The Sources of Anti-Slavery Constitutionalism in America, 1760-1848

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CHAPTER 4

Antislavery in
the New Nation

In the thirty years that separated the first two crises of the union (1788–1819), the efforts of the antislavery movement produced mixed results. Antislavery activists organized societies that encouraged manumission and protected free blacks. The Abolition Societies, as they were collectively called, united in a loose national federation, the American Convention, which coordinated a campaign of memorials to Congress calling for national antislavery action within the limits of the federal consensus. The states responded to problems of slavery in differing ways. In the north, the process of gradual emancipation continued. In the south, the state legislatures consolidated the legal system of slavery, and South Carolina reopened the slave trade. Slavery expanded into the new states of the southwest. Congress reaffirmed the federal consensus, abolished the international slave trade, enacted the first national fugitive slave legislation, and ratified the existence of slavery in the territories, including the District of Columbia.

Abolitionists in the Middle Atlantic States, especially New York and Pennsylvania, where slavery was waning and free blacks were often seized by slave catchers, organized societies whose names tell a good deal about the goals of early antislavery: the Pennsylvania Society for Promoting the Abolition of Slavery, the Relief of Free Negroes Unlawfully Held in Bondage, and for Improving the Condition of the African Race; the Providence [Rhode Island] Society for Abolishing the Slave Trade; the Delaware Society, for Promoting the Abolition of Slavery, for Superintending the Cultivation of Young Free Negroes, and for the Relief of Those Who May Be Unlawfully Held in Bondage; the New-York Society, for Promoting the Manu-
mission of Slaves and Protecting Such of Them as Have Been or May Be Liberated; the Kentucky Abolition Society; the Manumission Society of Tennessee.

The Abolition Societies were distinguished by three characteristics that contrasted with the antislavery movement of the 1830s. First, their members were strongly oriented toward state action. Though they petitioned Congress several times and sought goals, like abolition of the foreign slave trade, that required some national action, they devoted the bulk of their efforts to action at the state level. The later movement reversed these emphases. Second, early abolition was gradualistic, impeded by a sober and realistic calculation of the practical difficulties that stood in the way of universal emancipation. Later antislavery was immediatist, impatient of its predecessor's caution. Third, the early effort relied principally on legal, as opposed to political action. They did lobby, and were actually adept and successful at it, but they subordinated this and other forms of political action to more conventional, lawyer-like activities such as litigating, counseling, keeping an eye on slave registries, and compiling statutes. By contrast, the antislavery organizations of the 1830s went in for comparatively little litigation and considerably more politicking. These were all differences of degree rather than kind, but they set off the two phases of the organized movement and made the latter seem more radical than its relatively staid predecessor.

The individual societies, led by Pennsylvania's, sent petitions to the state legislatures and to the Confederation Congress and national Congress from the 1780s on. At the first national convention (1794), the delegates memorialized Congress for passage of statutes that would restrain American citizens from engaging in the slave trade by sending slaves to non-American nations and to prohibit aliens from fitting out ships in the United States to engage in the trade.¹ They urged Secretary of State Timothy Pickering to prevent Americans from engaging in slaving under Danish and other foreign flags, and asked Secretary of the Treasury Alexander Hamilton—himself a member of the New-York Society—to have his collectors stringently enforce federal legislation inhibiting peripheral incidents of the slave trade.²

The Abolition Societies enjoyed some gratifying successes in lobbying. The Pennsylvania Society, assisted by Anthony Benezet, secured enactment of Pennsylvania's 1780 gradual abolition act, regarded by contemporaries as a model statute. The federal slave trade act of 1794, prohibiting all persons from fitting out in, or sailing from, American ports for the slave trade to foreign countries, was enacted in response to the American Convention's 1794 memorial. Their lobbying may have had some indirect influence in getting the New York and New Jersey legislatures to begin gradual emancipation.

The Societies petitioned state legislatures as vigorously as they approached Congress, requesting the states to prohibit the importation of slaves into their ports; to annihilate all other aspects of the slave trade, as, for example, by prohibiting their citizens from engaging in the slave trade to foreign areas, "to promote such plans as may tend to diminish the number of slaves . . . meliorate their situation, and eventually eradicate [the] evil," and to pass laws making private manumissions easier. In 1821, the American Convention even suggested that its constituent societies demand that blacks in felony trials be tried only by a "jury selected from among the most respectable of his black associates or neighbors." They lobbied antiemancipation bills to death, and sought stiff antikidnaping statutes.

