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STUDENT COMMENTS

ANOTHER LOOK AT OUR FOUNDING FATHERS
AND THEIR PRODUCT: A RESPONSE TO
JUSTICE THURGOOD MARSHALL

Edward L. White III*

[T]he Constitution of the United States not only contained no guarantee in favor of slavery, but . . . was in its letter and spirit an anti-slavery instrument, demanding the abolition of slavery as a condition of its own existence as the supreme law of the land.¹

Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.²

INTRODUCTION

During the bicentennial celebration of the United States Constitution,³ Justice Thurgood Marshall⁴ announced that he

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¹ F. Douglass, Life and Times of Frederick Douglass 261 (1962) [hereinafter Life and Times]. Douglass wrote the statement in his later life. It was a reversal of his previous position of “no union with slaveholders.” Id. at 260-61. Douglass thought the federal government could abolish slavery if people, who used “their powers for the abolition of slavery, were voted into office.” 2 F. Douglass, The Life and Writings of Frederick Douglass 468 (P. Foner ed. 1950) [hereinafter Life and Writings].

² 9 The Works of John Adams 229 (C. Adams ed. 1854).

³ The bicentennial celebration will last from 1987 until 1991. The celebration is meant to “recall the achievements of our Founders and the knowledge and experience that inspired them, the nature of the government they established, its origins, its character, and its ends, and the rights and privileges of citizenship, as well as its attendant responsibilities.” First Report on the Commission on the Bicentennial of the United States Constitution 6 (1985).

Our Constitution was the first in which a people initiated a compact with a government. The Constitution was written to bind the people and the
would not "participate in the festivities with flag-waving fervor." Instead, he would "quietly commemorate the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document...."

Justice Marshall made his comments on May 6, 1987, at the annual seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii. During the speech, Marshall stressed that he did not find the founding fathers' "wisdom, foresight, and sense of justice . . . particularly profound."

government to a contract whereby the people relinquished some of their natural rights to the government. At the same time, they reserved the rest of their rights for themselves. The government, in turn, provided the necessary order and security for the nation to remain peaceful and prosperous. If the government breached its contract with the people, the people could regain their natural rights and either return to the state of nature or enter into a compact with another government. See J. LOCKE, TWO TREATISES OF GOVERNMENT 122-28 (T. Cook ed. 1947).


6. Marshall, infra, at app. 129. Marshall stated that he will celebrate the Constitution's bicentennial as a "living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights." Id. at app. 130.


Moreover, he thought the framers devised a “defective” government, which required “several amendments, a civil war, and momentous social transformations to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.”

Marshall specifically faulted the framers for not considering the majority of American citizens when they crafted the Constitution. He underscored that the preamble’s “We the People” only included free white males—blacks and women were excluded. The Justice further pointed out that the document sanctioned slavery in two places: in article I, section 2, it counted “other Persons” as three-fifths of “free Persons” for representational purposes; in article I, section 9, it prohibited the Congress from interfering with the international slave trade until 1808. According to Marshall, these “defects” stemmed from the framers’ “intentional” compromise of “moral principles.”

He contended that the Northern and the Southern delegates compromised on the slave trade for their economic well-being. The North allowed the sanctioning of slavery to guarantee the perpetuation of the South’s main source of wealth. The South, in return, acquiesced to New England’s demand that the Congress have broad powers to regulate commerce.

Marshall is convinced that the framers’ compromise “laid a foundation for the tragic events” that followed the nation’s founding. These events—mainly the legal inequality of

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9. Id. at app. 125-26.
10. Id. at app. 126.
11. Id.

As this student comment will discuss, the Constitution tolerated slavery in fifteen places. See infra notes 37-38 and accompanying text.

14. Id. at app. 126. Arguments similar to Marshall’s have been made. One of the earliest proponents of the position was Wendell Phillips, a Garrisonian abolitionist. In three books, Phillips argued that the Constitution was a compromise over slavery: CAN ABOLITIONISTS VOTE OR TAKE OFFICE UNDER THE UNITED STATES CONSTITUTION? (1845); THE CONSTITUTION: A PRO-SLAVERY COMPACT (1844); A REVIEW OF LYSANDER SPOONER’S UNCONSTITUTIONABILITY OF SLAVERY (1847). For modern versions of the argument, see R. COVER, JUSTICE ACCUSED (1975); A. HIGGINBOTHAM, IN THE MATTER OF COLOR (1978); W. JORDAN, WHITE OVER BLACK (1968); S. LYND, CLASS CONFLICT, SLAVERY AND THE UNITED STATES CONSTITUTION (1968); Cohen, Thomas Jefferson and the Problem of Slavery, 56 J. Am. Hist. 503 (1969).

16. Id.
17. Id. at app. 127.
blacks in our society—stemmed, he argued, “from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.” Justice Marshall thus concluded that the framers do not deserve credit for the present legal treatment of blacks, because the document they drafted in 1787 neglected the principles necessary to adapt to a changing society. In fact, Marshall argued that their document did not even survive the Civil War. After the war, it was replaced, he asserted, by a document that contains a “more promising basis for justice and equality, the fourteenth amendment.”

The new document protects “the life, liberty, and property of all persons against deprivations without due process, and [it] guarantee[s] equal protection of the laws” to all. Therefore, Justice Marshall credited those who did not “acquiesce in outdated notions of ‘liberty,’ ‘justice,’ and ‘equality,’ and who strived to better them.”

Marshall’s speech contains three arguments. First, the framers did not draft the Constitution by which our nation is bound, because their document did not protect all people. Second, the “original” document morally compromised the slavery issue. Third, although Marshall did not say so forthrightly, he implied that the Constitution is immoral in those areas that resulted from the compromise of morality. His last point is significant, because people are not obligated to follow an immoral document.

18. Id. at app. 128.
19. Id. at app. 129.
20. Id. at app. 128.
21. Id. Edwin M. Yoder Jr. pointed out that Marshall, who “argued the school segregation case as counsel for the NAACP,” should know that the fourteenth amendment “proved to be an unreliable weapon of racial equality.” Wash. Post, May 14, 1987, at A25, col. 1. The sympathetic United States Supreme Court in the early 1950s school cases “failed to find a clear mandate against segregation in the 14th Amendment. Its origins were too ambiguous.” Id. Moreover, “as Marshall also knows but failed to mention in Hawaii, the 14th Amendment was used by an earlier generation of judges far more as a license for robber barons than as a charter of liberty for all.” Id. The fourteenth amendment should be viewed “not as a graft but as a branch of the old trunk, drawing its vitality and meaning from it.” Id.
23. Id. at app. 129. Marshall, however, did not mention the names of the people who deserve credit.
24. Id. at app. 126.
25. Id. at app. 125-26.
26. The notion that an immoral or unjust law does not bind in conscience is a basic philosophical principle. SAINT THOMAS AQUINAS, SUMMA THEOLOGICA, I-II, Q. 96, A. 4. See also SAINT AUGUSTINE, ON FREE CHOICE OF THE WILL (A. Benjamin & L. Hackstaff trans. 1964). A law may be unjust in
Marshall's critique of the Constitution parallels that of the eighteenth and nineteenth century abolitionists, who branded the document pro-slavery. Of the abolitionists, the Garrisonians most strongly condemned the Constitution. They thought the document was contradictory because it included slavery along with the concepts of liberty and justice. Besides regarding the Constitution an instrument of incompatible parts, they judged it an improper sectional compromise. Hence, the Garrisonians argued that people could not uphold the document in good conscience.27

two senses. First, a law may be contrary to human welfare. Examples are laws that are not directed to assist the common good, but are instead onerous laws that direct the populace to satisfy their sovereign's cupidity or advancement; laws that exceed the authority of their authors to draft such laws; and laws that assign burdens unequally among the populace, even if the laws are directed toward the common good. SAINT THOMAS AQUINAS, supra, I-II, Q.96, A.4. As Saint Augustine wrote: "a law that is not just is not a law." SAINT AUGUSTINE, supra, at 11. Laws that are contrary to human welfare are never binding in conscience, unless to protect against creating scandal or public disturbance; in that case, people should relinquish their right to disobey the law, because the scandalous or public disturbance would cause more harm to the public welfare. Second, a law may be contrary to divine good. Examples are laws of a tyrant that lead people into idolatry or anything else that goes against the divine law. Laws that are contrary to divine good never bind in conscience and should always be disobeyed. SAINT THOMAS AQUINAS, supra, I-II, Q.96, A.4. See also the Encyclical Letters of His Holiness Pope Leo XIII, Au milieu des sollicitudes (On the Church and State in France) (Feb. 16, 1892); Sapientiae Christianae (On Christians as Citizens) (Jan. 10, 1890), reprinted in 2 THE PAPAL ENCYCLICALS 277, 211 (C. Carlen ed. 1981).

27. 2 LIFE AND WRITINGS, supra note 1, at 118; W. PHILLIPS, SPEECHES, LECTURES AND LETTERS 351, 375, 537 (1892). Up until the early part of the twentieth century, slavery was thought to have played a major role at the Philadelphia Convention. That view changed with THE FRAMING OF THE CONSTITUTION (1913), in which its author, Max Farrand, downplayed slavery's role at the Convention. Id. at 107-08, 110. According to Farrand, the main conflict at Philadelphia was between the small and large states over the question of proportional representation in the Congress. Id. at 108, 110. It was "the great compromise of the convention and of the constitution. None other was to be placed quite in comparison with it." Id. at 105.

Although Farrand's view was predominant in the historiography of the Convention for most of the twentieth century, it was challenged. In AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1952), Charles A. Beard argued that the motivational force at the Convention was not the conflict between the small and large states, but economics. Id. at 324. He contended that financial self-interest guided the document's framers and ratifiers. Id. at 324-25. These men represented, with few exceptions, the money, public securities, manufacturing, and trade and shipping interest groups of the country. Id. at 324. As a result of the new government, these conservative delegates received direct, immediate, and personal economic benefits. Id. at 188, 324. In Beard's opinion, these men created a national government that restricted the democratic aspirations
In contrast to Marshall's argument, the following discussion will demonstrate that the document was an instrument of compatible parts. Moreover, it will demonstrate that the framers did not act immorally by allowing the slavery provisions into the Constitution. Instead, they tolerated what they considered a lesser evil—slavery—for what they considered a greater good—the creation of a new nation.\textsuperscript{28} The framers reasonably thought that the Deep South\textsuperscript{29} would not have become part of a nation that outlawed slavery.\textsuperscript{30} If the Deep South left the Philadelphia Convention, the framers concluded that other states would have also departed the Convention and the dream of a new nation would have died.\textsuperscript{31} To prevent the collapse of the Convention, the framers allowed the institution of slavery of the states in order to steer the national economy. \textit{Id.} at 325. John Hope Franklin followed Beard's line of reasoning in \textit{From Slavery to Freedom} (4th ed. 1974). He called the Convention a "conservative reaction" to "stem the tide of social revolution" that was occurring at the local level. \textit{Id.} at 98. Because the framers' chief motivation was protecting private property interests, they drafted a document that effectively smothered local, social reform movements. \textit{Id.} at 100. The antislavery movements were, of course, affected.

Unlike Beard or Franklin, William Freehling contended in \textit{The Founding Fathers and Slavery}, 77 Am. Hist. Rev. 81 (1972), that the framers left slavery a "crippled, restricted, peculiar institution," by way of the Northwest Ordinance and the 1808 international slavetrade provision. \textit{Id.} at 91. Along similar lines, Don E. Fehrenbacher suggested that the Constitution was "bifocal" in nature. \textit{D. Fehrenbacher, The Dred Scott Case} 27 (1978). He argued that the framers recognized slavery's existence, while limiting it in a way that they hoped would cause its termination. \textit{Id.} Fehrenbacher wrote: "It is as though the framers were half-consciously trying to frame two constitutions, one for their own time and the other for the ages, with slavery viewed bifocally—this is, plainly visible at their feet, but disappearing when they lifted their eyes." \textit{Id.}

As should be clear, the question of slavery's impact on the framing of the Constitution has been disputed and probably will be in the future. This student comment proposes that our founding fathers tolerated the institution in order to craft a new document that would lead the states past the difficulties they were experiencing under the Articles of Confederation. By doing so, they created a government that would accept the abolition of the institution when the time had come.

\textsuperscript{28} \textit{See infra} notes 250, 262-63, 294 and accompanying text.

\textsuperscript{29} In this student comment, the Deep South refers to South Carolina and Georgia. To some extent, North Carolina should be included in the definition, but it did not have as unified a pro-slavery position as did the other two states.

\textsuperscript{30} \textit{See infra} notes 61, 84-87, 163, 180-82, 252-55, 265-66, 268, 286-87 and accompanying text.

\textsuperscript{31} \textit{See infra} notes 84-87, 265-66, 268-76, 286-87 and accompanying text. \textit{See The Federalist Nos. 1-10} (A. Hamilton, J. Jay, & J. Madison), for a discussion of the Philadelphia Convention's potential breakup had the
into the document under limited circumstances. Because the framers intended to achieve a greater good by tolerating a lesser evil, they acted morally. Part I of this student comment will highlight the constitutional provisions that addressed the subject of slavery. Part II will examine the slavery debates in both the federal and state ratifying conventions. Part III will address Marshall's assertion that the framers intentionally compromised their morality. The conclusion will underscore that the document, though incomplete, is moral.

I. THE SLAVERY PROVISIONS

The Philadelphia Convention represented every state except Rhode Island. It met from May 14, 1787, through September 17, 1787, with fifty-five delegates in attendance. The document the delegates drafted tolerated slavery in fifteen places, five directly and ten indirectly. The five explicit slavery provisions are

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32. See infra notes 256-61, 264 and accompanying text.

33. Numerous historical books and articles have been written about slavery. Some of the best works are SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS, AND AUTOBIOGRAPHIES (J. Blassingame ed. 1977); C. RICE, THE RISE AND FALL OF BLACK SLAVERY (1975); A DOCUMENTARY HISTORY OF SLAVERY IN NORTH AMERICA (W. Rose ed. 1976); Davis, SLAVERY AND THE POST-WORLD WAR II HISTORIANS, 103 DAEDALUS 1 (1974).

34. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 557 (M. Farrand ed. 1911) [hereinafter M. FARRAND].


36. See 3 M. FARRAND, supra note 34, at 557-59, for a complete list of the delegates. See also M. FARRAND, THE FRAMING OF THE CONSTITUTION 14-41 (1913), for a sketch of the Convention and its members.

37. The slavery provisions laid out in this student comment were drawn from Finkelman, SLAVERY AND THE CONSTITUTIONAL CONVENTION, in BEYOND CONFEDERATION 190-91 (R. Beeman, S. Botein, & E. Carter eds. 1987). Finkelman rightly claimed that the United States Constitution tolerated slavery in fifteen places. Other scholars have offered lower numbers. For example, James McPherson set the number at three. J. MCPHERSON, ORDEAL BY FIRE 2 (1982). Clinton Rossiter claimed slavery appeared in the Constitution in just four places. C. ROSSITER, 1787: THE GRAND CONVENTION 266-67 (1966). These authors offered shortsighted views, because they ignored some of the direct provisions and all of the indirect provisions. William M. Wiecek cited eleven slavery provisions within the Constitution that directly and indirectly tolerated slavery. W. WIECEK, THE SOURCES OF
(1) Article I, section 2. Representation in the lower House of Congress would be apportioned among the states based on population, which would be computed by counting all free persons and three-fifths of the slaves. The same basis of computation would be used should any "direct tax" be levied on the states;

(2) Article I, section 9, clause 1. The Congress was precluded from ending the states' involvement in the international slave trade before 1808;

(3) Article I, section 9, clause 4. The provision repeated what was already included in article I, section 2. It prohibited any "capitation" or other "direct tax" that did not conform to the three-fifths clause;

(4) Article IV, section 2, clause 3. The states could not emancipate fugitive slaves. Moreover, fugitives had to be returned to their owners "on demand"; and

(5) Article V. The Congress could not amend the slave trade and "direct tax" clauses until 1808.

