indeed proved to be required in 1861 to free the slaves.

A. Tax and Manumission

A high-enough tax per slave would force slaveholders to free their slaves. As noted, in the subsequent 1796 decision in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), the Supreme Court allowed a federal tax on carriages, calling it not a direct tax that would have had to be by population incorporating the three-fifths clause. If apportionment was unreasonable, and did not yield uniform tax rates across all states, it was not required. The *Hylton* rationale would allow a prohibitive unapportioned tax on slaves.

A prohibitive slave tax could also have been mandated within a requisition on the states. In a 1798 tax, for example, Congress set up quotas in each state by population including use of the three-fifths ratio, but also imposing a 50 cents tax per slave, which tax would be credited against the state's allocated quota.[22] George Mason, correcting Madison in the Virginia ratification debates, explained that Congress could have imposed a prohibitive tax within an apportioned tax.[23] Just as Congress could tax imports to reduce them, so it could tax slaves to reduce

22. Act of July 14, 1798, 1 Stat. at Large 597 (5th Cong, 2d Sess., 1798)

23. George Mason, Speech to the Virginia Ratification Convention, June 17, 1788 (Elliot, 3:468) saying correctly that Federalist debaters misconstrued the apportionment clause as preventing a tax on slaves without more exorbitant tax on Northern free people and that Congress could choose to enact prohibitively high tax on slaves within an apportioned requisition).

them. Prohibitive tax was a tool that could have been adopted by majority vote and presidential signature when Congress was ready.

B. Draft and Free Them

It was an accepted principle, North and South, that if a slave served in the army, that slave gained his freedom. In 1779, Hamilton, then a major aide to General Washington, wrote to John Jay, then president of the Continental Congress, proposing to enlist slaves in the Continental Army so as to "free them with their musket" (Hamilton 1961–1987, 17–19). In *Arabas v. Ivers*, 1 Root 92 (Conn. Super. Ct. 1784), a Connecticut court ruled, over the master's objection, that a slave who had served in the Continental Army was free, under the legal fiction "by implied contract." The most galling example to Henry would have been that Lord Dunmore, the last colonial governor in Virginia, proclaimed that Negroes willing and able to bear arms and join His Majesty's troops "to reduce Virginia to its duty" would be free.[24] Thousands of slaves responded. The Revolutionaries, however, did the same thing on their side. Virginia in 1783 freed slaves who had enlisted in the Continental Army in Virginia.[25] Henry was right. If Congress enlisted or drafted slaves under its power to "raise and support armies," that would free them. Drafting slaves was thus a routine tool Congress could use for abolition when it was ready.

C. Power over the General Welfare[26]

By its text, the US Constitution (art. 1, sec. 8, cl. 1) gives Congress the power to tax and spend to provide for the general welfare. Then, clause 17 gives Congress the power to use any other appropriate and necessary tool for the general welfare. The power to provide for the general welfare is parallel to the power to provide for the common defense in clause 1, and both powers are equally plenary and subject only to overrides protecting individual rights. The framers also made no distinction between tax and other regulation. Suppression of imports to preserve gold and silver was allowed by either tax or prohibition. Tax and spending are a sufficient tool for most general-welfare purposes;

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24. Dunmore's Proclamation, *Pennsylvania Journal and Weekly Advertiser*, December 6, 1775, History Resources, https://www.gilderlehrman.org/history-resources/spotlight-primary-source/lord-dunmores-proclamation-1775.

25. XI Va. Stat. at Large 308–309 (Oct. 1783). See Quarles (1995, 51–67), describing slave enlistment in the Revolutionary War.

26. The argument of this section is expanded in Johnson (2005, 2007, and 2013).

moreover, once tax is allowed, all other powers follow. The text is a codification of the binding resolution from the floor of the Constitutional Convention that Congress shall have the power "to legislate in all cases for the general Interests of the Union." Patrick Henry is right that the text gave Congress the power by ordinary votes to end slavery as inconsistent with the general welfare.

General welfare of such unrestricted scope was anathema to the South. The Confederate Constitution used the 1787 US Constitution as its model, but it took out the congressional power to provide for the general welfare. Once elected in 1800, Jefferson read the general welfare power out of the text. Instead, the Constitution was said—straying from the text—to grant only the set of fairly limited enumerated powers, none of which especially mentioned abolition.