The Societies were intensely litigious, so much so that they sometimes skirted the edges of barratry and maintenance. The Societies assumed that slavery was a creature of state statutes and judicial precedent and attacked it by seeking to overturn those bases. The older Societies had officers known as "Counsellors" whose functions included providing counsel to blacks in freedom suits; explaining and publicizing state laws and constitutional provisions pertaining to emancipation, the slave trade, kidnaping, and the rights of free blacks; giving legal advice to indigent blacks; and in states like Pennsylvania, whose gradual emancipation statute provided for manu-

3. Act of 22 March 1794, ch. 11, 1 Stat. 347.
6. Barratry is the common-law offense of stirring up litigation. Maintenance is "an unauthorized and officious interference in a suit in which the offender has no interest, to assist one of the parties to it, against the other, with money or advice to prosecute or defend the action" (Black's Law Dictionary, 4th ed., "maintenance")
mission registers, of seeing to it that manumissions were properly recorded.7

The counsellors of the Pennsylvania Society, led by William Lewis, Jared Ingersoll, and William Rawle,8 mounted an all-out assault on slavery in the Keystone State, hoping that its Supreme Court would declare slavery unconstitutional as they believed the Massachusetts Supreme Judicial Court had done in Quock Walker’s cases. In this effort, they met with repeated failure. In Pirate (alias Belt) v. Dalby (1786), Chief Justice Thomas McKean instructed the jury that slavery in Pennsylvania had a legitimate origin in the principle of partus sequitur ventrem,9 which he held to be “authorized by the civil law,” “consistent with the precepts of nature,” and “the law of the land.” The jury, not surprisingly, found for the alleged slave’s owner.10

In arguments in Respublica v. Blackmore (1797),11 Hugh Henry Brackenridge, counsel for the owner of slaves unregistered under the 1780 act, conceded that under the Pennsylvania constitution’s “all men are born equally free and independent” clause, slavery was “questionable,” thus suggesting that the Abolition Society’s efforts were not wholly quixotic. But in an unreported case, Negro Flora v. Graisberry (1802), the Pennsylvania High Court of Errors and Ap-


8. Ingersoll had been a member of the Constitutional Convention of 1787 and was at the time Attorney General of Pennsylvania; Rawle was then United States Attorney for Pennsylvania and later author of A View of the Constitution of the United States (1825), a distinguished constitutional treatise second only to Story’s Commentaries on the Constitution.

9. “The [status of the] offspring follows the [condition of the] mother,” a rule exogenous to the common law but adopted in Anglo-American jurisdictions to determine the status of children born of one or both slave parents. It was essential to the hereditability of slave status.

10. 1 Dall. 167 (Pa. 1786).

11. 2 Yeates 234 (Pa. 1797).
peals was reported to have held that slavery had had a legal existence in the state prior to the constitution, and that the 1780 gradual emancipation act had not totally abolished it.\textsuperscript{12}

The Societies had more success in freedom suits, where they sought merely to secure the freedom of individual blacks without establishing a more encompassing principle. The Maryland Society was said to be so successful in these actions that it was useless to defend a suit sponsored by it.\textsuperscript{13} The counsellors of the Societies were especially vigilant to prevent kidnaping. In states close to the planting areas, and in those having large ports, kidnaping was extensive, especially when prices of slaves were high. Slave catchers frequently decoyed and shanghaied free blacks. Antislavery lawyers therefore formed committees to keep an eye on suspected slave catchers in port. They ran down reports and rumors of kidnapings, in an effort both to free the black and to get the kidnaper punished. The New-York, Pennsylvania, Maryland, and Virginia Societies checked registers of manumission and saw to it that private manumissions were properly recorded under law, so as to preserve evidence in antikidnaping actions.

The Abolition Societies had neither the impact nor the notoriety of the later antislavery societies, but their achievements were considerable in their time. They constituted the first organizational vehicle for the development and transmission of the antislavery afflatus of the Revolution, and in their formal discourses and memorials kept that tradition vital. Their members had the satisfaction of knowing that thousands of black men and women secured or preserved their freedom thanks to their efforts. They could take credit for some early antislavery legislation, both state and national. They were the first to use laws and the legal process against slavery. They thereby converted what had been principally a religio-moral impulse into a secular legal activity. They never lost sight of their goal, "the ultimate and entire abolition of slavery in our land," and passed it on to their successors.\textsuperscript{14}

During the first generation of political and constitutional antislav-

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  \item \textsuperscript{13} Jeffrey R. Brackett, \textit{The Negro in Maryland: A Study of the Institution of Slavery} (Baltimore: Johns Hopkins University, 1889), 54; this was the opinion of a legislative committee, and may have been exaggerated.
  \item \textsuperscript{14} Minutes of the Proceedings of the Fifteenth American Convention . . . 1817 . . . (Philadelphia: Merritt, 1817), 36.
\end{itemize}
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In the North, gradual abolition went on apace, with the usual scrupulous regard being paid to property relationships and legally established social norms. In the South, slavery was entrenched in the new states of Kentucky, Tennessee, Louisiana, Alabama, and Mississippi; the states where it had been long established tinkered with their slave codes to make the control of blacks more secure; and Georgia and South Carolina insulted the consciences of Americans elsewhere by continuing and reopening the high seas slave trade.