The five explicit provisions were supplemented by ten clauses that indirectly tolerated slavery.38 For example, the Congress

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38. The ten implicit slavery provisions are
(1) Art. I, § 8, cl. 15. The Congress had the power to call "forth the Militia" to "suppress Insurrections";
(2) Art. I, § 9, cl. 5. Taxes on exports were prevented. In that way, the staple products of slave labor, for example, rice, could not be taxed; thereby, slavery would be free from any indirect taxation;
(3) Art. I, § 10, cl. 2. The states could not tax exports, which again protected slavery from indirect taxation by non-slaveholding states;
(4) Art. II, § 1, cl. 2. The electoral college would be used to elect the president based on congressional representation. The three-fifths clause would be used to compute the representation in the House;
(5) Art. III, § 2, cl. 1. Federal diversity jurisdiction was limited to "citizens of different states," which prevented slaves and, possibly, free blacks from bringing their cases to a federal court. The pro-slavery ramification of this clause appeared only after the United States Supreme Court decided Scott v. Sandford, 60 U.S. (19 How.) 393 (1857);
(6) Art. IV, § 1. The states had to give "Full Faith and Credit" to the laws and judicial proceedings of other states. As such, the free states had to recognize the laws of slavery;
(7) Art. IV, § 2, cl. 1. The privileges and immunities clause was restricted to "citizens." Thus, slaves and, in some cases, free blacks were not protected by this provision;
(8) Art. IV, § 2, cl. 2. Fugitives from justice had to be returned to the state that pursued them. The clause ensured the slave states that the other

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ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 62-63 (1977). Although Wiecek and Finkelman almost agreed on the number of provisions, Wiecek did not distinguish between the direct and indirect protection of the institution as did Finkelman.

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38. The ten implicit slavery provisions are
had the power to call "forth the Militia" to "suppress Insurrections," which could include slave uprisings.\textsuperscript{39}

The slavery provisions represented the compromise needed to unify the differences among the states. James Madison commented during the federal convention that the distinct interests of the states "resulted ... principally from the effects of their having or not having slaves. These two causes concurred in forming the great division of interests in the United States. It did not lie between the large and the small States. It lay between the Northern and Southern."\textsuperscript{40}

Although Madison was correct in noting that the conflict derived from slavery, he was incorrect in saying that the differences were clearly drawn between the North and the South. His statement implied that the regions were monolithic. They were not. In fact, the division was not even between the slave and the non-slave states.\textsuperscript{41} Except for the Deep South, the other parts of the confederacy held inconsistent slavery positions.\textsuperscript{42} The conflict was instead between the delegates who wanted slavery included in the Constitution and those who wanted it excluded. In this student comment, the two groups will be referred to as the pro-inclusion and the anti-inclusion delegates. To be sure, the distinction is not meant to suggest that all anti-inclusion delegates were enlightened enough to want the institution abolished. For various reasons, which this student comment will explain, few, if any, were prepared to battle that issue fully at the Philadelphia Convention.

The debates on the slavery provisions demonstrated the divided attitudes the delegates held toward the institution. Part II will address the pro- and anti-inclusion positions as well

\begin{itemize}
\item\textsuperscript{9} The United States government had to protect states from "domestic violence," which could include slave rebellions. This clause complemented art. I, § 8, para. 15; and
\item\textsuperscript{10} Three-fourths of the states were needed to ratify the Constitution. This provision enabled the slave states to veto any constitutional changes that affected slavery.
\end{itemize}

Finkelman, \textit{supra} note 37, at 191-92.

\textsuperscript{39} U.S. Const. art. I, § 8, cl. 15.

\textsuperscript{40} 1 M. Farrand, \textit{supra} note 34, at 486 (30 June 1787). Rufus King of Massachusetts also thought the difference in interests rested between the Southern and Eastern states. \textit{Id.} at 566 (10 July 1787).

\textsuperscript{41} The six principle slave states were Delaware, Georgia, Maryland, North Carolina, South Carolina, and Virginia.

\textsuperscript{42} W. Wieck, \textit{supra} note 37, at 64.
as the interplay of the delegates who subscribed to those viewpoints.

II. THE DEBATES ON APPORTIONMENT AND THE SLAVE TRADE

In his speech, Justice Marshall highlighted two of the five explicit slavery clauses.\(^{43}\) The two clauses concerned the apportionment of the House of Representatives and the regulation of the international slave traffic.\(^{44}\) The debates on those provisions showed the rift between the pro- and anti-inclusion delegates. The debates also showed the need for a moderate, tolerant position.\(^{45}\)

A. The Apportionment Debates

At the Philadelphia Convention, the delegates first considered the subject of slavery in their discussion of apportionment—the allotment or distribution of representatives in the Congress.\(^{46}\) At issue was whether slaves would be counted toward each state's population for purposes of apportionment. During the debates, the Deep South made its position clear: the region would only enter a union that included slaves in its representational scheme.\(^{47}\) The underlying basis for the unity

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43. Marshall, infra, at app. 126-27.
44. In this student comment, the terms slave traffic and slave trade refer to the international maritime importation of slaves from non-American areas. When the terms are meant to refer to inter- or intrastate trading it will be specified. For more information on the African slave trade, see, e.g., D. Davis, The Problem of Slavery in the Age of Revolution 1770-1823 (1975) [hereinafter Slavery in the Age of Revolution]; D. Davis, The Problem of Slavery in Western Culture (1966); Documents Illustrative of the History of the Slave Trade in America (E. Donnan ed. 1930); W. DuBois, The Suppression of the African Slave-Trade to the United States of America, 1638-1870 (1896); J. Franklin, From Slavery to Freedom (4th ed. 1974); E. Morgan, American Slavery, American Freedom (1975); U. Phillips, American Negro Slavery (1918); C. Rice, The Rise and Fall of Black Slavery (1975).
45. U.S. Const. art. I, §§ 2, 9. William Few, a Georgia delegate, wrote, in approximately 1816, that at the federal convention "[i]t was believed to be of the utmost importance to concede to different opinions so far as to endeavor to meet opposition on middle ground, and to form a Constitution that might preserve the union of the States." 3 M. Farrand, supra note 34, at 423.
46. The debates on apportionment began on May 29, 1787. 1 M. Farrand, supra note 34, at 15.
47. See infra notes 71-73, 107, 172-74, 252-54, 265-66, 286 and accompanying text.
of the Deep South was its firm belief that slavery was proper as well as essential to its existence.\footnote{48} In an attempt to strengthen its political power, the Deep South wanted slaves to be counted equally with whites.\footnote{49} On first blush, the demand may seem puzzling; the region appeared to be calling for the equality of blacks. In reality, the region only wanted slaves to be considered on the same level as whites in order to bolster its political position in the Congress.\footnote{50} It did not want blacks placed on a par with whites in any other respect.\footnote{51} Under the Deep South’s scheme, the slave states would have controlled 49.9 percent of the Congress.\footnote{52} The slave states could have gained a voting majority by increasing their number of slaves. Owing to the scheme’s extremeness, however, the anti-inclusion forces would not agree to it.\footnote{53}

During the apportionment debates, the anti-inclusion delegates also attempted to enhance their political position. They proposed that slaves not be counted.\footnote{54} Their proposition would have given the slave states only a forty-one percent share of the Congress.\footnote{55} The anti-inclusion delegates saw the Deep South’s scheme as illogical. They could not comprehend the consistency of considering slaves as both people and property for purposes of representation. Elbridge Gerry of Massachusetts argued that “[t]he idea of property ought not to be the rule of representation. Blacks are property . . . why should their representation be increased to the southward on account of the number of slaves, than horses or oxen to the north?”\footnote{56}

\footnote{48. See infra notes 238, 251, 267, 283 and accompanying text.} \footnote{49. 1 M. FARRAND, supra note 34, at 580 (P. Butler, Gen. C. Pinckney, 11 July 1787).} \footnote{50. Goldwin, Why Blacks, Women and Jews are not Mentioned in the Constitution, 83 Commentary 28, 30 (1987).} \footnote{51. Id.} \footnote{52. D. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765-1820, at 180 (1971).} \footnote{53. 1 M. FARRAND, supra note 34, at 561 (W. Paterson, 9 July 1787), 581 (J. Madison, 11 July 1787), 586 (R. King, 11 July 1787).} \footnote{54. 5 J. ELIOT, supra note 35, at 296 (G. Mason, 11 July 1787); 1 M. FARRAND, supra note 34, at 561 (W. Paterson, 9 July 1787); Goldwin, supra note 50, at 30.} \footnote{55. D. ROBINSON, supra note 52, at 180.} \footnote{56. 1 M. FARRAND, supra note 34, at 205-06 (11 June 1787). William Paterson of New Jersey used language similar to Elbridge Gerry’s in his opposition to the federal ratio. Paterson “could regard negroes slaves in no light but as property. They are not free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, and like other property entirely at the will of the Master.” Id. at 561 (9 July 1787).}
In addition, the anti-inclusion delegates thought the framers would mock the theory of representation by counting blacks.\textsuperscript{57} According to the theory, every person who is counted has an impact on lawmaking.\textsuperscript{58} But, under any system that included slaves, only slaveowners would participate in the process. Slaves, therefore, would not be truly represented in the federal legislature.\textsuperscript{59}

The anti-inclusion delegates' proposal was also unrealistic, and the slave states would not accept it.\textsuperscript{60} Besides decreasing the political power of the South, the plan would have placed an unfair economic burden on the slaveholding states. In \textit{The Federalist} No. 54, James Madison asked:

\begin{quote}
Would the convention have been impartial or consistent if they had rejected the slaves from the list of inhabitants, when the shares of representation were to be calculated; and inserted them on the lists when the tariff of contributions was to be adjusted? Could it be \textit{reasonably expected} that the southern states would concur in a system which considered their slaves in some degree as men, when burdens were to be imposed, but refused to consider them in the same light when advantages were to be conferred?\textsuperscript{61}
\end{quote}

The method of apportionment the delegates finally accepted was a compromise between the extreme positions of the pro- and anti-inclusion delegates.

On June 11, 1787, James Wilson of Pennsylvania suggested that the representation of each state be based on the total number of free inhabitants "and of every other description three fifths to one free inhabitant."\textsuperscript{62} Wilson's recommen-

\begin{footnotes}
\item[57] 2 J. Elliot, \textit{supra} note 35, at 227 (M. Smith, 20 June 1788); Goldwin, \textit{supra} note 50, at 29.
\item[58] 2 M. Farrand, \textit{supra} note 34, at 6 (R. King, 14 July 1787).
\item[59] Goldwin, \textit{supra} note 50, at 29. Neither the pro- nor the anti-slavery sides considered "[t]he humanity of blacks . . . the subject of the three fifths clause; voting power in Congress was the subject." \textit{Id}. at 30. For the prevalent attitude among American whites toward blacks, see \textit{infra} notes 237-38, 251 and accompanying text.
\item[60] 1 M. Farrand, \textit{supra} note 34, at 205.
\item[61] \textit{The Federalist} No. 54, at 279-80 (J. Madison) (M. Beloff 2d ed. 1987) (emphasis added). Alexander Hamilton asked the New York ratifying convention: "Would it be just to compute these slaves in the assessment of taxes, and discard them from the estimate in the apportionment of representation? Would it be just to impose a singular burden, without conferring some adequate advantage?" 2 J. Elliot, \textit{supra} note 35, at 237 (20 June 1788).
\item[62] 1 M. Farrand, \textit{supra} note 34, at 205. Later in the debates, James Wilson questioned his proposition. He could not [understand] on what principle the admission of blacks in the
\end{footnotes}
ration was not novel. It had been known under the Articles of Confederation as the federal ratio. The formula was used to determine the contributions of each state to the confederate government. Moreover, eleven of the thirteen states had adopted the formula. Under the three-fifths scheme, the South would control 46.5 percent of the Congress. Even though the South would be in the voting minority, some delegates feared the region could raise its representational power by increasing its number of slaves. The fear was unfounded, however, because increasing the number of slaves at the three-fifths ratio would have required a substantial number of slaves. Even under the representational scheme that the Deep South proposed, the North would still have held 50.1 percent of the vote. The anti-inclusion delegates' concern was even less substantiated, because, at the time, only South Carolina and Georgia appeared in need of importing slaves.

Any opposition to Wilson's plan was silenced by three delegates from the Deep South who had abandoned their extreme posture for the more plausible moderate plan. William Davie of North Carolina argued that his state "would
never confederate on any terms that did not rate [slaves] at least as three fifths." Similar promises came from Pierce Butler and Charles Pinckney, both from South Carolina. They reminded the Convention that the Carolinas and Georgia would never enter a nation that did not protect slavery. Whether or not these men were bluffing, the remainder of the delegates were unwilling to gamble the union's creation.

Because the Deep South stood firmly to its position, the Convention had every reason to assume the veracity of these statements. Moreover, the moral indifference of many delegates toward slavery allowed them to reach their decision more easily.

Wilson was aware of the tension between the pro- and anti-inclusion delegates and offered his plan to promote harmony in the Convention. His proposal worked. The delegates

71. Id. at 593 (12 July 1787).
72. Id. at 592-93 (12 July 1787).
73. Id. at 605 (P. Butler, 13 July 1787), 95 (C. Pinckney, 13 July 1787).
74. Some evidence exists to show that the Deep South was bluffing about not joining the union without its slaves. During the South Carolina ratifying debates, Charles C. Pinckney, in response to those who opposed the Constitution because it placed duties on slave importation but not on shipping, said: "[T]he Southern States are weak . . . we are so weak that by ourselves we could not form a union strong enough for the purpose of effectively protecting each other. Without union with the other States, South Carolina must soon fall . . ." 4 J. ELLIOT, supra note 35, at 283 (17 Jan. 1788).

The only person during the Philadelphia Convention to raise the issue of the Deep South's weakness was Nathaniel Gorham of Massachusetts. See infra notes 176-78 and accompanying text. Gorham was stifled by the other delegates, however, because they feared that such remarks would cause the Deep South to leave the Convention. See supra notes 66, 71-73 and accompanying text; see also infra notes 84-87, 107, 172-74, 180-82, 251-55, 265-66, 286-87 and accompanying text. The delegates' attitude tends to raise the belief that they did not realize the trouble the Deep South was in; then again, all of the states were having economic, social, and political problems. See infra note 239. Furthermore, Pinckney's statement was made to force the South Carolina delegation into ratifying the document, so he might have overstated the problem. Pinckney thought the document protected the Deep South's interests. See infra notes 207-08 and accompanying text.