There is no language or implication that the enumerated powers are exclusive. Indeed, the drafting history makes the list illustrative, but not exhaustive. The Articles of Confederation had given Congress only powers expressly delegated. The framers of the Constitution, however, took out "expressly delegated" limitation without any replacement implying exclusivity because as Edmund Randolph, who drafted the section, said, the limitation had proved "destructive to the Union." This Constitution expressly allows the power over general welfare (Johnson 2007, 2023).

Nonetheless, the narrow, enumerated-power doctrine prevailed over the more general power to provide for the general welfare as a matter of settled constitutional doctrine.[27] Henry is right as to the constitutional text but not as to the ultimately settled constitutional doctrine. The better contrary resolution in favor of the textual power to provide for the general welfare would have allowed Congress to declare slavery to be against the general welfare and would have ended slavery by declaration.

D. Regulation of Commerce

Beyond outright prohibition, Congress had the power to regulate interstate commerce. It could have banned carrying Black slaves across state lines, much as it later banned "white slavery," transporting prostitutes across state lines.[28] The South contested the prohibition of carrying slaves across state lines (Berns 1968), but their arguments, while intensely felt, seem unpersuasive, whether we consider slaves as property or as people, at least from the perspective of later bans on white slavery.

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27. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); *United States v. Hudson and Goodwin*, 11 U.S. 32, 33 (1812).

28. *Hoke v. United States*, 227 U.S. 308 (1913), upholding Mann Act criminalization of transporting prostitutes across state lines.

Once the ban on importing slaves kicked in, in 1808, Alabama, Mississippi, Louisiana, Missouri, Kentucky, and Tennessee would not have had access to imported slaves, nor to slaves from other slaveholding states, and could not have become slaveholding states. In the coming Civil War, the Confederate States of America would consist of just four coastal original states: Virginia, North and South Carolina, and Georgia. The Civil War would have been shorter.

E. Would Ordinary Legislation Have Been Sufficient?

The South defended against Lincoln's platform to ban slavery in the territories in 1861 by firing on Fort Sumter. If the South defended against restriction on slavery by violence in 1861, it would probably have defended slavery by violence at any time between 1788 and 1861. However, the North was not ready to end slavery by violence until 1861, when the Massachusetts militia began to sing that John Brown's "soul goes marching on."[29] "John Brown" has only one public meaning: ending slavery by violence. Volunteer soldiers and their cheering crowds were willing to do it. From 1788 onward, the US Constitution enabled Congress to abolish slavery through ordinary legislation. Congress thus had the tools to do so, but it would have plausibly required meeting Southern violence in defense of slavery with violence to use its constitutional toolkit.

VIII. NOT TANEY'S CONSTITUTION

In 1857 in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), the Supreme Court in an opinion by Chief Justice Roger Taney of Maryland said that Congress could not bar slaves from any territory, possibly any state, because slaves were property protected from congressional interference by the Fifth Amendment rule that no private property be taken without just compensation.

Dred Scott is not a reasonable interpretation of the US Constitution as to neither slaves as protected property nor congressional power to ban slavery in the territories.

Dred Scott, a slave, sued in federal court, arguing he was free because his master had carried him to Minnesota, a free territory.[30] Scott sued in federal court

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29. According to George Kimball, *Origin of the John Brown Song*, 1 (new series), *New England Magazine*, at 372 (1890), the marching song was written informally by a Massachusetts battalion in 1861. Julia Ward Howe's 1861 "Battle Hymn of the Republic" is also evidence of the North's new willingness to free slaves by violence. Howe wrote, "[As Christ] died to make men holy, let us die to make men free." People willing to die for a cause will kill for it.

30. This discussion of *Dred Scott* draws most of its information and attitude from Potter (1976, 327–96, 405–47).

under diversity jurisdiction, allowing a citizen of one state to sue a citizen of another state in federal court. The Supreme Court held that neither Scott nor any slave nor descendant of a slave was a citizen in any state, and none could therefore get jurisdiction in federal court based on diversity of citizenship.

That should have ended the suit and prevented the rest of the Court's words. A court does not have a free license to give out gratuitous orders beyond the needs of the case before it, and therefore everything after the denial of citizenship to deny jurisdiction should have been ignored as outside the scope of Taney's authority, beyond his role or robes.

A. No Property in Man

Whereas the Constitution of the Confederate States of America prohibited passage of any law "denying or impairing the right of property in negro slaves" (Conf. States, Constitution, art. 1, sec. 9, cl.4), the US Constitution did not. In the Constitutional Convention, Charles Cotesworth Pinckney (South Carolina) asked for protection for slave property (Farrand 1937, 1:594), but he did not get it—he did not even get a vote. Taney said that the right of property in a slave was "distinctly and expressly" affirmed in the Constitution (60 U.S. at 451–52), but when you look for it in the document, there is no such expression. Lincoln, in his Cooper Union Address in February 1860, said that the *Dred Scott* opinion was based on a mistake of fact in claiming that the text protected slave property either "distinctly" or "expressly."