In the late eighteenth century, gradual or total emancipation had occurred only in the New England states and Pennsylvania. New York and New Jersey resisted this trend. Both states enacted legislation prohibiting the importation of slaves and in other ways easing the lot of enslaved blacks in their jurisdictions. Finally, however, after a decade of political maneuvering and because the state's need for a servile labor force was dwindling, New York in 1799 passed a post-nati gradual emancipation act, placing the children thus freed in servitude to age twenty-eight (males) and twenty-five (females). It left their owners the option of turning over these children to the overseers of the poor, possibly as a means of compensating owners circuitously by having these children bound back to them with compensation for raising them as apprentices. New Jersey followed suit in 1804 with a more liberal post-nati statute.

With gradual abolition set in motion in five northern states, the legislatures had only to tie up several loose ends left in the dismantling


of slavery. New York in 1809 and 1813 extended certain civil rights to slaves, including the power to contract marriages indissoluble by the master, the power to own property, the right to testify in court, and a right to jury trial in all felony prosecutions.19 These statutes, placing slaves on a plane close to that of free blacks, were a certain sign that slavery in the Empire State was virtually extinct. Recognizing this, the legislature in 1817 administered the coup de grâce to slavery by converting the status of the ante-nati not liberated by the 1799 statute to limited-term servitude.20 Connecticut passed a post-nati emancipation act in 1797 and abolished slavery completely in 1848.21 Despite a lingering conviction in Pennsylvania that the remaining slavery was unconstitutional under the 1780 gradual abolition act,22 a belief not shaken by the failure of the Abolition Society's test cases, the state legislature never formally abolished the vestiges of slavery, leaving the institution to die out with the diminishing number of elderly slaves. In New Jersey, following Alvan Stewart's unsuccessful assault on the constitutionality of slavery in that state's Supreme Court in 1845, the legislature in 1847 converted extant slavery to apprenticeship, a modified form of involuntary servitude.23 Slowly, by desuetude rather than dramatic action, slavery's legal bases in the states above Maryland dwindled.

In the southern states, the debates over slavery induced by the Revolution reaffirmed a commitment to the maintenance of race control. During the War for Independence hostility to manumission surfaced in North Carolina legislation and in popular memorials to the Virginia legislature.24 Maryland, Virginia, and Georgia consolidated

22. A committee of the Pennsylvania house averred in 1792 that slavery was "contrary to the laws of nature, the dictates of justice, and the Constitution of this state"; Journal of the . . . Third House of Representatives . . . [1792] (Philadelphia: Bailey and Lang, 1792), 55.
23. New Jersey Revised Statutes . . . (1847), tit. 11, ch. 6.
and reenacted their colonial slave codes, though with their harsher features softened.\textsuperscript{25} (On the other hand, Kentucky, Maryland, and Virginia eased the process of manumission, and the Old Dominion went so far as to extend the "rights, privileges and advantages of citizens" to free blacks.)\textsuperscript{26} Slavery proved its staying power in the repeated failure of constitutional and legislative efforts at emancipation in Virginia and Maryland. Thomas Jefferson claimed to have drawn up a \textit{post-nati} emancipation bill that was coupled with provisions for mandatory expatriation of freed blacks. Nothing came of it because, in its author's words, "the public mind would not yet bear the proposition."

Despite the efforts of William Pinkney, a rising star in Maryland politics, the Maryland legislature regularly rejected gradual emancipation bills between 1785 and 1790. The hopelessness of emancipation efforts in the upper South was best revealed when Governor James Monroe expressed his hopes for emancipation to President Jefferson in 1802: "It would certainly be a very fortunate attainment if we could make [blacks] instrumental to their own emancipation, by a process gradual and certain, on principles consistent with humanity, without expense or inconvenience to ourselves."\textsuperscript{28} By making emancipation turn on unlikely, not to say fantastic, conditions, Virginians committed themselves to maintaining slavery indefinitely.

The Kentucky constitutional convention of 1790 turned back a vigorous attack on slavery and, like its mother state Virginia, accepted slavery with few misgivings. This set a precedent for the new states of the southwest, Tennessee, Mississippi, and Alabama. Louisiana (purchased 1803) and East Florida (ceded 1819) came into Ameri-


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can possession with slavery already established there. Thus by 1819, not only was most of the cis-Mississippi United States slave states or territory, but slavery had a foothold in the vast domains of the Louisiana Purchase.