In retrospect, one can argue that the framers should have pressed the Deep South harder to yield its pro-slavery position. But, that is the beauty of hindsight. One can always say what should have been done. The problem is knowing what to do when the event is occurring. Still, a great lesson can be learned from studying the Philadelphia Convention and the state ratifying debates: "moral problems . . . must be faced and met as early as possible; postponement is not solution, and political bargains and compromises merely postpone problems to be dealt with by future generations." M. MELLON, EARLY AMERICAN VIEWS ON NEGRO SLAVERY 167 (1969).

75. Finkelman, supra note 37, at 197.
approved the proposition chiefly because it was an accepted concept.\textsuperscript{76} Furthermore, it affirmed the contemporary law, which considered slaves in some respects as people and in other respects as property.\textsuperscript{77} Under the three-fifths scheme, slaves could be counted for representational purposes without the slave states needing to declare whether slaves were people or property.\textsuperscript{78} In turn, the non-slave states could also neglect the slave’s legal status.\textsuperscript{79} Each side accepted the law as it was. Any change would come later, when they were ready. The important point was that the opportunity for change could occur. For the time being, though, the federal ratio would be used for the apportionment of representation as well as for direct taxation.\textsuperscript{80}

\begin{itemize}
\item \textsuperscript{76} 2 J. Elliot, \textit{supra} note 35, at 36 (R. King, 17 Jan. 1788); Gerlach, \textit{supra} note 63, at 73.
\item \textsuperscript{77} Under the civil law, slaves were classified as property. Under the criminal law, for example, slaves were classified as persons: they were held accountable for their misdeeds and were punishable just as any free person. The \textbf{Federalist No. 54} (J. Madison). D. Fehrenbacher, \textit{supra} note 27, at 16, 32.
\item \textsuperscript{78} C. Mee, \textit{The Genius of the People} 224 (1987).
\item \textsuperscript{79} \textit{Id}.
\item \textsuperscript{80} According to historian Don Fehrenbacher, in the apportionment of representation and direct taxes, slaves were not treated as property any more than free persons were treated as property, but both were regarded in part as measures of wealth. The three-fifths compromise did not necessarily imply that a slave was 60 per cent human being and 40 per cent property. Instead, it incorporated a differential estimate of his wealth-producing capacity \textit{as a person}. It reflected a widespread belief in the relative inefficiency of slave labor.
\end{itemize}

\textit{D. Fehrenbacher, supra} note 27, at 22 (emphasis in original). Fehrenbacher’s position is in the minority among historians. The more popular argument, advanced especially by Winthrop D. Jordan, contends that the three-fifths provision “embodied more logic than has commonly been supposed. For the slave was, by social definition, both property and man, simultaneously partaking of the qualities of both; the three-fifths rule treated him accordingly, adding only a ludicrous fractional exactitude.” W. Jordan, \textit{White over Black} 322 (1968).

The draft of the three-fifths clause that the framers accepted stated:

\begin{quote}
Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to servitude for a term of years, and excluding Indians not taxed, three fifths of all other persons.
\end{quote}

\textit{2 M. Farrand, supra} note 34, at 590.
In the state ratifying conventions, both the pro-inclusion and the anti-inclusion delegates presented the provision to their conventions as a victory for their side. In the South, the delegates applauded the clause as “an immense concession in our favor.” Indeed, it was “the only practicable rule or criterion for representation.” In the North, the delegates assured their conventions that the clause was necessary to establish a nation. In New York, Alexander Hamilton stated that “[i]t became necessary . . . to compromise, or the Convention must have dissolved without effecting any thing.” He continued by pointing out that the clause resulted from “the spirit of accommodation, which governed the Convention. . . . [W]ithout this indulgence,” he concluded, “no union could possibly have been formed.” Even those New York delegates who publicly condemned slavery held similar opinions. Melancton Smith, for instance, said he was “persuaded we must yield this point, in accommodation to the Southern States.” Indeed, the delegates from the non-slave states thought the slave states would not join the union without concessions on the slavery issue. In their minds, they were not giving the slave states anything new. The wide acceptance of the federal ratio was demonstrated in the Massachusetts ratifying convention: Nathaniel Gorham said that the three-fifths ratio was “pretty near the just proportion” between blacks and whites. Likewise, his colleague Rufus King declared that the ratio “was adopted, because it was the language of all America.”

81. Of the state ratifying conventions, only the Georgia debates are not extant.
82. 4 J. ELLIOT, supra note 35, at 31 (W. Davie, 24 July 1788), 276 (E. Rutledge, 16 Jan. 1788); 3 id. at 457-59 (G. Nicholas & J. Madison, 15 June 1788); Ramsay, An Address to the Freemen of South Carolina on the Subject of the Federal Constitution (1788), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 378 (P. Ford ed. 1888).
83. Ramsay, supra note 82, at 378.
84. 2 J. ELLIOT, supra note 35, at 236 (20 June 1788).
85. Id. at 237 (20 June 1788). Richard Harrison, another New York delegate, agreed with Alexander Hamilton. He said to the New York delegation that “[w]ithout [compromise] no union could have been formed.” Id. at 269 (25 June 1788).
86. Id. at 243 (21 June 1788).
87. See supra notes 61, 84-86 and accompanying text; see also infra notes 180-82, 252-55, 263-66, 268, 286-87 and accompanying text.
88. 1 M. FARRAND, supra note 34, at 580 (11 July 1787).
89. 2 J. ELLIOT, supra note 35, at 36 (R. King, 17 Jan. 1788); Gerlach, supra note 63, at 73.
the law of the day, Gorham and King's statements were probably correct.90

To be sure, the framers did not think they had the power to establish a government; they thought they only had the authority to suggest one.91 Consequently, they had to recommend a government that could be approved by the states.92 Once the nation was established, the government could be modified by article V. The federal legislature, thereafter, would be responsible for realizing and implementing change.93

The Convention's concern about the Deep South's pro-slavery stance was even more apparent during the heated debates on the slave traffic. The region was just as firm in its position.94 Tolerance was even more necessary, because the desired nation seemed in peril.

B. The Slave Trade Debates

While the Constitutional Convention was taking place, the Pennsylvania Society for Promoting the Abolition of Slavery was also gathering in Philadelphia.95 In June, the Society drafted a provision to ban the international slave trade.96 Tench Coxe, the secretary of the Society, gave the petition to Benjamin Franklin (the Society's president97) to introduce at

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90. W. Wieck, supra note 37, at 69.
91. 2 J. Elliot, supra note 35, at 236 (A. Hamilton, 20 June 1788).
92. See infra note 277 and accompanying text.
93. See infra notes 294-302 and accompanying text; C. Bowen, Miracle at Philadelphia 204 (1966). George Washington thought legislative authority was the only proper and effective way for abolition to occur. S. Commings, Basic Writings of George Washington 519 (1948).
94. To learn more about the pro-slavery ideology, consult the following sources: T. Dew, J. Hammond, W. Harper & W. Simms, The Pro-Slavery Argument (1968); Slavery Defended: The Views of the Old South (E. McKitrich ed. 1963); Donald, The Proslavery Argument Reconsidered, 37 J. S. Hist. 3 (1971).
97. The Pennsylvania Society for Promoting the Abolition of Slavery
the Convention. Along with the petition, Coxe included his "opinion that it would be a very improper season and place to hazard the Application considering it was an over zealous act of honest men." Franklin apparently concurred with Coxe's assessment. He neither mentioned the petition at the Convention nor urged the suppression of the slave trade.

Franklin and Coxe's actions evidenced their awareness of late eighteenth-century politics. Few, if any, who knew the politics of 1787 could have honestly thought that the delegates would, or could, abolish the slave trade. The situation was made Benjamin Franklin aware of slavery's injustice. For more on the matter, see M. MELLON, EARLY AMERICAN VIEWS ON NEGRO SLAVERY 5-28 (1969).

98. The petition read:

To the revival of this trade The Society ascribe part of the Obloquy with which foreign Nations have branded our infant states. In vain will be their Pretensions to a love of liberty or regard for national Character, while they share in the profits of a Commerce that can only be conducted upon Rivers of human tears and Blood.

By all the Attributes, therefore, of the Deity which are offended by this inhuman traffic—by the Union of our whole species in a common Ancestor and by all the Obligations which result from it—by the apprehensions and terror of the righteous Vengeance of God in national Judgements—by the certainty of the great and awful day of retribution—by the efficacy of the prayers of good Men, which would only insult the majesty of Heaven, if offered up in behalf of our Country while the Inequity we deplore continues among us—by the sanctity of the Christian name—by the Pleasures of domestic Connections and the pangs which attend their Dissolution—by the Captivity and Sufferings of our American brethren in Algiers which seem to be intended by divine Providence to awaken us to a sense of the Injustice and Cruelty of dooming our African Brethren to perpetual Slavery and Misery—by a regard to the Consistency of principles and Conduct which should mark the Citizens of Republics—by the magnitude and intensity of our desires to promote the happiness of those millions of intelligent beings who will probably cover this immense Continent with national life—and by every other consideration that religion Reason Policy and Humanity can suggest—The Society implores the present Convention to make the Suppression of the African trade in the United States, a part of their important deliberations.

Tench Coxe and others to the Philadelphia Convention, June 1787, in MSS. of the Pennsylvania Abolition Society, I, 17, Historical Society of Pennsylvania (microfilm) (emphasis in original). See also F. BARBASH, supra note 96, at 148-49.

99. 3 M. FARRAND, supra note 34, at 361.
100. F. BARBASH, supra note 96, at 149.
101. Id. Thomas Dawes told the Massachusetts ratifying convention that "[i]t would not do to abolish slavery . . . and so destroy what our southern brethren consider as property." 2 J. ELLIOT, supra note 35, at 41 (18 Jan. 1788). The Declaration of Independence articulated property rights and, thereby, legitimized slave property. Freehling, The Founding Fathers and
especially true of the fifty-five delegates, approximately twenty-five of whom were slaveowners. The greater part of the anti-inclusion delegates, therefore, came to realize a key point: to create a federal government, they would need to tolerate slavery. Thus, the most they could strive for at the framing was the containment of the system.

Even before the Committee of Detail—the committee that was ordered to add detail and give coherence to the Convention’s resolutions—evaluated the slave trade provision, the Deep South stressed to the Convention the importance it placed on slavery. General Charles Pinckney of South Carolina told the delegates that “if the Committee should fail to insert some security to the Southern States against an emancipation of slaves, and taxes on exports, he should be bound by duty to


102. The framers who owned productive slaves included John Blair, Virginia; Pierce Butler, South Carolina; Alexander Martin, North Carolina; George Mason, Virginia; Edmund Randolph, Virginia; John Rutledge, South Carolina; Daniel of St. Thomas Jenifer, Maryland; Richard Dobbs Spaight, North Carolina; Charles Pinckney, South Carolina; Charles Cotesworth Pinckney, South Carolina; and George Washington, Virginia.

Delegates who owned domestic slaves included William Richardson Davie, North Carolina; John Dickinson, Delaware; William Samuel Johnson, Connecticut; William Livingston, New Jersey; Luther Martin, Maryland; James Madison, Virginia; John Francis Mercer, Maryland; Robert Morris, Pennsylvania; George Read, Delaware; James Wilson, Pennsylvania; and George Wythe, Virginia.

C. Beard, An Economic Interpretation of the Constitution of the United States 151 (1952); C. Mee, supra note 78, at 154.

103. George Mason, for one, did not accept the slavery provisions. He never signed the Constitution, as a result.

104. See infra notes 133-41, 267-76, 283-87 and accompanying text.

105. After creating the Constitution, the founding fathers’ actions left the institution of slavery crippled and restricted. They attacked slavery at its weakest point. As the nineteenth century progressed, they rid it from the North and from the Northwest Territories, pushed it south, and confined it to the Deep South. 2 J. Elliot, supra note 35, at 115 (W. Heath, 30 Jan. 1788); Freehling, supra note 101, at 91.

106. On July 26, 1787, the Philadelphia Convention gave the Committee of Detail twenty-three resolutions, including the slave trade provision. The five members of the Committee were Oliver Elseworth of Connecticut, Nathaniel Gorham of Massachusetts, Edmund Randolph of Virginia, John Rutledge of South Carolina, and James Wilson of Pennsylvania. 2 M. Farrand, supra note 34, at 116-28.
his State to vote against their Report."¹⁰⁷ The position of the Deep South apparently stirred the Committee, which returned with a special clause for the region: "No tax or duty shall be laid by the legislature on articles exported from any state; nor on the migration or importation of such persons as the several states shall think proper to admit; nor shall such migration or importation be prohibited."¹⁰⁸ The provision left the slave trade with the states.¹⁰⁹ The national government could not regulate the traffic either directly, by establishing anti-slave trade laws, or indirectly, by establishing navigation acts.¹¹⁰ The provision, therefore, would benefit primarily the Deep South. The majority of the other states, because their economies and social structures no longer depended on the institution, had either emancipated their slaves or had begun the process.¹¹¹ Maryland and Virginia, on the other hand, had slave surpluses.¹¹²

On August 21, 1787, the slave traffic debate began with Luther Martin of Maryland opening the discussion. By recommending that the trade be either prohibited or at least taxed, he clearly stated the anti-inclusion viewpoint.¹¹³ He supported his motion with a three-pronged argument. First, the three-fifths clause concerning representation would encourage the slave traffic.¹¹⁴ Second, because slavery weakened the entire nation, it was a national matter, not a local issue as the South-

¹⁰⁷. Id. at 95 (23 July 1787).
¹⁰⁸. Id. at 168-69 (emphasis added). W. Peters, A More Perfect Union 164 (1987). For a discussion of the views the pro- and anti-slavery groups held toward the interpretation of the terms migration and importation within the clause, see W. Wieck, supra note 37, at 75. See also J. Elliot, supra note 35, at 102 (J. Iredell, 26 July 1788).
¹⁰⁹. Unable to abolish slavery, the Philadelphia Convention dealt with whether the state or federal governments would control the institution. C. Bowen, supra note 93, at 201.
¹¹⁰. C. Mee, supra note 78, at 240.
¹¹¹. See infra notes 160, 238. In 1780, Massachusetts abolished slavery; Pennsylvania passed a post-nati gradual abolition statute in 1780; Connecticut and Rhode Island passed post-nati gradual abolition statutes in 1784; New York, in 1785, New Jersey, North Carolina, and Virginia, in 1786, passed manumission acts; before the framing, slavery had disappeared in New Hampshire by inanition; South Carolina had halted the international slave trade prior to the framing; Maryland and Delaware also had laws to halt the traffic; only Georgia lacked a law to prohibit the international slave trade. See W. DuBois, The Suppression of the African Slave-Trade to the United States of America 1638-1870, at 201-88 (1896), for a summary of the anti-slavery laws.
¹¹². See infra notes 154, 156, 158 and accompanying text.
¹¹³. 2 M. Farrand, supra note 34, at 364 (21 Aug. 1787).
¹¹⁴. Id. See supra notes 67-69 and accompanying text, for a response to Luther Martin's first point.
ern delegates claimed. For example, national troops would have to be used to suppress slave insurrections. Third, the clause "was inconsistent with the principles of the revolution and dishonorable to the American character...."