Recall that at least for the purposes of allocation of votes in the House and allocation of direct taxes, slaves cannot be property. Votes were determined by state wealth, measuring wealth by the population's contribution to that wealth, counting the slaves' contribution to wealth at three-fifths of the slave population. A state could not get *both* its population and also some kinds of wealth on top of the basic population measure to measure wealth and hence votes. The value of property, including real estate, oxen, and horses, and slaves as well, was excluded from the formula.[31] The text of the Constitution calls the slaves "other persons," and thus slaves are always people, never property, in the ascertaining of direct taxes or votes.

The default position of Anglo-American common law was that slavery was not lawful except under a slave code enacted by the legislature. In 1772 in *Somerset v. Stewart* (Lofft 1, 98 Eng. Rep. 499 (K.B. 1772), Lord Mansfield, chief justice of England's highest common law court, held that a slave could not be recovered by a master

31. Elbridge Gerry (MA) (Farrand 1937, 2:201), saying if slaves were property they were not in the determination of votes anymore than cattle and horses.

in England because Parliament had not given slavery any legal sanction. Slavery is "so odious," Mansfield said, "that nothing can be suffered to support it but positive law." There were later a series of successful suits in Massachusetts relying on *Somerset* in which slaves achieved freedom under Massachusetts common law incorporating English common law (Wiecekt 1974, 115). In general, by default the American courts accepted British common law as our own law, with adaptation to particular American circumstances (Hall 1951). But outside Massachusetts, British common law's hostility to slavery was not treated as incorporated in American law. Furthermore, the Southern states adopted slave codes to overcoming the *Somerset* objection.

Mansfield's holding that slavery was too odious to have foundation in common law but required a slave code was a settled premise even in the South. In the 1860 Democratic Convention meeting in Charleston, South Carolina, a Southern-dominated platform committee proposed that Congress had to enact a slave code for territories to cement the South's victory in *Dred Scott* that slavery could not be banned in the territories (Potter 1976, 409), The Northern delegates responded, "Gentlemen of the South, you mistake us, we will not do that, we will not do that" (Potter 1976, 409–10). The convention as a whole rejected the call for a territorial slave code by 165 to 138. The Southern delegates walked out, effecting an irreparable breach within the Democratic Party, the last important institution that had previously bridged North and South. With the walkout, Stephan Douglas could not get the required two-thirds majority of all delegates, and the Charleston Democratic Convention adjourned without a candidate. The Northern Democrats reconvened in Baltimore to nominate Douglas for the presidency, and the Southern Democrats reconvened to nominate John Breckinridge; both candidates lost the 1860 presidential election to Abraham Lincoln.

That said, the Fifth Amendment, ratified in 1791, four years after the end of the Constitutional Convention, prohibits Congress from taking property without just compensation. *Somerset* may have prohibited slavery without legislation, but the Southern states enacted the requisite legislation to make slaves property. Consequently, under law in the Southern states, the master could sell the slave, could dispose of his or her person, industry, and labor. Theft of slaves was a common crime bearing a penalty of two to ten years in prison.[32] Where a state slave code supported ownership of slaves as property, the "taking" of the property would require that the owner receive just compensation, which was too expensive for the federal

32. Kenneth Stampp, *The Peculiar Institution in the Antebellum South* (1956, 102–236). Slave legislation required the master to provide food and shelter and to take care of slaves in sickness and old age. Murder of a slave was still murder, although a death enforcing discipline was excused.

government to accomplish, especially because it had cheaper tools to accomplish abolition.

Prohibiting a "taking" is not, moreover, as absolute as the Confederate States' Constitution's prohibiting its Congress from "impairing the right of property in Negro slaves." Restrictions are not necessarily takings. A regulation designed to prevent "harmful or noxious uses" of property akin to public nuisances is not a constitutional taking and does not require compensation to the owner even when the regulation destroys the property's value.[33] A transaction such as slavery, which is so odious that it has no support in Anglo-American common law, *should* be considered a noxious public nuisance. Indeed, a quite reasonable argument is that if under its general-welfare power or with some other tool Congress just freed the slaves outright, that would not be a "taking" because there would be no transfer of ownership to the benefit of the federal government; it would just be a regulatory police power in freeing them.