In the upper South and the border areas, slavery was at least open to challenge. In the deep-South states of the Carolinas and Georgia, even that was impossible. The three states made manumissions more difficult in the postwar period. South Carolina in 1800 required an examination of the slave by a magistrate and five freeholders before a manumission could legally be valid, though this seems to have been aimed at preventing the emancipation of the aged and infirm slaves. But in 1820, the Palmetto State forbade emancipation without the approval of the legislature. 29 Georgia's 1798 constitution prohibited the legislature from emancipating slaves without consent of the owners, an effective bar to general abolition. In 1801, the legislature also forbade individual emancipation without the permission of the legislature. 30 North Carolina went even further, requiring in an 1801 statute a prohibitive £100 maintenance bond for individual emancipation. 31

To cap the deep-South commitment to slavery, South Carolina re-opened the high seas slave trade in 1803. (Georgia had permitted importation, except from the West Indies and Florida, until 1798). South Carolina had banned the importation of slaves in 1787, not for humanitarian reasons, but to get out from under postwar indebtedness. Because they left off the practice from economic motives, the Carolinians could resume it when the dictates of self-interest overcame the need to economize. These dictates became imperious as the region beyond the Low Country was settled, and the state reopened the trade in 1803.

The Carolinians' act immediately brought down on them the denunciation of everyone northward, especially in Congress, where shocked congressmen could not at first believe that the Carolinians

31. Laws of 1801, ch. 20, in Laws of North-Carolina . . . [1801].
were serious in wanting to resume what was everywhere regarded as a crime and what would in six years be outlawed as piracy.\textsuperscript{32} The reopened trade was not a minor venture. Though modern estimates vary widely as to the number of slaves imported into the United States after the Revolution,\textsuperscript{33} it is a safe assumption that the number of slaves brought in under the legal trade in the period of 1803 to 1807 numbered in the tens of thousands. For their part, the Carolinians, who had anticipated this denunciation, did not attempt to defend the morality of their venture, but only its necessity.\textsuperscript{34} American attitudes about the legality and morality of the trade had peculiar geographic perimeters. By 1810, federal laws would hang a man who carried a slave from Guinea to New Orleans, yet protect a similar voyage, with American naval power if necessary, if the port of origin was Charleston, South Carolina, rather than some slave factory on the West African coast. Moreover, southern laws provided that blacks illegally imported were to be disposed of, not by being handed over to federal authorities for transportation back to the point of origin, but rather by being sold into slavery, with the proceeds accruing to the benefit of the state.\textsuperscript{35}

Though these varying trends at the state level were important for the constitutional status of slavery in America, significant precedents were being set at the federal level too. This seems odd at first view, since the federal consensus assumed only an incidental role, if any at all, for the federal government in the regulation of slavery. This assumption proved wrong from the outset, as slavery's opponents regularly sought congressional action to inhibit slavery and as slavery's defenders tried to promote its expansion.


34. \textit{Annals of Congress}, 8 Cong. 1 sess. 991, 1006 (14 Feb. 1804).

Quakers in Philadelphia and New York began this struggle in 1790 with petitions urging Congress to do all it constitutionally could to impede the international slave trade. An accompanying memorial from the Pennsylvania Abolition Society, signed by its president, Benjamin Franklin, in studiedly vague language asked Congress to use "all justifiable endeavors to loosen the bands of slavery," and to promote "the restoration of liberty to those unhappy men." This provoked southern representatives to responses ranging along a spectrum of vehemence. At the extreme were Senator William Loughton Smith of South Carolina and Representatives James Jackson of Georgia and Thomas Tudor Tucker of South Carolina, who defended slavery as the southern "palladium" sanctioned by the Bible and threatened "civil war" if Congress moved against slavery. James Madison, then representing Virginia in the House, took a more centrist position, soothing the deep-South bloc by assuring them that it was "not contemplated by any gentleman" that Congress could "abolish slavery in all the states," yet at the same time hinting to northern colleagues that there were "a variety of ways by which [Congress] could countenance the abolition [of the slave trade] and regulations might be made in relation to the introduction of [slaves] into the new States to be formed out of the Western Territory." (The Father of the Constitution would change his mind on the latter point in the Missouri debates of 1820.) On the antislavery side of the debate, Representative Thomas Scott of Pennsylvania, perhaps with an eye on the Massachusetts freedom cases and the Abolition Society's challenge to the constitutionality of slavery in his own state, mused that "I do not know how far I might go, if I was one of the Judges of the United States, and those people were to come before me and claim their emancipation; but I am sure I would go as far as I could." Jackson retorted that such a judge would be lynched in Georgia.