John Rutledge of South Carolina responded to each of Martin's points. First, he did not understand how the federal ratio would encourage the importation of slaves. Second, he was not concerned about insurrections and would not require the national troops to protect the Southern states from them. And, third, he posited that religion and humanity had nothing to do with this question. Interest alone is the governing principle with Nations. The true question at present is whether the Southern States shall or shall not be parties to the Union. If the Northern States consult their interest, they will not oppose the increase of Slaves which will increase the commodities of which they will become the carriers.

Rutledge made the Deep South's position clear: without the protection of slavery, the region would not enter the union. In addition, the morality of the institution was not subject to debate, because it was a matter for each state to address.

Rutledge was raising the traditional states' rights argument, which holds that each state has the right to regulate its internal affairs. Protecting state sovereignty was important...
to the framers. Even in 1776, no one in the Continental Congress, save for Dr. Samuel Hopkins, suggested that the national government could abolish or control slavery in the states. For the Deep South, a powerful national government was permissible so long as it did not meddle with slavery. Slavery was a local matter. The framers and those who ratified the Constitution did not think they were treating slavery any differently from other issues outside the federal government’s control. The national consensus at the time forbade the Congress from interfering with many institutions and features of American life. The Deep South, then, was not unique in demanding local control over local institutions. As such, “[n]o conclusion—no constitutional clause, no public policy or pronouncement—that failed to take this minor premise fully into account could ever be acceptable to the South.”

Oliver Elseworth of Connecticut agreed with Rutledge. He favored importation. “The morality or wisdom of slavery,” he stated, “are considerations belonging to the States themselves. What enriches a part enriches the whole, and the States are the best judges of their particular interest.” He continued by remarking that the government under the Articles of Confederation “had not meddled with this point, and he did not see any greater necessity for bringing it within the policy of the new one.” Indeed, living under the Articles had conditioned the views of many framers toward the ability of a government to control slavery.


122. W. Wieck, supra note 37, at 57. Samuel Hopkins, a theologian, implored the Continental Congress to end slavery. S. Hopkins, A Dialogue Concerning the Slavery of the Africans, Showing it to be the Duty and Interest of the American Colonies to Emancipate all the African Slaves, with an Address to the Owners of such Slaves, in Timely Articles on Slavery 547 (1969).

123. D. Robinson, supra note 52, at 210.

124. Abraham Baldwin, a Georgia delegate, said: “Georgia was decided on this point.” 2 M. Farrand, supra note 34, at 372 (22 Aug. 1787).

125. D. Robinson, supra note 52, at 246.

126. Id.

127. The Federalist No. 36 (A. Hamilton).


129. 2 M. Farrand, supra note 34, at 364 (21 Aug. 1787).

130. Id.

131. Id.

132. Id.
Elseworth's speech reflected the hesitance that he and other delegates had about creating a government with strong, central control. They were unsure about giving up what they knew—however faulty—for something untried. In short, they wanted slow and steady change. Nevertheless, even if the Congress could regulate slavery, finding a delegate who could suggest how the new government would grant "the slaves both the substance and fact of freedom" would have been difficult, if not impossible. No doubt, finding a delegate who could suggest the structure of a society in which free whites and free blacks coexisted peacefully would have been even harder. The framers, therefore, were unwilling to alter radically the social structure of the states. They thought such an achievement would have caused the sweeping alteration of American society, especially in the Deep South. The change would have been more tumultuous than the Revolutionary War: the entire fabric of American society would have to have been ripped apart and then resown. Owing to the economic, political, and social instability of the states, the framers were suspicious about what they were creating. As historian David Robinson observed:

Men were being asked to commit their lives and destinies to an unknown and untried system of institutions the specifications for which were necessarily sketchy and incomplete. Who could know how the powers committed to the federal government would be used? Who could know what elements would control the administration? Who could confidently anticipate the balance of forces in the legislature, or what the dominant elements would try to do with their power? The ratification of the Constitution would be a gamble for everyone.

D. ROBINSON, supra note 52, at 235.

Moreover, suspicion existed among the delegates from the different regions. Pierce Butler of South Carolina was concerned that the North might use representation to force emancipation. 1 M. FARRAND, supra note 34, at 594 (12 July 1787). In return, Rufus King from Massachusetts thought the South would use its potential majority in the Congress to oppress commerce. Id. at 595-96 (12 July 1787). See also id. at 604 (G. Morris, 13 July 1787); 2 id. at 9-10 (J. Madison, 14 July 1787).

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134. See infra note 299 and accompanying text.

135. See supra note 133 and accompanying text; see infra notes 213, 284, 299-308 and accompanying text. In regard to the institution of slavery, the framers wanted the gradual replacement of slaves with free white and free black labor. M. MELLON, supra note 97, at 167.


137. Id. See infra note 251.

138. C. ROSSITER, supra note 136, at 31-32. Historian Clinton Rossiter rightly emphasized that the founding fathers were not "audacious heralds of a social revolution." They were, instead, "prudent builders of a nation." Id. at 268.
concluded that the states were neither willing nor able to withstand such a drastic change. The framers correctly reasoned that the time was not ripe to dissolve the system of slavery; but the Constitution could be modified should the proper mood ever surface.

Roger Sherman of Connecticut advocated the gradualist approach. He said that because the states were already allowed to import slaves and because "the public good did not require" the trade's termination, "he thought it best to leave the matter" alone. His chief concern was gaining the least number of objections to the new plan of government to ensure its acceptance. He continued by emphasizing "that the abolition of slavery seemed to be going on in the United States and that the good sense of the several States would probably by degrees compleat [sic] it." The Deep South supported Sherman's last point. Abraham Baldwin of Georgia, for instance, said that if his state was left alone on the matter, it would likely end the trade. For the time being, however, both Georgia and South Carolina needed the trade to resupply their fields with slaves.

Perhaps the most emotionally laden speech against the institution came from George Mason of Virginia. Slavery, he contended, was not a local matter, but a national issue. Further, he countered the Deep South's assertion that slavery would disappear, by highlighting the requests of the people in the western territories for slaves to work their lands. Mason worried that slavery would harm the new nation, because it "prevent[ed] the immigration of Whites, who really enrich and strengthen a Country." Equally important, he said that "[e]very master of slaves is born a petty tyrant. They bring the

139. See infra notes 239, 283-87.
140. See infra notes 251-55, 265-66, 284-87 and accompanying text.
141. See infra notes 293-308 and accompanying text.
142. 2 M. FARRAND, supra note 34, at 369 (22 Aug. 1787).
143. Id.
144. Id.
145. Id. at 369-70.
146. In addition, Charles Pinckney of South Carolina said: "If the Southern States were let alone they will probably of themselves stop importation." Id. at 371 (22 Aug. 1787).
147. Id. at 372 (22 Aug. 1787).
148. 4 J. ELLIOT, supra note 35, at 100 (R. Spaight, 26 July 1788). The Deep South had lost a significant number of slaves during the Revolutionary War. Id. at 101, 178 (J. Iredell, 26, 29 July 1787).
149. 2 M. FARRAND, supra note 34, at 370 (22 Aug. 1787).
150. Id.
151. Id.
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judgment of heaven on a Country... By an inevitable chain of causes and effects providence punishes national sins, by national calamities." 152

Mason's words were ironic. Even though he argued the most forcefully against slavery, he was the largest slaveholder among the delegates: he owned more than two hundred slaves on his Virginia plantation. 153 In his favor, he appeared to have been caught in the conflict of questioning the morality of a system he grew up accepting as a good, but which he was not yet ready to discard. Notwithstanding his moral confusion, Mason had obvious political and economic reasons for condemning the trade. Virginia, along with Maryland, had a slave surplus. 154 Importation would not have benefited them as it would have South Carolina or Georgia. 155 In fact, Virginia and Maryland would have gained financially from the ban; their slaves would have received a higher price in interstate trading. 156

Elseworth responded to Mason. 157 Besides mentioning Mason's hidden economic motives, Elseworth attacked the accuracy of Mason's prediction that slavery would continue. 158 Elseworth echoed the Deep South's argument that the need for slaves would be short-lived: "Slavery in time will not be a speck in our Country." 159 Consequently, the slave trade should be allowed to help the economy of the Deep South. 160

152. Id.
154. See infra notes 156, 158. Virginia's slave surplus and declining economy gave the state and, in particular, James Mason an economic reason to urge the end of the international slave traffic. W. DuBois, supra note 111, at 15.
155. As a result of the Revolutionary War, both states were in dire need of slaves. 4 J. Elliot, supra note 35, at 101, 178 (J. Iredell, 26, 29 July 1787).
156. 2 M. Farrand, supra note 34, at 371 (Gen. Pinckney, 22 Aug. 1787).
157. Id. at 370-71 (22 Aug. 1787).
158. Id. at 371.
159. Id.
160. See infra note 162. The economy of the slave states, which were predominately rural and agricultural, was labor intensive. The cultivation of labor intensive crops, such as tobacco and rice, caused a reliance on slavery. The economy depended on slaves because they were both capital and labor for slaveowners, that is, the slaveowners used their profits to buy additional slaves. As a result, the Southern economy grew, but did not develop commercial or industrial forms of production as did the North. It just grew more dependent on slavery. J. McPherson, supra note 37, at 23-27. On the economics of slavery and its relationship to Southern economic development, see Did Slavery Pay? (H. Aitken ed. 1971); E. Genovese, The Political Economy of Slavery (1965); Slavery and the Southern Economy (H. Woodman ed. 1966); The Structure of the Cotton Economy of the
Once the region substituted another effective form of labor, it would abolish the traffic. By prohibiting the traffic, Elseworth thought the delegates would be "unjust" toward South Carolina and Georgia.

Clearly, the founders were more concerned with creating a nation than with destroying an institution they thought was more economically essential than morally distasteful. The Deep South's proposal seemed reasonable to the delegates: if they let the region import slaves, it would join the union and perhaps abolish slavery in the future. Furthermore, many delegates thought slavery would be isolated to the Deep South and would eventually disappear. The Northwest Ordinance, which outlawed slavery in the Northwest Territories, had been passed and many states had either already outlawed slavery or had begun to do so because their economies and social


Unlike the economy of the slave states, the Northern economy did not depend on slavery. Its economy consisted of freehold farming, trade, and local manufacturing. Its agricultural economy was capital intensive, that is, Northern farmers invested their profits in machinery. Thus, the effectiveness of and need for slaves diminished with the increase of faster and more efficient machinery. J. McPherson, supra, at 23-27. See S. Bruchey, The Roots of American Economic Growth 1607-1865 (1965), for a fuller discussion of the Northern economy.

161. 2 M. Farrand, supra note 34, at 371 (22 Aug. 1787).
162. Id.
163. Hugh Williamson of North Carolina "thought the Southern States could not be members of the Union if the [slave trade] clause should be rejected, and that it was wrong to force anything down, not absolutely necessary, and which any State must disagree to." Id. at 373 (22 Aug. 1787).
164. See supra notes 146-47 and accompanying text.
165. See supra notes 145, 159 and accompanying text; see also infra notes 210-17, 313-14 and accompanying text.
166. The Continental Congress adopted the Northwest Ordinance on July 13, 1787. Regarding slavery, the Ordinance read: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted." 2 F. Thorpe, The Federal and State Constitutions 962 (1909).

Because of the political and emotional circumstances of 1787, "it would have been impossible, and therefore both fatuous and suicidal, for the Convention to have attempted to outlaw or even control slavery" in the original states. C. Rossiter, supra note 156, at 269. Those same circumstances, however, made it plausible for the Congress to exclude slavery from the Northwest Territory. Id. Moreover, as William Freehling stated, the founding fathers "helped protect slavery where it was explosive
structures no longer required slaves. The Deep South, moreover, was not imposing its needs on the other states. It was not forcing them to import slaves; rather, the Deep South was just requesting that the other states tolerate its need for the system.

By voicing the Deep South's conviction that slavery was warranted, Charles Pinckney seconded Elseworth's speech. "If slavery be wrong," he declared, "it is justified by the example of all the world. In all ages one half of mankind have been slaves." Pinckney was reinforcing the position of the Deep South that the morality of slavery was not debatable; it was a matter for each state to address by itself. He finished by arguing that any erosion of the region's right to own slaves would "produce serious objections to the Constitution. . . ." Similarly, General Charles Pinckney warned the Convention that even if the South Carolina delegation signed the Constitution, the state would never ratify it absent slavery protections. To emphasize his statement, he underscored the economic importance the institution had for the Deep South: "South Carolina and Georgia cannot do without slaves."

In spite of the criticism of Mason's speech, Mason rallied a few Northern delegates to oppose the provision. Stated simply, they did not want the document to sanction slavery. and helped demolish it where it was manageable." Freehling, supra note 101, at 93.

167. See supra notes 111, 160 and accompanying text; see also infra note 238 and accompanying text.

168. During the Massachusetts ratifying convention, Thomas Dawes said: "Besides, by the new Constitution, every particular state is left to its own option totally to prohibit the introduction of slaves into its own territories." 2 J. Elliot, supra note 35, at 40 (18 Jan. 1788).

169. General William Heath said, during the Massachusetts ratifying convention: "We are not, in this case, partakers of other men's sins; for in nothing do we voluntarily encourage the slavery of our fellow men." Id. at 115 (30 Jan. 1788).

170. 2 M. Farrand, supra note 34, at 371 (22 Aug. 1787).

171. Id. Charles Pinckney's statement was the only moral defense of slavery made at the Philadelphia Convention.

172. Id.

173. Id.

174. Id. Rawlins Lowndes said in the South Carolina ratifying convention: "Negroes were our wealth, our only natural resource. . . ." 4 J. Elliot, supra note 35, at 273 (16 Jan. 1788).

175. John Dickinson of Delaware, Elbridge Gerry of Massachusetts, and John Langdon of New Hampshire spoke out against the provision. 2 M. Farrand, supra note 34, at 372-73 (22 Aug. 1787).