One might also argue that the Fifth Amendment's prohibition of seizure without compensation, ratified in 1791, is part neither of the convention that framed the Constitution nor of the ratification debates. Still, the reasonable view is that both the Constitution and the first ten Amendments are part of the same package.

The ultimate outcome of slaves' status as property was settled by Robert E. Lee's surrender to Grant at Appomattox and the ratification, shortly thereafter, of the Thirteenth Amendment, ending slavery in the whole nation.

For resisting the call for protecting rights in Negro property, I rank the US Constitution as positive, a +2, notwithstanding whatever the Fifth Amendment requirement for compensation for a taking might mean.

B. Banning Slavery in the Territories

Article 4 of section 3 of the US Constitution gives Congress power to make all needful rules and regulations respecting the territories and properties of the United States. On its face, the "all needful rules" stipulation includes plenary power to ban slavery from a territory. As the Constitutional Convention was meeting in Philadelphia, moreover, the Confederation Congress meeting in New York prohibited

33. *Mugler v. Kansas*, 123 U.S. 623 (1887), a law prohibiting manufacture of alcoholic beverages; *Miller v. Schoene*, 276 U.S. 272 (1928), an order to destroy diseased cedar trees to prevent infection of nearby orchards; *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), a law effectively preventing continued operation of quarry in residential area.

slavery in the Northwest Territory that would become the states of Ohio, Indiana, Illinois, Michigan, and Wisconsin.[34]

The Taney opinion finds that the power granted by article 4, section 3, is confined to the Northwest Territory because it was the only territory at stake when the Constitution was adopted and does not apply to any future territory (60 U.S. 438). That conclusion allowed Taney to say that the Louisiana Territory through which Dred Scott passed could not have had congressional abolition, so Scott was not free. Taney also dismissed the precedent value of the Northwest Ordinance's ban on slavery. With the adoption of the Constitution, the Articles of Confederation became inoperative, he said, and the Northwest Ordinance which had prohibited slavery in the territory became "inoperative and a nullity" as well (60 U.S. at 438).

Abraham Lincoln's address at New York's Cooper Union in February 1860 (https://digital.lib.niu.edu/islandora/object/niu-lincoln%3A36629) took apart the Taney opinion with shark's teeth, fleshy chunk by chunk. The new Congress under the Constitution reenacted the Northwest Ordinance, including the ban on slavery, adjusting the language in minor ways, for example, to accommodate that the United States now had a president (Matteson 1941, 269). Framers who had been at the Constitutional Convention participated in the debates. The framers understood the Constitution better than we, Lincoln argued, and twenty-three of the original thirty-nine framers participated to take control of, interfere with, slavery in territories at some point in their public careers. The sixteen framers not so recorded included noted antislavery men.

Separating the Northwest Territory from all future territories is also not justified by the constitutional text. Article 4, section 3, does not say Congress shall have plenary power in the Northwest Territory; it says it has power in territories. Congress organized across the continent the territories that later became states, and article 4, section 3, was the only and necessary source of its power. Under Mansfield's *Somerset* opinion, moreover, slavey needed Congress to affirmatively pass a slave code. Absent a slave code, there could be no slavery in the territories.

If the dicta in *Dred Scott* were taken seriously, as if law, it would destroy Northern moderation. *Dred Scott* in its dicta blocked a status quo compromise that was also Lincoln's platform. Lincoln said he would not challenge slavery where it existed, but he would block any further expansion into new territories. Even Douglas, the Northern Democratic candidate, thought that slavery or not should be settled by local option, and his stance needed to have Congress prohibit slavery after

34. An ordinance for the government of the territory of the United States, northwest of the river Ohio (July 13, 1787, 32 JCC 334, 343).

a territory rejected it.[35] If the opinion could be ignored as gratuitous remarks by justices without a case before them, that was fine, but the opinion was a sword of Damocles because Taney's words were uttered by justices who could make law if they could get a real case before them. If the opinion can be read as meaning that slave property could be brought into nonslave states because Congress could not impair slave property, it was deeply repugnant to the North; it was an invasion of the moral position of the North and the start of a war of Southern aggression. The North had tolerated slavery if confined to the strange foreign land of the South, but with *Dred Scott*, the North could not just leave slavery where it lay and go about its business. Lincoln got the Republican nomination and the election victory by running against *Dred Scott* so devastatingly attacked in his Cooper Union Address. *Dred Scott*, quite plausibly, caused the war.

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35. *Id.*, at 338 (1976).

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