Back in the Senate Smith reiterated the federal consensus—"the toleration of slavery in the several States was a matter of internal regulation and policy, in which each State had a right to do as she pleases, and no other State had any right to intermeddle with her

policy or laws”—but he recognized that the consensus alone would prove inadequate in the defense of slavery. He therefore went beyond it and asserted that “there was an implied compact between the Northern and Southern people that no step should be taken to injure the property of the latter, or to disturb their tranquillity,” an early example of proslavery willingness to read into the Constitution guarantees for slavery that were not there.38

To rid themselves of the whole business, which had proved more ominous and wearisome than anyone anticipated, the House adopted a final report that affirmed its inability to end the high seas slave trade before 1808 but that recognized ways in which Congress might restrict American participation in the trade to foreign ports. The report also reaffirmed the federal consensus: “Congress have no authority to interfere in the emancipation of slaves, or in the treatment of them within any of the States; it remaining with the several states alone to provide any regulations therein, which humanity and true policy may require.”39

This compromise resolution may have been a disappointment to the Pennsylvania Abolition Society, but its president had the last laugh. Disgusted with Representative Jackson’s proslavery sentiments, Franklin composed a letter to the Philadelphia Gazette of the United States that was published only twenty-four days before his death. Franklin quoted from a fictive American consul’s report of debates in the Divan of Algiers on abolishing slavery of whites by the Algerians.40 An Algerian minister, Sidi Mehemet Ibrahim (sc. James Jackson) denounced the sect of Erika (sc. Quakers) for their “whimsical” proposal to abolish slavery. To justify enslaving whites, Sidi Mehemet used the same arguments Jackson had to justify enslaving blacks: they were indolent and would not work without compulsion; they could not intermarry because they would pollute the blood of the master race; slavery was good for them because it exposed them to the true religion; slaves were necessary to cultivate the Algerian lands because their masters would not stoop to servile labor to do it; manumission would encourage insurrections; and the Koran explicitly

38. Annals, 1 Cong. 2 sess. 1450–1464 (17 March 1790).
sanctioned slavery. It was a virtuoso performance, with the satire being just subtle enough to fool many into thinking that the account was genuine, only to be brought up sharply when they realized they had been hoaxed. The satire was lost on Jackson, but there must have been some guffawing at the next meeting of the Pennsylvania Abolition Society.

Notwithstanding the contumely heaped on them by Jackson and Smith, antislavery petitioners had some positive results to show for their efforts after 1790. Their greatest success came in efforts to curtail the high seas slave trade. The Abolition Societies took the hint tendered in the 1790 House resolution and requested Congress to restrict the trade from American ports to foreign areas. Twice rebuffed, the Societies in 1794 organized their national federation, the American Convention, which had better luck, securing passage of the 1794 federal anti-slave trade act noted earlier.

In debates on strengthening the statute in 1800 to prohibit the kidnapping of free blacks, defenders of slavery briefly extended their theoretical position. As John Rutledge of South Carolina was laboriously reiterating the federal consensus in an effort to have some anti-slavery petitions tabled or rejected, it occurred to Henry Lee of Virginia that the consensus would not sufficiently protect the South's long-term interests. He therefore proposed a different position: Congress "had no authority but to protect [slavery], and not take measures to deprive citizens of it."41 There was no occasion for Lee to elaborate this idea at the time, and it lapsed temporarily, only to resurface in the Missouri debates and later enter the mainstream of proslavery constitutional thought in the late 1840s. In 1804, when the House debated South Carolina's reopening of the high seas trade, the innovation in constitutional argument appeared on the antislavery side. Representative John Baptiste Lucas of Pennsylvania claimed that "wherever [slaves] go, the poor white man need not fix himself; for his labor and relative importance in society will be as nothing."42 This proto-Free Soil idea was born out of its time and languished, but it too would be resurrected in the Missouri debates, and a generation later take on irresistible force as the raison d'être of the Republican party.

As the time approached when Congress could constitutionally

41. Annals, 6 Cong. 1 sess. 231 (2 Jan. 1800).
42. Annals, 8 Cong. 1 sess. 1010 (13 Feb. 1804).
move against the trade, President Jefferson called for action at the earliest possible moment. Yet even then, with no major substantive question open, Congress managed heated disagreement, particularly over penalties for violation of the ban. In a day of almost riotous debate in the House (31 December 1806), Representative Joseph Stanton of Rhode Island suggested that if slavers were to be hanged for violation of the law, consistency required that their customers stretch a rope, too, since it took two, seller and buyer, to create a market for illegally imported slaves. The reporter discreetly omitted mention of southern reaction to that engaging suggestion. The act was passed, making the slave trade to American ports piracy.

As with all other kinds of federal legislation, enforcement of the statute was as important as its passage. The American navy did make an effort to stop slave smuggling, but it was ineffectual to the extent that a modern authority estimates that about fifty-four thousand slaves were illegally brought into the United States after 1807, an average of nearly a thousand a year. Despite this, and notwithstanding later abolitionist charges that abolition of the trade was accomplished solely to augment the prices of slaves on the domestic market and to encourage slave breeding, the antitrade acts represented a serious effort to strike at what nearly all Americans above Carolina were agreed was a moral evil.