176. John Dickinson "considered it as inadmissible on every principle of honor and safety that the import of slaves should be authorized to the States
Nathaniel Gorham of Massachusetts offered the sternest retort to the Deep South's position. He "did not see the propriety" of compromising on the matter.\textsuperscript{177} The Eastern states, he observed, "did not need the aid of the South\[\]. . . ."\textsuperscript{178} Gorham meant that the Eastern states were able to protect themselves from outside attackers, whereas the South was not.\textsuperscript{179} Gorham's speech alarmed Elseworth, who along with Roger Sherman of Connecticut and Edmund Randolph of Virginia, strove for compromise between the pro- and anti-inclusion delegates.\textsuperscript{180} Elseworth was concerned that the debates on the trade would disrupt the compromise on the apportionment provision as well as possibly dissolve the Convention.\textsuperscript{181} He argued that "[i]f we do not agree on this middle and moderate ground . . . we should lose two States," which might lead the other states to splinter "into several confederations and not without bloodshed."\textsuperscript{182}

Tension was apparent at the Convention. Neither the pro-inclusion nor the anti-inclusion sides seemed willing to acquiesce. Gouverneur Morris\textsuperscript{183} of Pennsylvania, realizing the

\textit{by the Constitution."} Id. at 372 (22 Aug. 1787). Elbridge Gerry said: "[W]e ought to be careful not to give any sanction to [slavery]." Id. (22 Aug. 1787). Gerry conceded the states' rights argument, however. He thought the Convention "had nothing to do with the conduct of the states as to slaves . . . ." Id.\textsuperscript{177} Id. at 374 (22 Aug. 1787).\textsuperscript{178} Id.\textsuperscript{179} Id. \textit{See also supra note 74.}\textsuperscript{180} On the issue of the slave trade, Roger Sherman said: "[J]t was better to let the Southern States import slaves than to part with them. . . ." 2 M. FARRAND, supra note 34, at 374 (22 Aug. 1787). Edmund Randolph "was for committing in order that some middle ground might, if possible, be found . . . [so that] two States might [not] be lost to the Union. Id. (22 Aug. 1787). \textit{See also} W. WIECEK, supra note 37, at 73.\textsuperscript{181} 2 M. FARRAND, supra note 34, at 375 (22 Aug. 1787); W. WIECEK, supra note 37, at 73.\textsuperscript{182} 2 M. FARRAND, supra note 34, at 375 (22 Aug. 1787); W. WIECEK, supra note 37, at 73. \textit{See infra} notes 271-80 and accompanying text, for a discussion of the potential confederations that would have been established had the Philadelphia Convention folded.\textsuperscript{183} Justice Marshall singled out Gouverneur Morris as one of the framers who committed a "moral compromise." Marshall, infra, at app. 127. Marshall seemed shocked that Morris could oppose slavery, later accept it, and even write the final draft of the document that tolerated it. \textit{Id.} Morris said at the Convention that "[h]e never would concur in upholding domestic slavery. It was a nefarious institution—It was the curse of heaven on the States where it prevailed." 2 M. FARRAND, supra note 34, at 221 (8 Aug. 1787). Even though he opposed slavery, Morris offered the compromise that united the slave and non-slave states and, thereby, helped create the nation. For the full text of Morris's famous anti-slavery speech, see \textit{id.} at 221-23.
potential harm the deadlock would cause, offered a compromise. His tool was the navigation acts clause. Navigation acts require all commodities to be shipped in vessels belonging to a particular nation. For the maritime states, the acts could bring a large profit. The Southern states, however, disliked navigation acts. They feared that the North, which controlled shipping and would also control the Congress, would pass acts requiring all American products to be shipped solely in American vessels. The Southern states, as the primary producers of commodities to be shipped, would be economically harmed by such a regulation, because the Northern shippers could charge whatever they wanted. In other words, Northern shipping and commerce would be benefited at the expense of the South. Because of the potential abuse, the Committee of Detail included a two-thirds requirement to make it highly unlikely for the Congress to pass navigation acts without Southern approval.

Morris understood that the Northern shipping states wanted the two-thirds provision excluded and that the Deep South wanted the slave trade provision included. Hence, he suggested that the Convention create a committee to evaluate both provisions. Morris hoped “these things [might] form a bargain among the Northern and Southern States.” The Convention concurred.

In less than one day, the Committee of Eleven came to terms, and on August 24 it presented the

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186. Navigation Acts include tariffs, quotas, and embargoes.
188. Id.
189. Id.
190. Id.
191. Id.
192. 2 M. Farrand, supra note 34, at 366 (22 Aug. 1787).
193. Besides questions of navigation acts and slave importation, the committee the Convention established—the Committee of Eleven—considered issues of export taxes and capitation. Id.
194. Id. at 374.
195. The members of the Committee of Eleven were Abraham Baldwin, Georgia; George Clymer, Pennsylvania; John Dickinson, Delaware; William Samuel Johnson, Connecticut; Rufus King, Massachusetts; John Langdon, New Hampshire; William Livingston, New Jersey; James Madison, Virginia; Luther Martin, Maryland; Charles Cotesworth Pinckney, South Carolina; and Hugh Williamson, North Carolina. Id. at 366.
agreement to the Convention: the two-thirds provision would be replaced by a majority vote of both Houses of Congress, and the slave trade would be permitted to continue until 1800.196 "But a tax or duty may be imposed on such importation not exceeding ten dollars for each person."197 The 1800 deadline was later extended to 1808, to allow the continuation of the trade for twenty years after the ratification of the Constitution.198 With little debate, the Convention voted in favor of the Committee's agreement.199 The slave states were satisfied, because the trade would continue;200 the non-slave states were satisfied, because the trade would be terminated in twenty years and slaves would be taxed.201

In the state ratifying conventions, the slave traffic provision was offered to the delegates to allay their insecurities about entering the new nation. In the Deep South, the clause was presented as a guarantee of its property. Robert Barnwell of South Carolina assured his state's convention that the trade would never end.202 "To think so," he stated, "is . . . contradictory to the general conduct of mankind. . . ."203 If South

196. Id. at 396. According to Frederick Douglass, most thinkers of 1787 "looked upon the slave trade as the life of slavery." 2 Life and Writings, supra note 1, at 473. These individuals concluded that the end of the trade would cause "the certain death of slavery." Id. As such, "American statesmen, in providing for the abolition of the slave trade, thought they were providing for the abolition of slavery." Id.
197. 2 M. FARRAND, supra note 34, at 400.
198. Id. at 408.
199. The framers agreed on the following draft of the slave trade clause:
   The migration or importation of such persons as the several 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.
   Id. at 596. For arguments regarding the different ways the Congress could have handled the slave trade, see W. WIECEK, supra note 37, at 81-83.
200. See infra notes 202-08 and accompanying text.
201. See infra notes 209-17 and accompanying text. After permitting the slave trade to continue, the delegates accepted the fugitive slave provision without argument. 2 M. FARRAND, supra note 34, at 443, 446, 453 (28, 29 Aug. 1787). The provision read: "No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be." Id. at 662. See, for scholarship on the Fugitive Slave Law, S. CAMPBELL, The Slave Catchers (1970); R. COVER, Justice Accused (1975); P. FINKELMAN, An Imperfect Union (1980); Wiecek, Slavery and Abolition Before the United States Supreme Court, 1820-1860, 65 J. AM. HIST. 34 (1978).
203. Id. at 296-97.
Carolina did not abolish the trade, he argued, it would continue forever. Barnwell reasoned that the Eastern states needed the produce of slaves for their carrier trade. As a result, the maritime states would encourage the trade for their advancement. Charles Cotesworth Pinckney instructed the South Carolina delegation that "[b]y this settlement we have secured an unlimited importation of negroes for twenty years. . . . [W]e have a security that the general government can never emancipate them, for no such authority is granted. . . ." He concluded by saying that "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."

The delegates in the other conventions used a different approach to gain approval for the provision. In those states, the clause was presented as an end to slavery. James Wilson remarked to the Pennsylvania ratifying convention that slavery would be confined to the Deep South. Referring to the Northwest Ordinance, Wilson assured the convention that the

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204. Id.
205. Id. at 296.
206. Id.
207. Id. at 286 (17 Jan. 1788).
208. Id.
209. George Mason maintained his anti-slavery position even during the Virginia ratifying convention. He said that
   by this Constitution, [the slave trade] is continued for twenty years. As much as I value a union of all the States, I would not admit the Southern States into the Union unless they agree to the discontinuance of this disgraceful trade, because it would bring weakness and not strength, to the Union.
3 id. at 452 (15 June 1788). Mason's position was in the minority. Furthermore, his stance was unreasonable, because if implemented, it would have probably brought about great disturbance: the nation would not have been formed and slavery would have probably had a firmer foundation under other governmental schemes. See also infra notes 267-74 and accompanying text.

Luther Martin of Maryland commented to his state ratifying convention that the trade and three-fifths clauses "ought to be considered as a solemn mockery of, and insult to that God whose protection we had then implored, and consider not fail to hold us up in detestation, and render us contemptible to every true friend of liberty in the world." 3 M. FARRAND, supra note 34, at 211 (29 Nov. 1787). Martin's statement is interesting because he had wanted the federal government to conduct a gradual emancipation program. His opposition to the Constitution seemed to contradict that position.
210. 2 J. ELLIOT, supra note 35, at 452 (3 Dec. 1787).
Congress had prohibited its spread into the new states. Furthermore, Wilson interpreted the clause "as laying the foundation for banishing slavery out of this country." He also predicted it would result in the same "gradual change, which was pursued in Pennsylvania." In the Massachusetts ratifying convention, the Reverend Backus noted that the Articles of Confederation did not prohibit importation; "but a door is now opened hereafter to do it, and each state is at liberty now to abolish slavery as soon as they please." On the same matter, James Iredell remarked to the North Carolina ratifying convention: "[S]urely... we gain by it." The United States, he declared, would be the first nation to restrict the trade and would, therefore, "set an example of humanity by providing for the abolition of this inhuman traffic, though at a distant period."

The delegates who ratified the Constitution obviously interpreted the document's handling of slavery differently. In the Deep South, the delegates thought it heightened the security of the institution. The delegates of the other states thought it successfully weakened slavery. Regardless of their interpretations, both sides joined the new nation secure that their inter-

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211. Id. For more on the Northwest Ordinance, see P. ONUF, STATEHOOD AND UNION (1987).

212. 2 J. ELLIOT, supra note 35, at 452 (3 Dec. 1787). Thomas Dawes said in the Massachusetts ratifying convention that, as a result of the slave trade provision, slavery "has received a mortal wound and will die of consumption." Id. at 41 (18 Jan. 1788).

213. Id. at 452.

214. Id. at 149 (2 Feb. 1788). The Articles of Confederation made no reference to slavery.

215. Id. In the Massachusetts ratifying convention, gentlemen responded to those who doubted that the Congress could end the slave trade by saying that the step taken in this article, towards the abolition of slavery, was one of the beauties of the Constitution. They observed, that in the confederation there was no provision whatever for its ever being abolished; but this Constitution provides, that Congress may, after twenty years, totally annihilate the slave trade; and that, as all the States, except two, have passed laws to this effect, it might reasonably be expected, that it would then be done. In the interim, all the States were at liberty to prohibit it.


216. 4 J. ELLIOT, supra note 35, at 101 (26 July 1788).

217. Id. James Madison thought the slave traffic provision was a "great point gained in favour of humanity. . . ." THE FEDERALIST NO. 42, at 219 (J. Madison) (M. Beloff 2d ed. 1987).
ests would be protected.\textsuperscript{218} As one historian has observed, "most Southerners and Northerners entered into government under the Constitution convinced that they were better off than they had been under the Articles, with regard to slavery as well as most other things."\textsuperscript{219}

Even though the framers compromised on slavery, their compromise was not immoral. As Part III will illustrate, the delegates made a morally defensible decision by tolerating the institution.

\section*{III. Is the Constitution a Document of Moral Compromise?}

\textit{Slavery and racism are morally indefensible.}\textsuperscript{220} Their moral status is independent of both the time and place under consideration. The wrongness of slavery flows from the relationship it establishes between one human being and another; its wrongness does not stem from where or when the parties to the relationship lived. In the same vein, racism is wrong, because it involves basing judgments of moral worth on such non-moral traits as skin color. Indeed, both slavery and racism are always and everywhere wrong. To think otherwise would be an endorsement of moral relativism. Moral relativism makes morality wholly arbitrary and subjective, because it makes non-moral factors, for example, the century and region in which one lives, somehow determinative of the morality of one's conduct.\textsuperscript{221} Furthermore, moral relativism denies the existence of one universal moral law or standard.\textsuperscript{222} Morality, on this account, is not absolute, but relative to the age, place, and circumstances in which it is found.\textsuperscript{223} Thus, an action that is proper in one society and time period \textit{may be} improper in

\begin{itemize}
\item \textsuperscript{218} The framers "were satisfied that they had disposed of the issue of slavery to the satisfaction of everyone. Everyone, it seems, judged the Constitution in light of the Articles of Confederation, and nearly everyone found it superior." D. Robinson, \textit{supra} note 52, at 243.
\item \textsuperscript{219} \textit{Id.} at 244. J. Elliot, \textit{supra} note 35, at 453 (J. Madison, 15 June 1788).
\item \textsuperscript{221} W. Stace, \textit{The Concept of Morals} 8 (1962).
\item \textsuperscript{222} \textit{Id.}
\item \textsuperscript{223} \textit{Id.}
\end{itemize}
another, because morality is determined by the commonly accepted practices of a person or of a people.\textsuperscript{224} Because the Deep South permitted slavery and racism, a relativist would conclude that both were morally proper. Such an argument, however, is fallacious and repugnant. Slavery and racism are neither time- nor place-dependent wrongs.\textsuperscript{225}

In his speech, Justice Marshall correctly noted the immorality of slavery, the moral indifference of many framers, and the achievement of the fourteenth amendment.\textsuperscript{226} As a matter of constitutional law, the fourteenth amendment clearly worked a radical change in the relationship between the federal government and the states.\textsuperscript{227} Subsequent to the inclusion of the amendment, the federal government acquired an expanded

\textsuperscript{224} Id. at 9. A moral relativist does not believe that universal moral standards exist. To a relativist, the word \textit{standard} refers to local, ephemeral, and variable sets of moral ideas. In contrast, a moral absolutist interprets the word \textit{standard} in two ways. The absolutist considers local, ephemeral, and variable sets of moral ideas, but compares them to a single universal moral standard. Therefore, for the local, ephemeral, and variable sets of moral ideas to be morally proper, they must align with the absolute and unchanging universal principle. For the moral relativist, however, the two-stage process of analysis is unnecessary to define good moral conduct: whatever the local people think is moral, is moral. \textit{Id.} at 10-12.

\textsuperscript{225} Moral relativism is harmful, because its acceptance and implementation will destroy the concept of morality. If morality is defined by commonly accepted practices, the nobler aspirations and qualities of man will disappear. This assertion is not as alarmist as it seems. Because moral relativism discards the belief in moral absolutes, comparisons between different moral standards is also discarded. Without moral valuations, people become the sole judges of their own morality. With the collapse of all effective standards, moral chaos will follow. If each person's sense of morality becomes as good as another's—no matter how different—practical conduct will be destroyed. If one person's moral standard is no better than someone else's, a person has no reason to recommend his morality or follow it. That person will, therefore, probably slip into lower and easier standards, which will be defended as morally sound solely because that person believes them to be. \textit{Id.} at 45-46, 48, 52-53. See Encyclical Letter of His Holiness Pope Leo XIII, \textit{Libertas} (On the Nature of Human Liberty) (June 20, 1888), \textit{reprinted in 2 THE PAPAL ENCYCICALS} 169 (C. Carlen ed. 1981), for a discussion on how universal corruption results when God and the existence of natural law and natural rights are set aside and human reason is used as the only authority by which to determine right from wrong. For more information on moral relativism, see also P. Foot, \textit{Moral Relativism} (1979); Harman, \textit{Moral Relativism Defended}, \textit{PHIL. REV.} (1975); Wiggins, \textit{Truth, Invention, and the Meaning of Life}, \textit{PROCEEDINGS OF THE BRITISH ACADEMY} (1976); Williams, \textit{The Truth in Relativism}, \textit{PROCEEDINGS OF THE ARISTOTELIAN SOC’Y} (1974-75).

\textsuperscript{226} Marshall, \textit{infra}, at app. 126-29.