Congress’ concession to antislavery sentiment in the slave trade statutes was more than offset by its actions protecting slavery in other ways. Though the federal consensus may have impeded action hostile to slavery, it was no bar to slavery’s expansion into free states and territories. Congress institutionalized a double standard concerning federal power over extrajurisdictional slaves: it could be used to recover but not to protect them.

Congress did not get around to resolving the ambiguities of the fugitive slave clause of the Constitution for four years. When it did

43. *Annals*, 9 Cong. 2 sess. 240 (31 Dec. 1806); see pp. 167–190 *passim* for the debates.
45. Curtin, *Atlantic Slave Trade*, 74–75; the author states that his figure is a “shot in the dark” guess.
47. Davis, *Problem of Slavery in the Age of Revolution*, 133.
do so in 1793, Congress was attempting to break a deadlock between Virginia and Pennsylvania over the rendition by the former of three men, two of whom were wanted for the murder of four Indians, and two of whom were wanted for the kidnaping of a black out of Pennsylvania. An involved triangular legal dispute between Governor Thomas Mifflin of Pennsylvania, United States Attorney General Edmund Randolph, and Virginia Attorney General James Innes over the obligation of Virginia to comply with Pennsylvania’s extradition request prompted President Washington to submit the controversy to Congress.48 After considerable debate, none of it, unfortunately, reported in the Annals, Congress enacted the Fugitive Slave Act of 1793.49

Because this act was supplemented, not replaced, by the 1850 Fugitive Slave Act, and hence was the governing statute until the abolition of slavery, it should be examined with care.

The act was remarkably simple, containing only four sections, the first two of which dealt with the interstate rendition of fugitives from justice. Section 3, following closely the wording of the constitutional clause, provided that when “a person held to labor” escaped into any states or territories of the United States, “the person to whom such labor or service may be due” or his “agent or attorney” could seize the runaway, hale him before a judge of the federal courts in the state or before “any magistrate of a county, city or town corporate,” and by affidavit or oral testimony prove title, whereupon the judge or magistrate had to provide a certificate entitling the petitioner to remove the slave. The act contained no provisions for the alleged slave to offer evidence of his own behalf, though this did not mean he was disbarred from doing so if the presiding judge or magistrate chose to let him. Section 4 provided criminal penalties, in addition to any civil action the owner might have under state law, for obstructing the capture and for rescuing, harboring, aiding, or hiding the fugitive. Congress rejected an amendment to the bill that would have allowed the black to prove that he was a native of the forum state or had resided there an unspecified number of years, a provision that would have moderated considerably the harsh procedures of the act.50


50. This provision and the legislative history of the act are ably discussed
Though eminent jurists repeatedly held the act to be constitutional, abolitionists after 1830 had little trouble proving to themselves that the statute was invalid. (The debate continues in the twentieth century.) Their universe of discourse was one much different from that of 1793, but they did make three points that were probably valid in 1793. First, that part of section 3 empowering state judicial and executive officials to enforce the federal statute may have been unconstitutional if it were construed to force those officials to do so. This point was implicitly recognized in Justice Joseph Story’s opinion in *Prigg v. Pennsylvania* (1842), in which he claimed that such state officials were not obliged to assist in the enforcement of the act. The states could, however, permit their officials to do so. The abolitionist argument was indirectly supported in *Kentucky v. Dennison* (1861), holding that the fugitive-from-justice procedures in the companion sections 1 and 2 of the 1793 act were a binding obligation on a state’s governor, but were not enforceable by federal authority.

Second, since the fugitive slave clause refers only to slaves “in one State . . . escaping into another,” the application of section 3 of the 1793 statute to territories was an improper extension of Congress’ authority. Though this had a precedent in the Northwest Ordinance’s fugitive slave provision, the Ordinance was enacted under the authority of a different constitutive document, by a body distinct from the Constitutional Convention and later Congresses, and thus was not pertinent on this point.

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53. 24 How. (65 U.S.) 66 (1861).
Third, the 1793 act did impinge on the powers of the states to protect their free residents from kidnaping. The Prigg decision of 1842 construed it and the fugitive slave clause as voiding state statutes, like the personal liberty laws, that interfered with rights the master enjoyed under the federal Constitution and laws. Yet the fugitive slave clause and the 1793 act refer, euphemistically but unmistakably, only to slaves. This raised the vital question of which state, the forum jurisdiction or the master's domicile, was to determine the status of the alleged fugitive. If the 1793 act were construed to exclude the forum jurisdiction from making that determination, it would have been an unconstitutional invasion of the states' police powers.