\textsuperscript{227} Many books and articles have been written about the fourteenth amendment; \textit{see}, \textit{e.g.}, R. Cortner, \textit{THE SUPREME COURT AND THE SECOND BILL}
superintendency over the methods the several states used to
govern their citizens. The federal government's broader power—a prerogative that specific provisions of articles I and IV of the Constitution\(^{228}\) had narrowly confined—was, by the fourteenth amendment, given an open-endedness that has been the focal point of constitutional debate for the past one hundred years. The fourteenth amendment acknowledges that a just government—one that is fair to all people and respectful of everyone's rights—is a condition of a morally legitimate government, which is a gain for the American political culture. Put another way, the amendment precludes any value in leaving the states free to deny fairness or the protection of rights to some of its citizens. As Marshall argued, the constraint the fourteenth amendment has put on state sovereignty is, therefore, both substantial and, to an extent, defensible.\(^{229}\)

Despite the merits of Marshall's speech, he wrongly condemned the actions of the framers. Because Marshall analyzed the federal convention from a late twentieth-century perspective, he treated the framers' work unfairly. He should have given the period in which the delegates were living and laboring more thoughtful consideration.\(^{230}\) Had he done so, he would have realized that before the mid-eighteenth century, few white men debated the morality of black slavery.\(^{231}\) Conse-

\(^{228}\) See supra notes 37-38 and accompanying text, for a list of the relevant provisions in articles I and IV.

\(^{229}\) See R. Berger, Federalism: The Founder's Design 158-63 (1987), for a brief discourse on the fourteenth amendment. Berger correctly noted that the amendment was not intended by its framers to strip the states of their right to regulate their internal affairs, even though the United States Supreme Court has interpreted the amendment in that way. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). For a more detailed account of the limited objections held by the framers of the fourteenth amendment, see R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 193-220 (1977). Berger argues that the social change the fourteenth amendment brought about was caused by federal judges who used the amendment as a vehicle to reconstruct federal/state relations.

\(^{230}\) In his speech, Justice Marshall disregarded the argument "that the Constitution was a product of its times," as a justification for its defects. Marshall, infra, at app. 127-28. He gave no reasons, however.

\(^{231}\) Even though slavery was used throughout the Western Hemisphere, the morality of the subject was rarely debated by white men before the mid-eighteenth century. J. McPherson, supra note 37, at 38. Yet, by the middle of the century, three currents of Anglo-American and French thought addressed the immorality of the institution. Id.

The first of these oppositions to slavery came from the religious sector.
quently, at the framing, no national passion against and no compelling moral objection to the institution existed.\textsuperscript{232} As John Jay wrote in 1788, "the great majority" of people in both the North and the South accepted slavery, and "very few among them even doubted the propriety and rectitude of it."\textsuperscript{233} Some people, of course, had begun to question the morality of the institution by the time of the framing, but their influence was infinitesimal on the populace.\textsuperscript{234}

In 1688 the Germantown Mennonites declared in Philadelphia that slavery was inconsistent with Christian principles. \textit{Id.} W. \textsc{Bennett} \& T. \textsc{Eastland}, \textsc{Counting by Race} 28 (1979). Another religious group, which became more effective than the Mennonites in its anti-slavery crusade, was the Quakers. By 1760 they had freed their slaves and in 1775 had established the Pennsylvania Society for Promoting the Abolition of Slavery—the first anti-slavery organization in America. The Quakers emphasized that slavery was not a necessary subordination to authority in order to preserve the social order. Instead, it was a sin. W. \textsc{Bennett} \& T. \textsc{Eastland}, \textit{supra}, at 28; J. \textsc{McPherson}, \textit{supra}, at 38.

The second development was the intellectual advancements of the Enlightenment. These advancements challenged the intellectual rationalization of slavery by questioning the place bondage had in a society that strove to provide the greatest happiness for the greatest number. J. \textsc{McPherson}, \textit{supra}, at 38. Moreover, the belief in the inherent goodness and dignity of man exposed during the Enlightenment further challenged the theory behind slavery. \textit{Id.} K. \textsc{Stamp}, \textsc{The Peculiar Institution} 19 (1956).

The third force was the emergence of laissez-faire economics, which discarded feudalism and mercantilism. According to this economic theory, slavery was counterproductive to the economy, because it restricted free enterprise and free labor. These objections were outlined by Adam Smith in \textsc{An Inquiry into the Nature and Causes of the Wealth of Nations} (1776). Smith wrote that "the experience of all ages and nations" proved that slave labor "though it appears to cost only their maintenance, is in the end the dearest of any. A person who can acquire no property, can have no other interest but to eat as much, and to labour as little as possible." \textit{Quoted in} J. \textsc{McPherson}, \textit{supra}, at 39 \& \textsc{Slavery in the Age of Revolution}, \textit{supra} note 44, at 352.

\textsc{See supra} notes 95, 231.
Accepted and used throughout the colonies, slavery was the oldest form of forced labor in Western civilization. Because most whites considered blacks inferior beings, slavery was especially agreeable. Owing to their background, white Americans needed time to recognize the immorality of the subject; moreover, they needed time to implement that knowledge. In 1787, the immorality of the institution was a minor concern, if a concern at all. The primary issue was establishing a nation that would overcome the problems experienced by the states under the Articles of Confederation.


236. J. McPherson, supra note 37, at 38.


238. M. Farrand, The Framing of the Constitution 110 (1913). Another problem with Marshall's approach is his failure to offer the reader a clear ethical basis to judge the morality of the framers' actions. The problem is linked to his twentieth-century outlook. Even though today we realize the immorality of slavery, our disgust with the practice is not representative of the late eighteenth century. This was especially true of the Deep South's position toward slavery; the region's attitude was not isolated. Slavery had been a common practice in the colonies. J. Stewart, supra note 235, at 5. Yet, at the time of the framing, only the Deep South still relied heavily on the institution, because it had not developed other economic means of production. See supra note 160. Based on the widespread use of slaves in the colonies, one can reasonably infer that the views of the Deep South were prevalent throughout the other states. That attitude lessened, however, as the need for slaves diminished.

The Deep South, in particular, considered blacks inferior beings. The color black was equated with baseness, filthiness, and sin, whereas the color white represented purity, virginity, and virtue. W. Jordan, supra note 80, at 3-43. As a result, blacks were considered unsuited for any freedom, whether economic, emotional, intellectual, moral, political, or social. Scott, 60 U.S. (19 How.) at 405, 407-08; R. Bernstein, Are We To Be A Nation? 128 (1987). Because blacks had no rights—the main condition of slavery—they could justifiably be placed into perpetual bondage. G. Fredrickson, White Supremacy 70 (1981). Although the Deep South was incorrect in its outlook toward blacks, the opinion was widespread among the white community. Scott, 60 U.S. (19 How.) at 407. The opinion was neither disputed nor was it thought to be open to dispute. Id. The view toward blacks and slavery was even more solidified, because the Deep South's economy, politics, and social structure depended on it. J. Stewart, supra, at 6, 7.

239. In 1781, the colonies were organized as states under the Articles of Confederation. The Articles preserved state independence by protecting states' rights and decentralizing authority. Each state had its own local constitution, its own currency, and could impose tariffs on each other's trade. 2 J. Elliot, supra note 35, at 269 (R. Harrison, 23 June 1788); M. Jensen, The New Nation 25, 178, 322-23, 326, 344, 376 (1967).

Conversely, the Congress had almost no power. It only had the powers
In judging the framers’ product by the more developed sociological and anthropological knowledge of the twentieth century, Justice Marshall’s conclusions do a “disservice to the cause of history.” Historical analysis should capture the essence of the period under scrutiny and evaluate its events within the context of that time frame. Historical inquiry should demonstrate the differences of one age from another, so those living today can benefit from the experiences of those living yesterday. Historical inquiry should “recapture the richness of the moments, the humanity of the men, the setting of external circumstances, and the implications of events... .” In these ways, the parties involved in a particular struggle and the causes and effects of their judgments can best be understood to assist the present and aid the future.

Studying the past with reference to contemporary society dismisses the occurrence of all intervening developments.
The faithful portrayal of earlier events is thereby precluded, because the inferences the historian makes about prior happenings are not drawn from the past, but from a blend of the past and the present. All intervening developments, therefore, and the manner in which they have affected the present are neglected. When viewed in this insular and distinct manner, modern day society appears superior to earlier societies. As such, history is not produced, but, rather, an illusion.

Even though historical analysis, completely unadulterated by current attitudes and convictions is impossible, it should be the ideal; it should be striven for. With that intention, the historical examination in this student comment, unlike Marshall’s, has attempted to focus on what the framers thought and accomplished in the climate and opinion of their own time. Granted, Justice Marshall probably did not want to consider the Philadelphia Convention as an historian; instead, he probably intended to view it as a constitutional interpreter and, to an extent, as a black reformer—an advocate for a broader understanding of the Constitution today. As a constitutional interpreter, Marshall may be free or even required to make moral judgments that he would not make as an historian. As a reformer, Marshall’s assault on the founding fathers demonstrates his concern with the modern “original intent movement,” which calls for a constitutional jurisprudence guided by the framers’ intent. The problem with Marshall’s position, however, is its irrelevance to both the practical and abstract considerations at the time of the country’s founding.

Doubtless, the framers’ main purpose at the Philadelphia Convention was to create a national government. The fram-
ers, however, could not have created a government and have also abolished slavery.\textsuperscript{251} The framers reasonably thought that

\textit{the Union.”} 1 Documentary History of the Constitution of the United States of America, 1786-1870, at 8 (1901); 1 J. Elliot, supra note 35, at 120-39. The Constitution was established “to form a more perfect union...” U.S. Const. preamble. Roger Sherman of Connecticut said that “the object of our convention is to amend [the] defects [in the Articles of Confederation.]” 1 J. Elliot, supra, at 470 (30 June 1787). James Madison of Virginia exclaimed that “[i]t was incumbent on us... to frame a republican system... as will control all the evils which have been experienced.” 3 Documentary History of the Constitution, supra, at 74. See also The Federalist No. 14, at 64 (J. Madison) (M. Beloff 2d ed. 1987); id. No. 23 (A. Hamilton).

251. The tone of Marshall’s argument leaves the impression that he thought the framers could have created a nation that included all of the states, but did not include slavery. At least five reasons exist to explain why slavery was not abolished during the period between the Revolutionary War and the Philadelphia Convention: first, inertia; it had existed in the old empire and as a result flourished in the New Republic. If it had been done away with south of Pennsylvania, it would have required an economic, political, and cultural revolution of great proportions. G. Fredrickson, supra note 238, at 70; C. Rossiter, supra note 136, at 31-32; K. Stampp, supra note 231, at 15-17.

Second, apprehension that American society could not absorb the free blacks, who were so numerous and culturally alien to whites. Such a move would have required a change for the worse, according to many whites. C. Rossiter, supra, at 32. For example, James Galloway in the North Carolina ratifying debates said: “It is impossible for us to be happy, if, after manumission, [blacks] are to stay among us.” 4 J. Elliot, supra note 35, at 101 (26 July 1788).

Third, lack of imagination in giving the “emancipated slaves the substance as well as the appearance of freedom.” C. Rossiter, supra, at 32.

Fourth, ideology; it was impossible for the majority of whites to think of blacks as their equal. \textit{Id.}

Fifth, private property, a concept to which the framers were committed; by abolishing slavery, the framers would have taken private property away from slaveholders. 1 M. Farrand, supra note 34, at 594 (C. C. Pinckney, 12 July 1787); S. Lynd, Class Conflict, Slavery and the United States Constitution 181 (1968). See also infra note 285.

For many whites, the belief that blacks were a “brutish sort of people” allowed them to justify asserting the innate rights of man while denying blacks those same rights. W. Bennett & T. Eastland, supra note 231, at 25. As for the Declaration of Independence’s statement that “all men are created equal,” Thomas Jefferson, the author of the Declaration, and other Americans, did not believe blacks were included in the phrase. \textit{Id.} at 26; M. Peterson, Thomas Jefferson and the New Nation 263 (1970). Jefferson thought all men were equal only in their moral faculty. W. Bennett & T. Eastland, supra, at 26. In short, all men were the same because of their moral sense. \textit{Id.} The aim of the Declaration, however, was to assert the rights of all white Americans as Englishmen. Over time, the distinction was blurred to include all men, in spite of their race. \textit{Id.} at 26-27. Thus, because America was dedicated to the principles of liberty and equality, it could not
the slave states would not have joined a union that did not protect the institution.252 They believed John Rutledge when he told the federal convention: "The true question at present is whether the Southern States shall or shall not be parties to the Union."253 They also believed his colleague General Charles Pinckney when he told the delegates that "South Carolina and Georgia cannot do without slaves."254 The framers were convinced, because the position of the Deep South never wavered.255

By entering the union, those who opposed the inclusion of slavery in the Constitution did not accept or endorse the convictions of those who favored the system.256 Instead, they tolerated the interests of the slave states in order to consolidate the disparate interests of the states into one nation.257 Without adopting a tolerant view of slavery, the framers could have predicted with reasonable certainty the Deep South's departure from the Convention, the ensuing evaporation of the Convention, and the apparent end of their dream of unified advancement toward concerted goals. Therefore, the framers' steadfast desire to create a nation was appropriate. Existent circumstances faced the states: they were experiencing political and economical chaos; they were also fearing attack from the British and Spanish Empires, which surrounded the states on their northern, western, and southern sides. A newly designed system of government was necessary to stabilize and protect the states. Owing to the framers' underlying interest in tolerating slavery, their use of the concept was morally defensible.

Indeed, the concept of tolerance can be used incorrectly. If the framers had tolerated the Deep South's use of slaves

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252. James Madison wrote to Thomas Jefferson on November 24, 1787, that "South Carolina and Georgia were inflexible on the point of the slaves." M. KAMMEN, THE ORIGINS OF THE AMERICAN CONSTITUTION 73 (1986). Other delegates agreed. James Iredell, for example, told the North Carolina ratifying convention that South Carolina and Georgia would not budge on the matter. 4 J. ELLIOT, supra note 35, at 100 (26 July 1788).

253. 2 M. FARRAND, supra note 34, at 364 (21 Aug. 1787).

254. Id. at 371.

255. W. WIECEK, supra note 37, at 64.

256. See supra notes 168-69 and accompanying text.

257. Id.
without aiming for a greater good, the framers would have acted improperly.\textsuperscript{258} Yet, the framers did not merely tolerate the continuation of slavery for its own sake; they tolerated the temporary continuation of the institution to establish a nation in which the system had a better chance of being extinguished.\textsuperscript{259} Despite any naivety on the framers' part regarding the ease in which slavery would vanish from the country and despite any insensitivity on the framers' part regarding the grave evil of slavery, the framers were prudent in their decision to endure the continued life of the institution. Their tolerance allowed the American people to enter into a living arrangement with those who held contrary views.\textsuperscript{260} It also assured the American people the time to come to the realization that the institution was immoral. In so doing, it allowed some American people to implement the universal principles on which America's freedom from Great Britain was based, in particular, the principle that all men are created equal.\textsuperscript{261}

Because the framers thought the states could best solve their difficulties if they were unified,\textsuperscript{262} creating a nation took precedence over all other problems.\textsuperscript{263} Owing to the intent of the framers to achieve a greater good by tolerating what they

\textsuperscript{258} To illustrate further the concept of tolerance: if people tolerate a crime for any reason other than to help the victim, they would be acting incorrectly. But, if people tolerate a crime to achieve a greater good, for example, not interfering to allow time for the police to arrive and arrest the criminals, they would be acting correctly. Granted, the type of crime must be considered. If people can help prevent a crime by actively stopping the criminal, they should. But, if prudence dictates that they should not interfere because their actions would not help apprehend the criminal, they should wait for the police to arrive. The concept of tolerance is tricky. The main element on which to focus is the intent of the tolerance, which should be to achieve a greater good. \textit{Saint Thomas Aquinas, supra} note 26, II-II, Q. 64, A. 7.

\textsuperscript{259} \textit{See infra} notes 312-14 and accompanying text.

\textsuperscript{260} George Washington wrote to the Marquis de Lafayette on February 7, 1788: “It appears to me, then, little short of a miracle, that the Delegates from so many different States (which States you know are also different from each other in their manners, circumstances and prejudices) should unite in forming a system of national Government.” 29 \textit{The Writings of George Washington from the Original Manuscript Sources} 1745-99, at 409 (J. Fitzpatrick ed. 1939) [hereinafter \textit{J. Fitzpatrick}]. James Madison wrote to Thomas Jefferson on October 24, 1787, that it was “impossible to consider the degree of concord which ultimately prevailed as less than a miracle.” 1 J. \textit{Madison, Letters and Other Writings of James Madison} 344 (1884).

\textsuperscript{261} \textit{The Declaration of Independence} para. 2 (U.S. 1776).

\textsuperscript{262} \textit{See infra} notes 263, 265-66, 286-87 and accompanying text. \textit{See also} \textit{The Federalist} No. 37, at 177 (J. Madison) (M. Beloff 2d ed. 1987).

\textsuperscript{263} \textit{See supra} note 250.
considered a lesser evil, they acted morally.264 James Madison pointed out to the Virginia ratifying convention that South Carolina and Georgia would not have joined the union without the temporary permission of [the slave] trade; and if they were excluded from the Union, the consequences might be dreadful to them and to us. . . . Great as the evil is, a dismemberment of the Union would be worse. If those states should disunite from the other states for not indulging them in the temporary continuance of this traffic, they might solicit and obtain aid from foreign powers.265

Patrick Henry voiced a similar concern to the Virginia ratifying convention. He said:

As much as I deplore slavery, I see that prudence forbids its abolition. . . . But is it practicable by any human means, to liberate them, without producing the most dreadful and ruinous consequences? We ought to pos-


Saint Thomas wrote that "[m]oral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental. . . ." SAINT THOMAS AQUINAS, supra, II-II, Q. 64, A. 7. Saint Thomas understood that tolerating a lesser evil to achieve a greater good would cause two effects. Id. The two effects of the framers’ actions were (1) tolerating an evil, slavery, for (2) the greater good of establishing a union that would allow for the system’s end. To be sure, the framers’ good intention was not rendered unlawful, because it was in proportion to the end. Id. The framers were only allowing the temporary extension of slavery to ensure the creation of the union.

Historian William Wiecek wrote that the slavery compromise demonstrated that the founding fathers thought “the highest good was national union.” W. WIECEK, supra note 37, at 73.

265. 3 J. ELIOT, supra note 35, at 453-54 (15 June 1788). As gleaned from James Madison’s Federalist writings, Madison reasoned that to liberate the slaves at the time of the Constitution’s drafting would have violated the rights of the rest of the American people to pursue happiness by causing the destruction of the Union; therefore, Madison accepted the continuation of slavery, because it achieved the greater good of establishing a nation. M. WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION 226 (1987).
sess them in the manner we have inherited them from our ancestors, as their manumission is incompatible with the felicity of the country.\textsuperscript{266}

Because slavery was essential to the Deep South’s existence,\textsuperscript{267} without its inclusion in the document, the framers could have expected the region to discard the plans of creating a strong federal government.\textsuperscript{268} The reactions of the states to a disbanded Convention can only be speculated. More than likely, absent the union, various confederations would have formed. Initially, three would have been established:\textsuperscript{269} (1) a confederation of the New England states;\textsuperscript{270} (2) a confederation of the middle states, perhaps without New York, which could have existed alone because of its grand harbor;\textsuperscript{271} and (3) a confederation of the Southern states.\textsuperscript{272} A combination of either New England and the middle states might have occurred, or ten states in one confederation, Rhode Island by itself, and South Carolina and Georgia in another. The states could also have fallen back on the Articles of Confederation.\textsuperscript{273} Of course, without the Constitution, slavery would have been more firmly rooted in those states that desired the system.\textsuperscript{274}

Absent a general government to control state action, the states

\begin{itemize}
\item \textsuperscript{266} 3 J. ELLIOT, supra note 35, at 590-91 (24 June 1788).
\item \textsuperscript{267} Deep Southerners “were convinced that slavery was essential to the peace of their society, and they suspected that those who lived where blacks were sparse could never understand this fact.” D. ROBINSON, supra note 52, at 210. For example, Rawlins Lowndes in the South Carolina ratifying convention, voicing his concern about the trade provision, said:

\begin{quote}
In the first place, what cause was there for jealousy of our importing negroes? Why confine us to twenty years, or rather why limit us at all? ... But they don’t like our slaves, because they have none themselves, and therefore want to exclude us from this great advantage. Why should the Southern States allow ... this... [?]
\end{quote}

\item \textsuperscript{268} See supra notes 61, 84-87, 163, 180-82, 252-55, 265-67 and accompanying text; see also infra notes 286-87 and accompanying text. Berns, supra note 101, at 25.
\item \textsuperscript{269} THE AMERICAN CONSTITUTION: FOR AND AGAINST 20 (J. Pole ed. 1987) [hereinafter J. POLE].
\item \textsuperscript{270} The New England states were Connecticut, Massachusetts, New Hampshire, and Rhode Island.
\item \textsuperscript{271} The middle states were New Jersey, New York, and Pennsylvania.
\item \textsuperscript{272} The Southern states were Delaware, Georgia, Maryland, North Carolina, South Carolina, and Virginia.
\item \textsuperscript{273} Under the Articles of Confederation, the slave trade could continue indefinitely. See THE FEDERALIST No. 38 (J. Madison). The Articles omit reference to slavery.
\item \textsuperscript{274} 4 J. ELLIOT, supra note 35, at 100 (J. Iredell, 26 July 1788); J. POLE, supra note 269, at 19.
\end{itemize}
would have retained complete sovereignty to do as they wished.\textsuperscript{275} The elimination of the institution nationally for those who desired it would have been lost or, at least, postponed.\textsuperscript{276}

Clearly, the framers wanted to draft a document that would appease the majority of interests.\textsuperscript{277} The document did not canonize the institution of slavery, as is evident from the term's omission from the text.\textsuperscript{278} If it had, it would have been morally flawed.\textsuperscript{279} The framers omitted any reference to slavery, because they knew the non-slave states would have disagreed to a document that openly endorsed the institution.\textsuperscript{280}

\begin{itemize}
  \item \textsuperscript{275} 4 J. Elliot, supra note 35, at 100 (J. Iredell, 26 July 1788). As Alexander Hamilton noted: "A nation without a national government is an awful spectacle." The Federalist No. 85, at 451 (M. Beloff 2d ed. 1987).
  \item \textsuperscript{276} 4 J. Elliot, supra note 35, at 231 (J. Iredell, 31 July 1788); C. Rossiter, supra note 136, at 268.
  \item \textsuperscript{277} Georgia delegate William Few wrote in his autobiography that "[o]n that principle of accommodation the business progressed, and after about three months' arduous labor, a plan of Constitution was formed on principles which did not altogether please anybody, but it was agreed to be the most expedient that could be devised and agreed to." 3 M. Farrand, supra note 34, at 423 (Oct. 1816).
  \item Furthermore, in a November 10, 1787, letter to his son, Bushrod, George Washington wrote:
  \begin{quote}
    Is it best for the States to unite, or not to unite? [T]hose who [agree that the states should unite] and yet object to parts of [the Constitution], would do well to consider that it does not lye [sic] with any one State, or the minority of the States to superstruct a Constitution for the whole. The separate interest, as far as it is practicable, must be consolidated; and local views must be attended to, as far as the nature of the case will admit. Hence it is that every State has some objection to the present form and these objections are directed to different points, that which is most pleasing to one is obnoxious to another, and so vice versa. If then the Union of the whole is a desirable object, the component parts must yield a little in order to accomplish it.
  \end{quote}
  \item \textsuperscript{278} On this matter, one author has noted that considering that the subject of slavery was perhaps the most inflammable question on the agenda and provoked sharp exchanges each time it came up, one is tempted to conclude that the lack of any direct allusion to it in the final version of the Constitution is testimony to either the statesmanlike discreetness or lily-livered mendacity of the delegates.
  \item \textsuperscript{279} See supra note 26 and accompanying text.
  \item \textsuperscript{280} Luther Martin said to the Maryland ratifying convention that the framers "anxiously sought to avoid the admission of expressions which might
Also, by classifying slaves as “other persons” the framers achieved two goals: first, the slave states would join the nation, because slavery was protected; second, the framers set the impression that once freed, slaves would receive all the rights enjoyed by whites.

In light of the social, economic, and political ramifications that slavery had for the slave states, abolition had to be be odious in the ears of Americans, although they were willing to admit into their system those things which the expressions signified.” 3 M. FARRAND, supra note 34, at 210 (29 Nov. 1787). Roger Sherman wanted euphemisms because the word “slave” was “not pleasing to some people.” 2 id. at 415 (25 Aug. 1787); Berns, supra note 101, at 23.

281. One reason that no direct reference to slavery appears in the Constitution was because slaves were the main form of property, save for realty, in the states. If the Convention attempted to abolish the institution, slaveholders would have furiously opposed it. The national government could not have, nor would have, forced abolition; abolition would have to have been achieved at the local level. 1 R. KLUGER, supra note 278, at 37. Also, the term had not been used in the Articles of Confederation. 2 J. ELLIOT, supra note 35, at 451 (J. Wilson, 3 Dec. 1787).

282. U.S. CONST. art. I, § 2; Reynolds, Another View: Our Magnificent Constitution, 40 VAND. L. REV. 1343, 1347 (1987). The word slavery first appeared in the Constitution by way of the thirteenth amendment. The words race and color first entered the document through the fifteenth amendment. The words black and white have always been absent from the Constitution. Goldwin, supra note 50, at 28.

On February 1, 1820, Jonathan Roberts, a Senator from Pennsylvania, asked his colleagues during a debate on the Missouri question: Why is a circumlocution of words used in [the Constitution], to designate such persons, instead of one so appropriate as that of slaves? Either because it was considered as a painful word, or for the better reason, that it was hoped the Constitution would survive a state of things where the word would be applicable. In either case, emancipation must have been looked to as a desirable event, and a righteous consummation of the promises of the Revolution.

35 ANNALS OF CONG. 340 (1820).

283. From the Georgia frontier up through the Virginia tidewaters and Maryland, slavery influenced almost every aspect “of the region’s economic life, social customs, and political institutions.” J. STEWART, supra note 235, at 6. At the start of the eighteenth century, many Southern whites (especially Deep Southerners) considered slave labor as a “prerequisite for order, liberty, and prosperity,” because it eliminated the potential problem of an unruly population of lower-class whites. Id. at 7; J. MCPHERSON, supra note 37, at 33; Morgan, Slavery and Freedom: The American Paradox, 59 J. AM. HIST. 5, 25 (June 1972); SLAVERY IN THE AGE OF REVOLUTION, supra note 44, at 261.

Slavery was ingrained in the South. By the early 1770s, 35 to 40% of the Southern population was black. D. FEHRENBACKER, supra note 27, at 15; J. STEWART, supra, at 7. In Maryland, North Carolina, and Virginia, slaves made up 30 to 40% of the population. J. STEWART, supra, at 7. In parts of the coastal areas of South Carolina, whites were in the minority, with one white for every five blacks. Id. But, not every white Southerner owned a slave. In
achieved without severely disrupting what it influenced. As a result of their association under the Articles of Confederation, the states were in no condition to withstand a social revolution. The abolition of slavery at the framing, therefore, would have been disastrous. George Nicholas asked the Virginia ratifying convention: "As the Southern States would not confederate without [the slave trade] clause, . . . [would] gentlemen . . . rather dissolve the confederacy than to suffer this temporary inconvenience, admitting it to be such?"

And, John Rutledge said to the Philadelphia Convention: "Had we not better keep the Government up a little longer, hoping that another Convention will supply our omissions, than abandon everything to hazard?"

As lawmakers, the framers were responsible for drafting laws that would lead people to virtue, that is, move people

Delaware, eastern Maryland, eastern and northern Virginia, and parts of North Carolina, slaves were seldom owned. Id. at 8. The economy in those areas was based on family farming and commercial activity. Id. Of those who owned slaves in the South, the majority held less than five. R. Bernstein, supra note 238, at 5. The exception to that rule was the large slaveholders, who were found in the Deep South. J. Stewart, supra, at 8. Although the ownership of slaves varied in the South, as it did in the North, the South, particularly the Deep South, had a greater dependence on the institution for its economic, social, and political order. Id. at 5-6. Stemming from the long tradition of slavery in the Deep South, the moral implications were not deeply considered. For more on the matter, see also A. H. Stephens, Corner Stone Speech at Savannah, Georgia (Mar. 21, 1861), reprinted in H. Cleveland, Alexander H. Stephens, In Public and Private with Letters and Speeches, Before, During, and Since the War 721 (1866). On the Southern plantation society, see F. Gaines, The Southern Plantation (1925); 1-2 L. Gray, History of Agriculture in the Southern United States to 1860 (1933).

284. J. Stewart, supra note 235, at 6. During the Revolutionary period, "slavery was of central importance to both the southern and national economies, and thus to the viability of the 'American system.'" Slavery in the Age of Revolution, supra note 44, at 256.

285. See supra note 239 and accompanying text.

286. 3 J. Elliot, supra note 35, at 456 (15 June 1788).

287. 2 M. Farrand, supra note 34, at 19 (15 Jan. 1788).

288. Saint Thomas Aquinas, supra note 26, I-II, Q. 96, A. 2. According to Saint Thomas, virtue is simply a good operative habit. Id., I-II, Q. 55, A. 1-4. It "is the habit of perfecting man in view of his doing good deeds." Id., I-II, Q. 58, A. 3. The purpose of virtue, therefore, is to mold men. It protects human nature from the influences that would lead to its deterioration. In short, "[v]irtue breaks down the barriers to full, free, human living, sets the powers of man ever more free, free enough ultimately to soar up to God Himself." 2 W. Farrell, A Companion to the Summa 193 (1939). Put another way, virtue is a good quality of the mind, by which we live
away from licentiousness;\textsuperscript{289} the framers thought licentiousness led people to tyranny.\textsuperscript{290} But laws should lead people to virtue in a gradual fashion.\textsuperscript{291} Sudden change causes greater disturbance, because the non-virtuous are unable to adapt swiftly to the new laws and are instead led to greater evil.\textsuperscript{292}

The framers wanted to achieve a nation in which gradual change would take place to ensure national stability.\textsuperscript{293} Each framer realized that a solid federal government first needed to be established before the country could solve the tough problems it faced.\textsuperscript{294} The purpose of the framers was to recommend a system of government that would unite the states.\textsuperscript{295}

righteously. Virtues are great goods that come from God, which He works in us and without us. SAINT AUGUSTINE, supra note 26, at 80-83.