Congress also promoted the extension of slavery by establishing and protecting it in all federal territories, districts, and properties outside the free states and the Northwest Territory. At the time President Washington chose a ten-mile-square site on the Potomac River for the location of the federal city that was to be named after him, slaves already resided in the area. Ten years later, when the federal establishment moved to the District of Columbia, there were some 3,200 slaves and 800 free blacks living there, out of a total population of only 14,000.54 Much of Washington's physical plant, including the White House and the Capitol, was rebuilt by gangs of leased slaves after being fired by the British in 1814. That the Capitol of the United States should have been built by the labor of black slaves had a great, though usually overlooked, symbolic significance for the place of slavery in American life.

The District's slaves needed laws for their governance and, under the Somerset precedent, for their very status as slaves. Rather than go to the trouble of drawing up a slave code for the District from scratch, Congress simply adopted the extant state laws, by declaring that the statutes of Maryland and Virginia relating to slavery in force on 1 December 1800 should remain in force.55 These congressionally adopted state laws were supplemented with municipal ordinances drafted by the Corporation of the City of Washington, including an 1827 code, that were designed principally as police regulations governing the immigration and behavior of free blacks.56

56. The Corporation's ordinances were reprinted in "A Member of the
This tripartite derivation of the positive law of slavery for the District was more expedient than sensible. The Virginia and Maryland laws differed between themselves, and the District was governed by their inconsistent provisions until the retrocession of the Virginia portion of the District in 1846. Apart from their multifariousness, the statutes contained provisions, some dating back to eighteenth-century codes, that all regarded as inhumane in the antebellum era. Technically, for example, a slave in Washington could have had his ears cropped for striking a white, though no instance is known of this punishment actually being carried out. Maryland repealed its cropping law in 1821, yet it hung on in a grisly afterlife in the District.

Even more offensive was a provision derived from a 1719 Maryland statute providing that blacks seized as runaways and held in District jails could be sold for jail costs and other expenses of capture if unclaimed after public advertisement of their seizure. Because nothing in the statute exempted free blacks who were seized by mistake, free persons were sometimes taken up, imprisoned, and sold into slavery because no master would claim them, for the obvious reason that they were free. Maryland rid itself of this feature of its laws shortly after cession, but the jailor's sale provision continued with undiminished vitality in the District.

This law produced the 1826 cause célèbre of Gilbert Horton, a free black citizen of New York, who was seized as a runaway in the District and advertised for sale. He was rescued by the timely intervention of William Jay and other New York abolitionists, who prevailed on New York Governor DeWitt Clinton to secure his release. The Horton incident and the jailor's sale law displayed the legal system of slavery in its most oppressive light. If a humane jailor became

Washington Bar," *The Slavery Code of the District of Columbia* (Washington: L. Towers, 1862), an unofficial compilation, rearranged topically, of congressional, state (Maryland only), and local components of the District slave code as of 1862, with footnote citations to decisions of the Maryland and District courts construing these laws; a useful compilation.


59. For one example, see Washington *Daily National Intelligencer*, 3 March 1825, advertising John Brown, Henry Hanson, and William Brown for sale. All of them, the ad noted, claimed to have been born free.

persuaded that one of his black charges was in reality a freeman, he faced the difficult choice of nonetheless selling him into slavery to recoup his costs, for which, under the southern fee system of the time, he was personally responsible, or bearing the expenses of the black’s unjustified detention out of his own pocket.

Congress’ moral and legal responsibility for slavery in the Capital heightened after 1808 with the rise of a thriving slave trade in Washington and Alexandria. Alexandria residents and Virginia Representative John Randolph denounced the trade. Abolitionists emphasized the spectacle of slave coffles shuffling by the Capitol on their way south. Virginians of Jefferson’s time, even when defending slavery, condemned slave traders as “the feculum of society,” so the thought of a brisk trade in humans going on in the environs of the Capitol was uncomfortable to everyone, and was responsible for the prohibition of the District trade as part of the Compromise of 1850. But until then the federal city contained barracoons and slave pens; traders auctioned slaves and advertised in the city’s papers; slave catchers and kidnapers—and the two were often indistinguishable—plied their trade through the city under the aegis of congressionally adopted laws.

If slavery in the District of Columbia had a largely symbolic significance, the expansion of slavery into other federal territories was a different matter. Fast becoming an anomaly in western civilization as the nineteenth century progressed, slavery possibly might not have maintained its dynamism, and perhaps could not even have long survived as a significant form of labor organization in the United States, without spreading into new slave territory, which in turn led to the dream of a continental or hemispheric slave empire, and to the need to subvert the policies of nonslaveholding states and communities. This expansionist thrust was connived at by the policy of the federal government, which either established slavery in the western territories or protected it by federal law.

That the history of the southwestern territories turned out so differently from that of the Northwest Territory was due in some measure to the action of North Carolina, which, in its 1790 cession of its western land claims that formed a part of “The Territory South of the

River Ohio,” stipulated that the benefits of the Northwest Ordinance should be made available to the settlers, “provided always that no regulations made or to be made by Congress shall tend to emancipate slaves.” Congress respected this proviso, admitting as slave states Kentucky (part of the Virginia cession) in 1792, Tennessee (including the aborted State of Franklin and part of the North Carolina cession) in 1796, Mississippi in 1817 and Alabama in 1819 (both carved out of the Georgia and South Carolina cessions, plus portions of West Florida annexed between 1810 and 1812). This policy was extended to East Florida, ceded by Spain in 1819 and admitted as a state in 1845.

Congress did not write, or even adopt, a slave code for these areas while they were in the territorial stage. This was the function of the territorial government which, during the first stage of its existence, was empowered to adopt the constitution and laws of any of the original states for its territorial code. Congress then accepted the laws, including slave codes, thus adopted, but it did not do so without opposition. In 1798, when Congress tried to create Mississippi Territory (encompassing roughly the southern third of modern Mississippi and Alabama less West Florida), northern congressmen tried unsuccess­fully to block the extension of slavery there.

An even more significant leap of slavery westward took place in 1803 with the Louisiana Purchase. Under the Spanish and French regimes, the white settlers of Louisiana had held slaves and participated in the international slave trade. At the time of Napoleon’s cession, there were about thirteen thousand slaves in Louisiana, more than the number of whites, according to the information furnished President Jefferson. The French residents were determined not only to hold onto these, but to acquire more by keeping open the interna-

63. Annals, 5 Cong. 2 sess. 1306–1311 (23 March 1798).
64. These included residents of settlements not only around the mouth of the Mississippi River near modern New Orleans, but also those in distant trading outposts up the river, including Kaskaskia and Cahokia in present-day Illinois, Vincennes in modern Indiana, Cape Girardeau, Ste. Genevieve, St. Charles, and St. Louis in modern Missouri.
nional trade.\textsuperscript{66} The Treaty of Cession provided that the Louisiana inhabitants should “as soon as possible” enjoy “the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the Religion which they profess.”\textsuperscript{67} Opponents of the international trade included those opposed to slavery on principle, as well as upper-South representatives who feared the influx of black rebels from Santo Domingo.\textsuperscript{68} On the other side, a proslavery coalition insisting on unlimited imports revealed the dynamism of slavery’s expansionist tendency. To the argument that republican America should support freedom, not further enslavement, Senator Jackson of Georgia responded, “you cannot prevent slavery—neither laws moral or human can do it—men will be governed by their interest, not the law.” Senator David Stone of North Carolina insisted that slaves were merely property, whose owners had the same right to carry them into the territories as they had to bring in any other sort of property, a dim anticipation of Chief Justice Taney’s position in \textit{Dred Scott}.\textsuperscript{69}

In the end, a compromise prevailed. Extant slavery was secured; immigrating slaveowners were permitted to bring in their human chattels; but the inhabitants of the territory were prohibited from importing slaves from ports outside the United States, and from bringing slaves in by the interstate trade who had been imported into the United States since 1 May 1798, and indirect slap at South Carolina’s reopening of the trade.\textsuperscript{70}


\textsuperscript{68} Memorials from the American Convention and Philadelphia Quakers, reprinted in \textit{Annals}, 8 Cong. 2 sess. 1569, 39, 996; David Humphrey’s, \textit{A Valedictory Discourse, Delivered before the Cincinnati of Connecticut . . . 1804 . . .} (Boston: Gilbert and Dean, 1804), 26–33; Davis, \textit{Problem of Slavery in the Age of Revolution}, 157; for a survey of constitutional issues generally, see Everett S. Brown, \textit{The Constitutional History of the Louisiana Purchase, 1803–1812} (Berkeley: Univ. of California Press, 1920).


\textsuperscript{70} Act of 26 March 1804, ch. 38, §10, 2 Stat. 283.
The actions of the federal government during the first generation of antislavery were decisive on several issues. The federal consensus was, after repeated and protracted debate, elevated to the status of a constitutional principle—though some proslavery political leaders had begun to sense its inadequacy, and had urged a more positive role of the national government in the protection and promotion of slavery. Slavery expanded smoothly into the southwest territories, and, in the acquisition of Louisiana, established a trans-Mississippi beachhead. The free states were obliged to extend a measure of hospitality to slave catchers on their soil. With a suddenness that took observers by surprise, these potentially disruptive tendencies erupted in 1819, when a salient of slave expansion in Illinois was attacked by a bold flanking movement of antislavery forces onto Missouri territory. The years from 1789 to 1819 had set the stage for the second crisis of the Union.