In describing the United States Constitution, Robert Goldwin wrote:

A good constitution provides guidance and structure for the improvement of the society. A good constitution is designed to make the political society better than it is, and the citizens better persons. It must be close enough to the institutions and the people as they are to be relevant to the working of the society in its everyday activities, but it should also have what might be called formative features, a capacity to make us better if we live according to its provisions and adhere to its institutional arrangements.

Goldwin, supra note 50, at 31. On the guidance the Constitution provides to inform and shape American political life and public policy in terms of ethical norms and values, see the essays contained in STILL THE LAW OF THE LAND? ESSAYS ON CHANGING INTERPRETATIONS OF THE CONSTITUTION (J. McNamara ed. 1987). See also infra notes 289-90.


290. The framers held common beliefs. In particular, they were preoccupied with the mortality of republics. The framers considered the spread and maintenance of public virtue the key to preserving the republic. \textit{Id}. The framers thought the decline in public virtue—the increase of vice—would cause the decline of the republic. With the decline of public virtue would come an increase of vice and licentiousness. Licentiousness would lead to anarchy, and anarchy would eventually degenerate to tyranny. \textit{Id}. The result would be the republic's destruction.


292. \textit{Id}.

293. \textsc{The Federalist} No. 37, at 177 (J. Madison) (M. Beloff 2d ed. 1987); \textit{id}. No. 43 (J. Madison).

294. See supra notes 262-68, 265-66, 286-87 and accompanying text. Richard Harrison told the New York ratifying convention that “a close union is essential to the prosperity of states; that, therefore, some measures should be pursued to strengthen that union, and prevent a dissolution.” 2 J. ELLIOT, supra note 35, at 269 (23 June 1788). THE FEDERALIST No. 85, at 451 (A. Hamilton) (M. Beloff 2d ed. 1987).

295. See supra notes 249, 264 and accompanying text. According to historian William Wiecek, the framers thought “the highest good was national union.” W. WIECEK, supra note 37, at 73.
The federal legislature would thereafter be responsible for keeping the states harmoniously together. 296 George Washington's statement shortly after the federal convention indicated the framers' position. He wrote:

The Constitution . . . is not free from imperfections, but there are as few radical defects in it as could well be expected considering the heterogeneous mass of which the Convention was composed and the diversity of the interests that are to be attended to. [A] Constitutional door is opened for future amendments and alterations. 297

James Madison agreed. He thought it was incumbent on the framers' successors to improve the document to "guard[ ] equally against that extreme facility, which would render the constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults." 298

The framers included article V to assure the perpetual improvement of the Constitution. 299 The cumbrous nature of the amendment process guaranteed that the flaws in society could be altered, while the essential integrity of the document's structure would be safeguarded. 300 What the framers drafted in 1787 represented the country's prevalent attitude. 301 The
framers correctly assumed that the national consensus would change during the country's lifetime. Hence, the document had to reflect that growth. For example, when the social consensus toward slavery changed after the Civil War, three amendments were adopted to reflect that different attitude. The amendments took what the document had tolerated and made it constitutionally impermissible: blacks were no longer enslaved; blacks were acknowledged to be legally equal to whites; and, blacks had the right to vote. Granted, the additions were the product of a violent war, a war that represented the end of the nation's tolerance of slavery. Yet, the amendments did not create a new Constitution as Justice Marshall contended. They represented the document's ability to adapt. The amendments grew, therefore, from the intent of the framers and of their product: they were the framers' predicted growth for the document. Furthermore, the amend-

understood that no formula or system of government is universally desirable or workable; instead, if government is to be viable, it must be made to conform to human nature and to the genius of the people—to their customs, morals, habits, institutions, and aspirations. The framers did just that, and thereby used old materials to create a new order for the ages.

F. McDonald, The Sixteenth Annual Jefferson Lecture (May 6, 1987) (Sponsored by the National Endowment for the Humanities).

302. 4 J. ELLIOT, supra note 35, at 176-77 (J. Iredell, 29 July 1788); Reynolds, supra note 282, at 1350.

303. Thomas Jefferson wrote to Edward Carrington on August 4, 1787, that even “with all the imperfections of our present government, it is without comparison the best existing or that ever did exist.” 4 WRITINGS OF JEFFERSON 423-25 (P. Ford ed. 1895). Albert Newsome wrote:

So adept have been the American people in the art of self-government that the Federal Constitution has survived in a world of crashing empires, tottering thrones, and changing governments as the oldest operating written constitution among the nations of the world. Under [the] Constitution, the people of this American republic have achieved permanent union, political stability, and national greatness.


304. The thirteenth amendment was adopted in 1865; the fourteenth amendment was adopted in 1868; the fifteenth amendment was adopted in 1870. The three amendments are often called the Civil War amendments.

305. U.S. CONST. amend. XIII.

306. Id. amend. XIV.

307. Id. amend. XV.

308. Marshall, infra, at app. 128. If a new Constitution was created after the inclusion of the Civil War amendments, are the United States Supreme Court decisions prior to the amendments still valid? Did the branches of government survive the Civil War? Reynolds, supra note 282, at 1349.
ments emphasized that the nation was strong enough to acknowledge the universal principles on which its freedom from Great Britain was founded, and, more importantly, they underscored that the nation was strong enough to implement that knowledge.

In crafting a new nation, the framers acted prudently. As will be affirmed in the conclusion, the framers’ decisions resulted in a moral document.

Conclusion

In his speech, Justice Marshall called the United States Constitution a product of moral compromise and the framework of a defective government. 309 He rested the blame on our founding fathers. 310 In particular, Marshall blamed those framers who initially opposed slavery’s inclusion in the document but who later agreed to it. 311 Yet, as this student comment has shown, those men did not act immorally. They made a morally defensible decision when they admitted the slavery provisions into the document. They intended to bring about a greater good—a new nation—by tolerating a lesser evil—slavery. 312 The document they drafted did not accept the institution; accordingly, it did not give permanent life to slavery. 313 What the framers constructed was a system of government that satisfied the needs of eighteenth-century American society but that also had the ability to amend the wrongs of that society. 314

The achievement—the moral achievement—of the Constitution is that it permitted the moral advancements that Marshall applauded in his speech. The weight and direction of the movement, starting with the document, was to eradicate slavery. 315 The movement was morally built into the Constitution

310. Id. at app. 125-29.
311. Id. at app. 127.
312. See supra notes 256-61, 264 and accompanying text.
313. For example, General William Heath exclaimed to the Massachusetts ratifying convention: “The federal Convention went as far as they could. The migration or importation . . . is confined to the states now existing only; new states cannot claim it.” 2 J. Elliot, supra note 35, at 115 (30 Jan. 1788) (emphasis in original). See supra notes 105, 210-12 and accompanying text.
314. See supra notes 149, 163, 214-16, 218-21 and accompanying text. “Simply to have made it possible for the new government to move against the slave trade in twenty years (and to tax it in the meantime) was as decisive a victory for human decency as men who loved the Union and hated slavery could have won at Philadelphia.” Rossiter, supra note 136, at 268 (emphasis added).
315. The slave trade clause demonstrates one anti-slavery aspect that the
with the 1808 provision and the amendment process.\textsuperscript{316} For these reasons, the founding fathers should be respected and given credit.

Despite Justice Marshall’s disagreement,\textsuperscript{317} the Constitution was a product of its time. It was designed to reflect the nation’s evolving attitudes. It remains, as such, an incomplete but moral document, which is a product of our own time as well. The genius of the document is its provision for its own future change: it can be altered to correct the wrongs of our past and secure the promises of tomorrow. It has the ability, therefore, to allow our nation to realize and adopt basic, universal principles—the paramount one being the respect and preservation of all human life. The decision to make the changes, however, rests with the American people and not with the document itself. As in the past, the fate of our country is in our hands.

\textsuperscript{316} Along similar lines, Professor Walter Berns commented that, based on the three-fifths, fugitive slave, and slave trade clauses, “the Constitution was, to the greatest extent possible, an anti-slavery document.” Berns, \textit{supra} note 101, at 24; \textit{see also} \textit{LIFE AND TIMES}, \textit{supra} note 1, at 260-61.

ANOTHER LOOK

APPENDIX

REMARKS OF THE HONORABLE THURGOOD MARSHALL AT THE ANNUAL SEMINAR OF THE SAN FRANCISCO PATENT AND TRADEMARK LAW ASSOCIATION IN MAUI, HAWAII, MAY 6, 1987*

The year 1987 marks the two hundredth anniversary of the United States Constitution. A Commission has been established to coordinate the celebration. The official meetings, essay contests, and festivities have begun.

The planned commemoration will span three years, and I am told 1987 is “dedicated to the memory of the founders and the document they drafted in Philadelphia.”¹ We are to “recall the achievements of our founders and the knowledge and experience that inspired them, the nature of the government they established, its origins, its character, and its ends, and the rights and privileges of citizenship, as well as its attendant responsibilities.”²

Like many anniversary celebrations, the plan for 1987 takes particular events and holds them up as the source of all the very best that has followed. Patriotic feelings will surely swell, prompting proud proclamations of the wisdom, foresight, and sense of justice shared by the framers and reflected in a written document now yellowed with age. This is unfortunate—not the patriotism itself, but the tendency for the celebration to oversimplify, and overlook the many other events that have been instrumental to our achievements as a nation. The focus of this celebration invites a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the “more perfect Union” it is said we now enjoy.

I cannot accept this invitation, for I do not believe that the meaning of the Constitution was forever “fixed” at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective

* Justice Marshall has permitted the Notre Dame Journal of Law, Ethics & Public Policy to reprint his remarks in this Appendix. His speech has been reprinted verbatim, except for stylistic changes, including putting long quotations into block form and adding footnote 11 to document the quotation from Scott v. Sandford more clearly.


from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today. When contemporary Americans cite "The Constitution," they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago.

For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document's preamble: "We the People." When the founding fathers used this phrase in 1787, they did not have in mind the majority of America's citizens. "We the People" included, in the words of the framers, "the whole Number of free Persons."

On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes—at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years.

These omissions were intentional. The record of the framers' debates on the slave question is especially clear: The Southern states acceded to the demands of the New England states for giving Congress broad power to regulate commerce, in exchange for the right to continue the slave trade. The economic interests of the regions coalesced: New Englanders engaged in the "carrying trade" would profit from transporting slaves from Africa as well as goods produced in America by slave labor. The perpetuation of slavery ensured the primary source of wealth in the Southern states.

Despite this clear understanding of the role slavery would play in the new republic, use of the words "slaves" and "slavery" was carefully avoided in the original document. Political representation in the lower House of Congress was to be based on the population of "free Persons" in each State, plus three-fifths of all "other Persons." Moral principles against slavery, for those who had them, were compromised, with no explanation of the conflicting principles for which the American Revolutionary War had ostensibly been fought: the self-evident truths "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

4. Id. amend. XIX.
5. Id. art. 1, § 2.
6. The Declaration of Independence para. 2 (U.S. 1776).
It was not the first such compromise. Even these ringing phrases from the Declaration of Independence are filled with irony, for an early draft of what became that Declaration assailed the King of England for suppressing legislative attempts to end the slave trade and for encouraging slave rebellions. The final draft adopted in 1776 did not contain this criticism. And so again at the Constitutional Convention eloquent objections to the institution of slavery went unheeded, and its opponents eventually consented to a document which laid a foundation for the tragic events that were to follow.

Pennsylvania's Gouverneur Morris provides an example. He opposed slavery and the counting of slaves in determining the basis for representation in Congress. At the Convention he objected that

the inhabitant of Georgia [or] South Carolina 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 and damns them to the most cruel bondages, shall have more votes in a Government instituted for protection of the rights of mankind, than the Citizen of Pennsylvania or New Jersey who views with a laudable horror, so nefarious a practice.

And yet Gouverneur Morris eventually accepted the three-fifths accommodation. In fact, he wrote the final draft of the Constitution, the very document the bicentennial will commemorate.

As a result of compromise, the right of the Southern states to continue importing slaves was extended, officially, at least until 1808. We know that it actually lasted a good deal longer, as the framers possessed no monopoly on the ability to trade moral principles for self-interest. But they nevertheless set an unfortunate example. Slaves could be imported, if the commercial interests of the North were protected. To make the compromise even more palatable, customs duties would be imposed at up to ten dollars per slave as a means of raising public revenues.

No doubt it will be said, when the unpleasant truth of the history of slavery in America is mentioned during this bicentennial year, that the Constitution was a product of its times, and embodied a compromise which, under other circumstances,
would not have been made. But the effects of the framers’ compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.

The original intent of the phrase, “We the People,” was far too clear for any ameliorating construction. Writing for the Supreme Court in 1857, Chief Justice Taney penned the following passage in the *Dred Scott* case, on the issue whether, in the eyes of the framers, slaves were “constituent members of the sovereignty,” and were to be included among “We the People”:

> We think they are not, and that they are not included, and were not intended to be included.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.

Accordingly, a negro of the African race was regarded as an article of property, and held, and bought and sold as such.

No one seems to have doubted the correctness of the prevailing opinion of the time.

And so, nearly seven decades after the Constitutional Convention, the Supreme Court reaffirmed the prevailing opinion of the framers regarding the rights of Negroes in America. It took a bloody civil war before the thirteenth amendment could be adopted to abolish slavery, though not the consequences slavery would have for the future Americans.

While the Union survived the Civil War, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the fourteenth amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws. And yet almost another century would pass before any significant recognition was obtained of the rights of black Americans to share equally even in such basic opportunities as education, housing, and employment, and to have their

11. *Id.* at 404, 407-08.
votes counted, and counted equally. In the meantime, blacks joined America’s military to fight its wars and invested untold hours working in its factories and on its farms, contributing to the development of this country’s magnificent wealth and waiting to share in its prosperity.

What is striking is the role legal principles have played throughout America’s history in determining the condition of Negroes. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law. Along the way, new constitutional principles have emerged to meet the challenges of a changing society. The progress has been dramatic, and it will continue.

The men who gathered in Philadelphia in 1787 could not have envisioned these changes. They could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendent of an African slave. “We the People” no longer enslave, but the credit does not belong to the framers. It belongs to those who refused to acquiesce in outdated notions of “liberty,” “justice,” and “equality,” and who strived to better them.

And so we must be careful, when focusing on the events which took place in Philadelphia two centuries ago, that we not overlook the momentous events which followed, and thereby lose our proper sense of perspective. Otherwise, the odds are that for many Americans the bicentennial celebration will be little more than a blind pilgrimage to the shrine of the original document now stored in a vault in the National Archives. If we seek, instead, a sensitive understanding of the Constitution’s inherent defects, and its promising evolution through two hundred years of history, the celebration of the “Miracle at Philadelphia”12 will, in my view, be a far more meaningful and humbling experience. We will see that the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune that was not.

Thus, in this bicentennial year, we may not all participate in the festivities with flag-waving fervor. Some may more quietly commemorate the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled. I plan to celebrate the bicentennial

of the Constitution as a living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights.