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The three-fifths compromise

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THE THREE-FIFTHS COMPROMISE

A Thesis

Presented to

The Faculty of the Department of Political Science

San Jose State University

In Partial Fulfillment

of the Requirements for the Degree

Master of Arts

By

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May, 1991

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ABSTRACT

THE THREE-FIFTHS COMPROMISE

By John R. Loera

This thesis addresses the issue of slavery, specifically the "three-fifths" compromise at the Constitutional Convention of 1787. It examines the "original intent" argument, the effect of the issue of slavery at the Convention, the method by which the compromise was made, and lastly, the best manner to interpret the written Constitution.

Research on the "three-fifths" debate has revealed the significance of understanding the Constitution through the Declaration of Independence, and the methods employed by the Framers to keep the promise of the Declaration alive. Further, that the compromise with slavery was a conscious effort on the part of the Framers to, first, establish a strong Union, and, second, provide a system to abolish slavery altogether. Although the Framers made concessions to slavery, they wrote the Constitution in a manner that inevitably lead to its ultimate extinction.

To John Adams Wettergreen

TABLE OF CONTENTS

Introduction	1
Original Intent	
The Framers Revisited	
Chapter I	15
The Guiding Principles	
The Framers	
Chapter II	24
Equality and Consent	
The Framers on Equality	
The Meaning of "Men" as Understood by the Framers	
The Declaration and the Constitution	
Chapter III	47
The Three-Fifths Debate	
Chapter IV	82
Final Debates on the Three-Fifths Clause	
The Great Compromise	
Chapter V	130
Conclusion	
Sources Consulted	150

INTRODUCTION

As the United States continues to celebrate the Bicentennial of the Constitution, a debate of great significance has been brought to the forefront--whether the "original intent" of the Framers of the Constitution should serve as the ultimate touchstone of constitutional interpretation. The debate over the institution of slavery at the Constitutional Convention was of paramount importance to the Framers. That debate is likewise paramount for understanding their "original intent." The purpose of this thesis is to examine the historical and theoretical validity of the various interpretations of the American Founding by discussing the issue of slavery in the Constitutional Convention, with a central focus on the issue of the three-fifths compromise. The aim is to clarify the utility of "original intent" as the basic mode of determining the Constitution's meaning for our time.

As James Madison noted in the Convention, the presence of slavery brought into question the very possibility of republican government.¹ Yet it was obviously necessary to

¹Max Farrand, ed., The Records of the Federal Convention of 1787 (New Haven: Yale University Press, 1937, reprinted 1987), I, 318.

fashion a political compromise on the issue, because any aggressive attempt to abolish slavery would have insured the failure of the Constitution. Madison and the other leading Federalists surely knew, however, that, without a firm union of the states, there would be no hope--or only the most remote one--of ever abolishing slavery.

An examination of the three-fifths debate in the Convention provides some insight into the process and character of the compromise about slavery and the Framers' intent in abolishing the necessary evil. On its face, the three-fifths compromise was an instrument of aristocratic (not republican²) government; but it was viewed by the Framers as only a temporary departure from republican principles; republican principles were in the ascendancy in the Convention, but that ascendancy required some compromise. This compromise necessitated that the Framers intentionally depart from republican principles, first, to establish the Union, and, second, to provide a system by which the institution of slavery would become extinct. How did the three-fifths compromise affect the basic character of the Founding? Was the compromise with slavery fundamental or

²Republican government means that the citizens elect representatives rather than directly conduct public affairs. Further, each citizen must be represented equally.

incidental? These are the questions whose clarification will illuminate understanding of "original intent."

ORIGINAL INTENT

The argument over using "original intent" is distinguished by two fundamentally opposing views. The first view is best represented by Supreme Court Justice Thurgood Marshall. Justice Marshall writes that, he "cannot accept an invitation"³ to celebrate the Bicentennial of the United States Constitution because the Constitution of 1787 is nothing more than a faded document "yellowed with age."⁴ In Marshall's view it has no real historical or political significance to contemporary American political discourse because he does "not find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound."⁵ Marshall concludes, that, "the government they devised was defective from the start."⁶

³Thurgood Marshall, "Speech to the San Francisco Patent and Trademark Law Association," Maui, Hawaii, May 6, 1987, reprinted in The Los Angeles Daily Journal, "A Flawed Constitution: It Took 200 Years and War to Bring a More Perfect Union," May 8, 1987, PT I, p.6, col. 2.

⁴Ibid.

⁵Ibid.

⁶Ibid.

The view taken by Justice Marshall should be contradistinguished from that of former Attorney General Edwin Meese III. For Meese "[T]he Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is why it is the fundamental law."⁷ Furthermore, Meese, unlike Justice Marshall, has stated that the Constitution "is not buried in the mists of time,"⁸ because we can learn to understand the "original intent" of the Framers by the records they left behind, especially the notes of the Federal Convention left by Madison. Meese goes on to say that the men who drafted the Constitution "chose their words carefully... and the language they chose meant something."⁹

But what exactly does the language of the Framers mean? In his address to the Text and Teaching Symposium, Justice William Brennan answers this question specifically. To

⁷Edwin Meese III, "Speech to the American Bar Association," Washington D.C., July 9, 1985, reprinted in The Great Debate: Interpreting our Written Constitution, (Washington, D.C.: The Federalist Society, 1986), 9.

⁸Edwin Meese III, "Speech before the D.C. Chapter of the Federalist Society Lawyers Division," Washington D.C., Nov. 15, 1985, reprinted in The Great Debate: Interpreting our Written Constitution, (Washington, D.C.: The Federalist Society, 1986), 31.

⁹Ibid. 34.

Brennan, those who contemplate the legitimacy of "original intent" are demanding that "Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the cases before them."¹⁰ Justice Brennan further describes "original intent" as "little more than arrogance cloaked in humility."¹¹ Therefore, to Justice Brennan:

It is arrogant to pretend that from our [the Supreme Court] vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightenment such as the records of the ratification debates provide sparse or ambiguous evidence of the original intention.¹²

Neither Justice is pleased with reliance on "original intent" and both are in agreement that the "original intent" of the

¹⁰William Brennan, "Speech to the Text and Teaching Symposium," Georgetown University, Oct. 12, 1985, reprinted in The Great Debate: Interpreting our Written Constitution, (Washington, D.C.: The Federalist Society, 1986), 14.

¹¹Ibid.

¹²Ibid.

Framers cannot be found in the Constitution itself or even the records the Framers left behind.

To Justice Marshall, the Constitution of 1787 was flawed and did not yield the "more perfect Union" that it promised to the inhabitants of America. With disdain for the work of the Framers, Marshall does not believe that the Constitution is "forever fixed" by permanent political principles. Furthermore, Justice Marshall implies that the Framers were simply deluded in their belief that there were discoverable first principles for political life, what Thomas Jefferson described in the Declaration of Independence as "the laws of nature and of nature's God."¹³ For Justice Marshall to say that the Constitution was "defective from the start" implies that the rights which the Constitution sought to protect were also imperfect, or imperfectly understood.

Justice Marshall, like his colleague Justice Brennan, holds that the principles or values of liberty, justice, and equality as the Framers spoke about them in 1787 are antiquated and need to be revised and updated. Again, Justice Brennan explained his view on October 12, 1985, when he said

¹³Declaration of Independence, July 4, 1776.

Those who would restrict claims of right to the values of 1787 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.¹⁴

Both Justices Marshall and Brennan assert that the values of 1776 and 1787 are antiquated and therefore incompatible with the values of today and must be modified. Both deny the relevance of the self-evident truths that the Framers believed formed the foundation of the principles of the American Revolution. Yet these self-evident truths have metaphysical and political importance, as Harry V. Jaffa explains:

For a proposition to be self-evident does not mean it cannot be denied: it means only that anyone grasping its terms is already in possession of the evidence of its truth. No attempt at proof can make an axiomatic premise better understood, or better known to be true. The axiom that the whole is equal to the sum of its parts, is as well known as it can

¹⁴William Brennan, "Speech to the Text and Teaching Symposium," Georgetown University, Oct. 12, 1985, 15.

be to anyone who already understands the meaning of "whole" and of "part."¹⁵

For example, Jaffa continues, the self-evident truth espoused in the Declaration of Independence that "all men are created equal," means that there is no such difference, between man and man, as there is between man and beast, that allows one man to be the natural ruler of another."¹⁶ Further, as Edward J. Erler has stated:

Every other species has its form of social organization imposed upon it by nature or instinct. The queen bee, for example, is naturally the ruler of the beehive, having been marked out by natural superiorities for rule. The hierarchy of the beehive is imposed upon the hive by nature. Bees have no capacity to change this relationship and no consciousness that change is a possibility.¹⁷

¹⁵Harry V. Jaffa, What is Political Science?: Or How to Deal with the Lemming (or Gadarene Swine) Instinct, (Claremont: The Salvatori Center for the Study of Freedom, 1988), 19.

¹⁶Ibid.

¹⁷Edward J. Erler, Equality, Natural Rights, and the Rule of Law: The View From the American Founding (Claremont: The Claremont Institute, 1984), 13.

Justices Marshall and Brennan would not agree with this understanding of the Declaration's teaching. The principle of equality stated in the Declaration is an appeal to the "laws of nature and of nature's God." This principle, although "self-evident," is sadly not sufficiently recognized in contemporary American political discourse, as the statement by Justices Marshall and Brennan show.

In defense of the Constitution, Meese, in a speech before the American Bar Association, called for a "Jurisprudence of Original Intent"¹⁸ when expounding the Constitution. Meese appealed to the Supreme Court to reflect on the fundamental principles of the Constitution, rather than to rely on the justices' own will or sentiments regarding the cases before them. It is the understanding of Meese that the Supreme Court, especially during the 1984-85 term, disregarded the Constitution's intent and therefore failed to exemplify the rule of law. As Meese states it, the "Court's opinions were, on the whole, more policy choices than articulations of constitutional principle."¹⁹ Meese went on to add:

¹⁸Edwin Meese III, "Speech to the American Bar Association," (July 9, 1985), 9.

¹⁹Ibid.

A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection. This belief in a Jurisprudence of Original Intention also reflects a deeply rooted commitment to the idea of democracy.²⁰

Meese suggested that judges, being the expounders of the law, should rely on "defensible principles" to determine the meaning of the Constitution. However, it was not until Meese's speech at Dickinson College that he fully articulated what he meant by "defensible principles."

In this speech, Meese maintains that the principles of the Declaration of Independence were the informing principles of the Constitution.²¹ And he further adds, that the rights of life, liberty and the pursuit of Happiness,

were neither a matter of legal privilege nor the benevolence of some ruling class. They were rights

²⁰Ibid.

²¹Edwin Meese III, "Speech at Dickinson College," (September 17, 1985).

that existed in nature before governments and laws were ever formed.²²

In this speech, Meese seems to commit himself to the idea of natural law as the ground for the Constitution's organic law. However, Meese did not go beyond his Dickinson College speech, to pursue his thoughts on the natural law doctrine of the Declaration. Although Meese is closer to understanding the relationship among natural law, the Declaration, and the Constitution than either Justices Marshall or Brennan, one must still turn elsewhere for an in-depth look at what the "original intent" of the Framers were when forming the "more perfect union." A good place to start is to examine the Framers on the subject of slavery.

THE FRAMERS INTENT REVISITED

William Newell defended the Framers' intent while debating the proposed Fourteenth Amendment before the House of Representatives on February 15, 1866:

the combined wisdom of these patriotic men [the Framers of the Constitution] produced our present Constitution. It is a noble monument to their

²²Ibid.

ability; but, unfortunately, like all human instruments, it was imperfectly constructed, not because the theory was wrong, but because of the existence in the country of an institution so contrary to the genius of free government, and to the very principles upon which the Constitution was founded, that it was impossible to incorporate it into the organic law so that the latter could be preserved free from its contaminating influence.²³

Representative Newell understood that the "theory" upon which the Constitution rested was correct, for, without the establishment of the new government, slavery could have continued indefinitely. Thus the principles of the Constitution were sound although the full implementation of those principles had to be delayed.

The great Abolitionist crusader Frederick Douglass, like Newell, also defended the Framers. Douglass conveyed a similar interpretation of the Founding when he made the following statement on July 6, 1863:

²³Congressional Globe, 39th Congress, 1st Session, 1866, 866.

I hold that the Federal Government was never, in its essence, anything but an anti-slavery Government. Abolish slavery to-morrow [sic], and not a sentence or syllable of the constitution need be altered. It was purposely so framed as to give no claim, no sanction to the claim of property in man. If in its origin slavery had any relation to the Government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed.²⁴

To Frederick Douglass, there was no vehicle other than that of the Constitution to insure eventual emancipation. Furthermore, Douglass held the Constitution to be a symbol of faith since it never allowed any claim or sanction to the holding of property in man. Therefore, to Douglass, slavery was only the "scaffolding to the magnificent structure" which would be removed as soon as the Union was complete. And by complete, he meant the abolition of slavery.

²⁴"Address for the Promotion of Colored Enlistments," July 6, 1863, in The Life and Writings of Frederick Douglass, ed. Philip S. Foner (New York: International Publishers, 1950), 3:365.

Echoing the remarks made by Newell and Douglass, Thaddeus Stevens, the leading Radical Republican, on May 8, 1866, said the following about the Founding Fathers:

Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now.²⁵

To Thaddeus Stevens, implementation of the principles of the Declaration was merely postponed to assure the establishment of a Union sufficiently capable of abolishing the injustice of slavery. That is, it is obvious the American Constitution was incomplete until the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, which assured fulfillment of the republican principles espoused in the Declaration and the Constitution.

²⁵Congressional Globe, 39th Congress, 1st Session, 1866, 2459.

CHAPTER I

THE GUIDING PRINCIPLES

In order to study adequately the three-fifths compromise at the Constitutional Convention, a careful analysis of the following topics is necessary: (1) the Declaration of Independence; (2) the Constitution; (3) the Records of the Federal Convention; (4) the Framers; and (5) the reflections of Abraham Lincoln on the American Founding.

THE DECLARATION AND THE CONSTITUTION

The synchronous relationship that exists between the Declaration of Independence and the United States Constitution must be grasped in order to understand the three-fifths compromise at the Federal Convention. Acceptance of this relationship is not shared by either Justices Brennan or Marshall, nor by the former Attorney General Edwin Meese III. That is, like Brennan and Marshall, Meese, apart from his Dickinson College speech, regards the question of the Constitution's principles as something that one discovers merely by looking at the Constitution.¹ Meese's understanding of "original intent," although better than that of Brennan or

¹Harry V. Jaffa, "What Were the 'Original Intentions' of The Framers of the Constitution of the United States?", Puget Sound Law Review 314 (June 1987): 360-61.

Marshall, does not qualify him as the best interpreter of "original intent."

In order to discover the prudence of the Constitution, one must distinguish the compromises of the Constitution from the principles of the Constitution. Therefore, it is only fitting to reflect upon the Declaration of Independence to examine the theory of government that the Framers had in mind when writing the Constitution.

The Declaration of Independence sets forth the fundamental principles of the new government, while it is the Constitution which sets up the laws which will secure those fundamental principles. This view of their relationship is in concurrence with Harry V. Jaffa who writes that:

The Declaration not only implies what are the goals to be sought with the consent of the governed in a free society; it also states a theory of political obligation. Indeed, that is the immediate purpose of the document.²

²Harry V. Jaffa, Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglass Debates, (Chicago: University of Chicago Press, 1982), 13.

Hence, when the Framers were debating the framework of the new government, they were conscious of the principles of the Declaration and were thereby held to obligations of "the laws of nature and of nature's God" in expounding the self-evident truths of nature. Jaffa writes that James Madison considered the Declaration of Independence the "fundamental act of Union," which allows it to remain the fundamental legal instrument attesting to the existence of the United States.³ Further to articulate the relationship of the Declaration and the Constitution, Jaffa states:

From it [the Declaration] all subsequent acts of the people of the United States, including the Constitution, are dated and authorized. It defines at once the legal and the moral personality of that "one People" (who are said to be a "good people") who separated themselves from Great Britain and became free and independent... This tells us why the Constitution ought to be obeyed, why we have a duty to obey it, and why, and in what sense, it may be truly said that the voice of the people is the voice of God. For these reasons, the Declaration remains

³Jaffa, "What Were the 'Original Intentions' of The Framers of the Constitution of the United States?," 363.

the most fundamental dimension of the law of the Constitution.⁴

Just as Jaffa understands the relationship of first principles, in the Declaration and the Constitution, so does his student Edward J. Erler, who has expressed clearly the congruent relationship of these founding conventions:

Thus the Constitution must be properly read in light of the principles of the Declaration. The self-conscious purpose of the Framers was to put those principles in motion through the instrument of constitutional government, a government which would have as its central purpose the equal protection of the laws understood as the equal protection of equal rights.⁵

THE RECORDS

A serious study the Records of the Federal Convention on the three-fifths compromise would be incomplete if it did not make clear the Framers' understanding of what good government

⁴Ibid.

⁵Edward J. Erler, Equality, Natural Rights, and the Rule of Law: The View From the American Founding (Claremont: The Claremont Institute, 1984), 3.

would entail. Their aim was to establish a government based on a universal human standard--equality. Careful consideration of the Records of the Federal Convention is needed to understand the methods employed by the Framers to achieve their goals.

The Records of the Federal Convention kept by James Madison and other delegates allow for a better perspective on the "original intent" of the Framers regarding the compromise. Since the Records provide the most accurate evidence of the proceedings, they will be used extensively to sustain the conclusion that the Framers set up a government that, although tolerating slavery, put it on the "course of ultimate extinction."⁶ The Framers' remarks at the Convention and thereafter will serve as testimony to their principled hostility toward the existence of slavery in the new republic and the political compromises they found it necessary to make.

THE FRAMERS

The character of the Framers of the American constitution is best described by Alexis de Tocqueville in Democracy in America:

⁶Collected Works of Abraham Lincoln, ed. Roy P. Basler, (New Brunswick: Rutgers University Press, 1953), III, 306.

When the inadequacy of the first federal Constitution [the Articles of Confederation] was first felt, that outburst of political passions which gave birth to the Revolution had somewhat calmed down, but all the great men then thrown to the front were still alive. That proved a double blessing for America. The assembly responsible for drafting the second Constitution was not numerous, and it included the men of greatest intelligence and noblest character ever to have appeared in the New World.⁷

Tocqueville's description of the Framers as having "great intelligence and [the] noblest character," is not merely a compliment to them but an accurate description of this august assembly--in Thomas Jefferson's phrase, "an assembly of demigods."⁸ Similarly, as Paul Eidelberg has stated, the "Constitution was formed by an extraordinary body of men, a

⁷Alexis de Tocqueville, Democracy in America, (trans. George Lawrence, J.P. Mayer, ed.) (New York: Anchor Books, 1983), 114.

⁸Letter to John Adams, August 30, 1787, in Max Farrand ed., The Records of the Federal Convention of 1787, (New Haven: Yale University Press, 1937, reprinted 1987), III, 76.

body of men whose combined virtues and talents have seldom if ever been equaled."⁹

In keeping with their praiseworthy characters, the Framers sought to establish a republic that would endure, not one that would crumble at the first instance of war or disillusionment. The Framers studied diligently the great books, which inspired them to create a government which, for the first time in the history of the world, would be founded on "reflection and choice," rather than "accident and force,"¹⁰ unlike all governments hitherto. Further, the new government would be a "government of, for and by the people."¹¹ Thus the American regime¹² is unique.¹³ The

⁹Paul Eidelberg, A Reinterpretation of the Intentions of The Founding Fathers: The Philosophy of the American Constitution, (Lanham: University Press of America, 1986), 233.

¹⁰Federalist No. 1 (Clinton Rossiter, ed.) (New York: New American Library, 1961) 33.

¹¹Collected Works of Abraham Lincoln, VII, 22.

¹²The word regime is meant as the way of life of a city as reflected in the end pursued by the city as a whole and by those constituting its governing body. Regime is similar to the Greek word politeia, which literally translated means constitution, as in the American Constitution. As Harry V. Jaffa states, in the Crisis of the House Divided, (Chicago: The University of Chicago Press, 1982), 331. "the Constitution is a set of laws, albeit fundamental laws. However, the politeia is not the laws but rather the animating principle of the laws, by virtue of which the laws are laws of a certain kind. That is, the laws set forth in the Constitution best represent the American constitution, and therefore are forever

Constitution was novel, since it was the first to be tailored specifically for one people based on universal principles.

Subsequently, it was the responsibility of the Framers to reflect upon the mistakes of past framers and correct their improprieties with institutions that would protect the people against the abuses of government. Their constant reverence for "the best form of government" was illustrated best by their unending quest for the highest political standards for America. That is, they sought for the foundation of the new government to be solidly based on the equality of all men and for the superstructure to be built of laws constantly aiming for the preservation of liberty and equality among all human beings. The United States Constitution was penned by patriots who sought to protect America from the abuses of a tyrannical power--Great Britain. They established a regime that could resist the dreaded face of despotism. Since the Framers were careful planners and knew the limits of government, they instituted a government that would constantly honor the promise of equality and liberty for all. The Framers were not

represent the American constitution, and therefore are forever fixed. For a more complete and thorough examination of regime and politeia, consult Aristotle, Politics, trans., Carnes Lord (Chicago: University of Chicago, 1984).

¹³Erler, Equality, Natural Rights, and the Rule of Law: The View From the American Founding, 1.

hypocrites with regard to slavery. Rather, they were men of prudence, who consciously postponed the promise of equality and liberty, in order to establish a firm Union that would eventually lead to the destruction of slavery.

ABRAHAM LINCOLN

Last, a thorough examination of this crisis in American history cannot be undertaken without considering the reflections of the man who knew more about the Founding than any subsequent political commentator--Abraham Lincoln. For it was Lincoln who always revered the Declaration and who in his address at the Cooper Union on February 27, 1860, explained the views of the Founding Fathers regarding slavery. The Cooper Union address, along with other addresses of Lincoln, provide evidence that the Framers of the Constitution endeavored to establish a firm government which would ultimately abolish slavery in the United States. The orations of Lincoln enable us to truly and effectively understand the "original intentions" of the Framers regarding the existence of slavery.

CHAPTER II

EQUALITY AND CONSENT

The Declaration of Independence is explicit regarding the "self-evident truth," endowed by the Creator, that "all men are created equal," and that just "governments are instituted among men" and derive their powers from the "consent of the governed." The United States Constitution says nothing specifically about equality, yet it contains several provisions protecting the institution of slavery and slaveholders. As John Alvis has stated, "Chattel slavery denies some men equal rights and the dignity of being ruled by laws to which they have consented, moral possessions proper to human beings, simply as human beings, according to the Declaration."¹ If this is the essential truth of the matter, then is this Constitution with its recognition of slavery compatible with the "self-evident truths" stated in the Declaration? The short answer is an emphatic yes.

To the Framers of the Constitution who assembled in Philadelphia, the question stated above was central to their deliberations and the answer to it must be clear before

¹John Alvis, "The Slavery Provisions of the U.S. Constitution: Means for Emancipation," Political Science Reviewer 17 (1987), 241.

proceeding further. For anyone genuinely to understand the Framers on the question of slavery and on the affinity between the Declaration and the Constitution, the Framers' intent must be fathomed.

The preamble of the Declaration of Independence sought to constitute Americans as a people, nay "one people,"--that justified the independence of the American nation by appeal not to an English or an Anglo-American standard but to the universal standard of human rights.² That is, the Declaration's appeal is to the "laws of nature and of nature's God," as understood as the natural human rights of equality and liberty. For the Declaration says,

When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that

²Dennis J. Mahoney, "The Declaration of Independence as a Constitutional Document," in The Framing and Ratification of the Constitution, ed., Leonard W. Levy and Dennis J. Mahoney (New York: Macmillan, 1987), 54.

they should declare the causes which impel them to the separation.³

The task of the drafters of the Declaration of Independence was to set forth the precise principles of legitimate government that would institute a new government dedicated to the proposition "that all men are created equal." The Framers of the Declaration sought to constitute themselves as one people separate from the people of Great Britain.

The defining proposition of the American people was not that all men are treated equally, but that "all men are created equal." Justice dictates that equals be treated equally as regards those things in which they are equal.⁴ Abraham Lincoln put it best when he remarked that the Framers of the Declaration:

did not mean to assert the obvious untruth, that all men were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no such power to confer

³Declaration of Independence, July 4, 1776.

⁴Mahoney, "The Declaration of Independence as a Constitutional Document," 58.

such a boon. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all, constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of color everywhere.⁵

Upon declaring the unity of the American people, the Declaration appeals to the reason of mankind and asks for a decent respect for the opinions of mankind, that is, a decent respect for human equality.

Further, the Declaration in its second paragraph states the ends of government and the conditions under which obedience to government is proper:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that

⁵The Collected Works of Abraham Lincoln, ed. Roy P. Basler, (New Brunswick: Rutgers University Press, 1953), II 406.

among them are life, liberty, and the pursuit of happiness.⁶

The recognition of human equality in the American regime is the "defining characteristic of the American nation."⁷ Equality, as expounded by the Framers, meant that human beings are equal by nature and do not have natural rulers. Since human beings are equal by nature and possess the potential for reason, they are therefore able to choose their form of government freely. Herbert J. Storing has put it best:

The Founders understood quite clearly that Negroes, like men everywhere, were created equal and were endowed with unalienable rights. They did not say that all men were actually secured in the exercise of their rights or that they had the power to provide such security; but there was no doubt about the rights.⁸

⁶Declaration of Independence, July 4, 1776.

⁷Mahoney, "The Declaration of Independence as a Constitutional Document," 58.

⁸Herbert J. Storing, "Slavery and the Moral Foundations of the Republic," in The Moral Foundations of the American Republic, ed. Robert H. Horwitz (Charlottesville: University Press of Virginia, 1986), 316.

It was the Framers' belief that the "laws of nature and of nature's God" dictated the natural equality of mankind, making equality the "standard maxim" for the new government.

To the Framers of the Constitution, equality did not mean social equality or equality of condition, "but rather equality of natural rights--of the rights to life, liberty, and the pursuit of happiness."⁹ In this sense, equality is equivalent to liberty, and therefore "men have a right to liberty only because they are born equal."¹⁰ This statement brings to mind the words of Thomas Jefferson's last letter:

... that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God. These are grounds of hope for others. For ourselves, let the annual return of this day forever refresh our recollections of these rights, and an undiminished devotion to them...¹¹

⁹Harry V. Jaffa, American Conservatism and the American Founding, with an Introduction by Charles R. Kesler (Durham: Carolina Academic Press, 1984), 11.

¹⁰Ibid.

¹¹Letter to Roger C. Weightman, June 24, 1826, in Merrill D. Peterson, ed., The Portable Thomas Jefferson, (Kingsport: Viking Press, 1985), 585.

Jefferson, like the Framers, never doubted the Declaration's appeal to the doctrine of natural rights. The Framers understood that equality and liberty should be the foundation for the new government and, although not easily attained, should always be approximated.¹² To the Framers' generation, the Declaration was nothing more than a common sense reflection of the American mind. As Jefferson himself noted, he neither turned to book nor pamphlet for ideas expressed in the Declaration. The Framers of the Constitution debated vigorously about the structure of government and were aware of the distinctive American mind. Americans then, and now, have always valued the common sense testament of equality and liberty for all. The principles stated in the Declaration were understood by every colonist in 1776 and should have remained "self-evident" through posterity.

THE FRAMERS ON EQUALITY

In the Constitutional Convention, an articulated compromise was made regarding the "inherent evil" of slavery. The institution of slavery was a direct violation of the principles affirmed by the American Revolution. However, for the Framers, it would have been "fruitless and impractical, and perhaps even morally wrong, for the new nation to strive

¹²Collected Works of Abraham Lincoln, II, 406.

to become spotlessly moral."¹³ That is, slavery was realistically a part of America and was not going to be banished easily.

It is the Declaration that affirms the true spirit of the American regime. This powerful declaration proclaims a "self-evident" truth that "all men are created equal." Within the "self-evident" truths themselves lies the Declaration's meaning. As Harvey C. Mansfield has stated

A self-evident truth may be obvious or obscure, but it must contain its meaning within its own terms rather than look to something outside. To see that all crows are black one must look at the crows, but to understand what "all men are created equal" means one must know only the meaning of "man." This is said to be a "truth," be it noted. It is not a concept created by men, for men have themselves been created. Men must make their way in a world and be guided by a truth they have not made. Since their freedom is based on this truth, they are not free

¹³Robert A. Goldwin, "Of Men and Angels: A Search for Morality in the Constitution," in The Moral Foundations of the American Republic, ed. Robert H. Horwitz (Charlottesville: University Press of Virginia, 1986), 28.

to deny it. Nor may they regard this truth as an ideal to be aimed at, for it states the real nature of man from which and by which men must build.¹⁴

The Declaration was not a proclamation by or for a superior people, but, as expressed in its title, a declaration inspired by a "decent respect to the opinions of mankind." That is, since human beings are equal, they hold unalienable rights to life, liberty, and the pursuit of happiness; however, no one can reasonably yield or justly ask his equal to alienate the rights from him.¹⁵ Therefore, all men being born equal, government is necessary to secure their rights once they form civil society. Further, government must be by consent of those it intends to govern, and even then it must be limited in its powers.¹⁶

¹⁴Harvey C. Mansfield, "Thomas Jefferson," in American Political Thought: The Philosophic Dimension of American Statesmanship, eds. Morton J. Frisch and Richard G. Stevens (Itasca: F.E. Peacock, 1983), 24.

¹⁵Ibid.

¹⁶The discussion of consent, specifically "tacit consent", is explained by John Locke in his Second Treatise of Government, (New York: Cambridge University Press, 1965), 392. Locke says the following: "Every Man being, as has been shewed, naturally free, and nothing being able to put him into subjection to any Earthly Power, but only his own Consent; it is to be considered, what shall be understood to be a sufficient Declaration of a Mans Consent, to make him subject to the Laws of any Government." (Author's emphasis).

In Federalist 51, when speaking of government, Publius remarked that: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."¹⁷ Since government is needed to preserve the rights of men, it requires men to abide by the controls (limited insofar as consent is given) of government that is instituted for the protection of human rights.

To the Framers, the Declaration was the foundation and starting point of a government dedicated to the principle of equality. The government would endure and prosper as long as it continued to seek the equality of all men and kept the ardor of freedom in the heart and mind of the new nation.

Through the ages, the single piece of parchment in the National Archives in Washington D.C. is best remembered by Abraham Lincoln, who when paying tribute to Thomas Jefferson, said this concerning what Lincoln called the "merely revolutionary document":

¹⁷Federalist, No. 51 (Clinton Rossiter, ed.) (New York: New American Library, 1961): 322.

All honor to Jefferson - to the man who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all men and all times, and so to embalm it there, that today and in all coming days, it shall be a rebuke and a stumbling block to the very harbingers of reappearing tyranny and oppression.¹⁸

The "abstract truth" in the Declaration is said to be derived from the "laws of nature and of nature's God." This plain and simple statement of human equality best embodies the nature of the American Revolution. The Revolution was fought to secure liberty and freedom for all men, yet could not grant equality to all men because there was no government efficient enough to enforce the abolition of slavery. Further, public opinion during the time of the Revolution would not have supported the termination of slavery.¹⁹

¹⁸Collected Works of Abraham Lincoln, III, 376.

¹⁹Donald L. Robinson, Slavery in the Structure of American Politics: 1765 - 1820, (New York: Harcourt Brace Jovanovich, 1971), 86. Robinson says: "Slavery was an extremely complicated institution, raising difficult theoretical problems. Few men, then or later, dared to confront it directly. Slaves were persons, but they were also property,

The continuance of slavery after the Revolution, and especially after the ratification of the Constitution, meant that the government was incomplete since it did not protect the principles of the Declaration of Independence, "particularly the injunction that the moving principle of legitimate government was the 'consent of the governed.'"²⁰ Because the Constitution had not provided for the abolition of slavery in the Constitution, it was an incomplete document. It was essential for the Framers to seek the best compromise on the issue of slavery at the Convention, because they realized that a more radical stance on the issue would end the Convention and ultimately never allow a "more perfect Union" to be instituted. Despite the need to compromise, the Framers established the magnificent superstructure of the Constitution on the foundation of the Declaration, creating a firm Union to secure the "unalienable rights" of mankind.

which meant that a Negro's right to liberty conflicted with his master's right of property." Therefore, calling an end to slavery meant the relinquishing of property for some colonists without compensation.

²⁰Edward J. Erler, Equality, Natural Rights, and the Rule of Law: The View From the American Founding, (Claremont: The Claremont Institute, 1984), 4.

THE MEANING OF "MEN"²¹ AS IT IS UNDERSTOOD BY THE FRAMERS

As mentioned in the introduction, Justice Thurgood Marshall denounces any celebration of the Bicentennial of the United States Constitution because it allowed for the institution of slavery to exist after it was adopted. Further, Justice Marshall contends that the first words of the preamble "We the People" excluded Negroes from participating in the new government²² and were meant only to include "the whole number of Free persons." So, Justice Marshall asks, "Why celebrate a constitution that treated blacks as less than human?"²³

Robert A. Goldwin has pointed out that, "it would be distressing if the above charge was true, but fortunately it

²¹The Oxford English Dictionary defines man "In abstract or generic sense, without article: The human creature regarded abstractly, and personified as an individual, human beings collectively; the human race or species; mankind." Therefore, any serious definition of the word "men," as understood by the Framers, must understand the term in the universal contextual meaning of "mankind." [Page 1710].

²²Thurgood Marshall, "Speech to the San Francisco Patent and Trademark Law Association," Maui, Hawaii May 6, 1987, reprinted in The Los Angeles Daily Journal, "A Flawed Constitution: It Took 200 Years and War to Bring a More Perfect Union," May 8, 1987, PT I, p. 6, col. 2

²³Robert A. Goldwin, "Why Blacks, Women & Jews Are Not Mentioned in the Constitution," Commentary, (May, 1987), 28.

is not."²⁴ Further, Goldwin says that a misunderstanding of the document, "comes from not appreciating the importance of knowing how to read the original Constitution on subjects it does not mention."²⁵ That is, the Constitution must be read in light of the Declaration and kept as embodying principles to continuously strive for.

The Declaration of Independence penned by Thomas Jefferson sought merely to "set forth the common sense of the American people on the subject of political legitimacy."²⁶ Therefore, it was left to the good people of the colonies to establish a government based on the universal standard of human rights. And by doing so, they would base their political doctrine on the equality of all men. It is therefore necessary to look at the manner in which Jefferson used the term "men" in the Declaration of Independence.

Jefferson first uses the word "men" in the famous phrase, "all men are created equal" and states that they are "endowed by their Creator with certain unalienable rights ... among

²⁴Ibid.

²⁵Ibid.

²⁶Dennis Mahoney, "Declaration of Independence," Society, (November/December 1986): 46.

[which] are life, liberty and the pursuit of happiness." What Jefferson meant was that "equality is the condition of men prior to government--logically prior, not chronologically. But that equality is not equality of condition, or even equality of opportunity; certainly it is not equality of intelligence, strength or skill."²⁷ It is the equality that is inherent by nature to human beings--the equality of right. That is, there is among human beings no natural ruler, unlike the rule of the dominant male lion over the lion pride. The dominant male lion has been selected by nature to rule over the lion pride; but unlike that relationship, one human being has not been selected to rule over another by right. By writing this famous phrase in the Declaration, Jefferson proclaims what Lincoln later termed a "standard maxim" by which all legitimate governments could be judged.

In his second use of the word "men," Jefferson says that "to secure these rights, government is instituted among men." That is, "[T]he purpose of government is to protect the natural rights that men possess, but which, in the absence of government, they are not secure enough to enjoy. Government in society is not optional, it is a necessary condition for

²⁷Ibid., 47.

the enjoyment of natural rights."²⁸ Once again, Jefferson uses the universal understanding of the term "men"; this is much like the term "person" that is mentioned often in the Constitution. Both terms are what is referred to as universal terms, that is, neither refers to a man or a woman precisely, and the term "men" is understood to be applicable to humankind.

The third time that Jefferson uses the term "men" is in his condemnation of King George III for obstructing attempts to abolish the slave trade. The original passage from the draft of the Declaration reads as follows:

He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the person of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation hither. This piratical warfare, the opprobrium of INFIDEL powers, is the warfare of the CHRISTIAN king of Great Britain. Determined to keep open market where **MEN** are bought and sold, he has prostituted his negative for

²⁸Ibid.

suppressing every legislative attempt to prohibit or to restrain this execrable commerce.²⁹

Jefferson's condemnation of the slave trade in this passage is most certainly admirable evidence of his understanding about the reach of the Founding principles of the American regime. Jefferson expresses his abomination for the slave trade, which in his words is "piratical warfare." This passage in the original Declaration was rejected by the Continental Congress in 1776. Even though this passage was not included in the final draft of the Declaration, the facts that Jefferson capitalizes the term "men" and places it in bold characters are his efforts to make certain that no one will misunderstand his simple proposition: that negroes were included in this proclamation. However, an immediate conferral of equality on all persons in the states would have been impossible. Consequently, neither Jefferson nor any of the other gentlemen in Philadelphia in 1776 had the power to bestow this equality upon everyone living in the states. Nay, they did not even have the power to bestow it upon themselves.

²⁹Declaration of Independence, (original draft) (emphasis added).

THE DECLARATION AND THE CONSTITUTION

Dennis Mahoney writes that:

The Framers of the Constitution faced the circumstance that the institution of human slavery, acknowledgedly incompatible with the "principles of liberty" that were the foundation of their Revolution, was long established in a part of the country. Nevertheless, Northerners and Southerners, slaveholders and antislavery men, contrived together to keep the shameful word out of the Constitution. Although certain guarantees were written into the document for those who then depended upon the institution, Congress was given the power (after the lapse of but one generation) to proscribe the traffic in human beings, as well as the power to govern the territories, which power the Congress then sitting under the Articles of Confederation had used to provide that "there shall be neither slavery nor involuntary servitude" in the Northwest Territory.³⁰

³⁰Mahoney, "The Declaration of Independence as a Constitutional Document," 66.

That is, the Framers addressed slavery at the Convention and provided protections for it in several places, realizing that the Constitution "could never have been written or ratified without some concessions to slavery."³¹ Allowing slavery in the states already existing was a political necessity at that time and the best arrangement that the Framers could hope for. The Framers knew that without a strong national government there would be little chance of ever ridding the country of the odious practice of slavery.³² Donald Robinson has expanded on this point by commenting that,

...slavery could not have been eliminated by political processes during the founding period, and consequently that the cataclysm of war between the states could not have been prevented by different decisions taken at the founding--except perhaps the decision not to attempt union at all.³³

If a union had not been attempted, slavery and the suffering that went with it would have endured indefinitely. The

³¹Edward J. Erler, "Slavery and the Constitution," (forthcoming) [photocopy], 2.

³²Ibid., 3.

³³Donald L. Robinson, Slavery in the Structure of American Politics (New York: Harcourt Brace Jovanovich, 1971), 6.

Constitution provided a "structure" for a government that embodied the spirit of liberty and equality dictated in the Declaration. Goldwin has said, "A good constitution is designed to make the political society better than it is, and the citizens better persons."³⁴ The Constitution of 1787 planted the seeds to nurture a "political society" that would cherish and protect the fundamental rights of all people and most certainly to nurture a society where slavery would have no place.³⁵ The Framers assured the eventual abolition of slavery when they sought to make the political base of slavery as weak as possible and diminish its evil influence over the "more perfect union."

It would be naive to believe that the Framers did not recognize the contradiction between the principles espoused in the Declaration and some elements of the Constitution. Even so, the argument of this thesis is that the relationship between the Declaration of Independence and the Constitution is one of immutable and profound cohesiveness in establishing a regime. As Joseph Cropsey has written:

³⁴Robert A. Goldwin, "Why Blacks, Women & Jews Are Not Mentioned in the Constitution," Commentary, 31.

³⁵Ibid., 31.

Both together--the Constitution, laws, judicial opinions; and the Declaration of Independence and great public utterances of eminent men--articulate the conception that constitutes the American regime. But the regime is what we stand for, the expression of what our goals are--freedom, equality, and rights.³⁶

As stated above, the Constitution and the Declaration embody everything that is truly American through the promise of equality and liberty for all. Abraham Lincoln showed that he understood the importance of the Declaration and the Constitution when he reflected upon the secession of the South and its attempt to establish a new government by compromising on the principle of equality and its applicability to all men when he said:

Our adversaries have adopted some Declaration of Independence; in which, unlike the good old one, penned by Jefferson, they omit the words "all men are created equal." Why? They have adopted a

³⁶Joseph Cropsey, The United States as Regime and the Sources of the American Way of Life, in The Moral Foundations of the American Republic, ed., Robert Horwitz (Charlottesville: University Press of Virginia, 1986), 165-166.

temporary national constitution, in the preamble of which, unlike our good old one, signed by Washington, they omit "We the People,"... Why this deliberate pressing out of view, the rights of men and the authority of the people?³⁷

Lincoln, like the Founders, saw and proclaimed the essential connection between the rights of men and the authority of the people.³⁸ It is the Declaration which articulates the ends of government and its limits, and it does so in order for a government to be instituted, taking into account those ends and limits (i.e., justice and the prevention of "factions" or illegitimate rule). The parity between the documents is that the Declaration of Independence "proclaims the illegitimacy of any government that fails to serve these ends or observe these limits."³⁹ The Constitution is ruled by the Declaration, thereby making the government created by the Declaration a regime that protects equality and liberty through the Constitution.⁴⁰

³⁷The Collected Works of Abraham Lincoln, IV, 438.

³⁸Mahoney, The Declaration of Independence as a Constitutional Document: 66.

³⁹Ibid., 68.

⁴⁰Ibid.

Therefore, the Framers' intentions regarding the Declaration of Independence should be acknowledged in studying the three-fifths compromise at the Federal Convention. This thesis will rely on the principles of the Declaration and of the republican form of government which the Constitution established as the keys to understanding the compromise made with slavery at the Federal Convention of 1787.

CHAPTER III

THE THREE-FIFTHS DEBATE

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 Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons.¹

As the Convention began its debate concerning representation, its members were gravely divided over the method which would be adopted to determine representation. The question was whether representation would be based on the "rule of numbers" or the "rule of wealth." Either of the "rules" would determine the composition of the "National Legislature." In the sections that follow, a historical account will be given of the three-fifths compromise and the enormous effort made by the Framers to reach a just compromise on the sensitive issue before them.

¹Constitution, (original draft), Art. I, Sec. 2.

Each section is separated by the date of the debate and relevant arguments revolving around the three-fifths compromise. The study of the three-fifths compromise begins on May 29, continues through the heated debates of July 11 through the 13 and the Great Compromise of July 16, and culminates with the adoption of the Constitution on September 17.

MAY 29

May 29 was the first day the Convention began deliberation and was spent hearing and discussing a plan that was presented by Edmund Randolph, the distinguished representative from Virginia. His plan of action for the Convention became known as the Virginia Plan, and it was a careful and detailed outline which set the tone of the Convention. Since this thesis is concerned with how the three-fifths compromise affected the basic character of the Founding and whether the compromise made was fundamental or incidental, only the section concerned particularly with the three-fifths compromise will be examined. As the debates began, the Second Resolution of the Virginia Plan was read by Randolph as follows:

... therefore that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases...²

This resolution structured the debate concerning representation around either "the Quotas of contribution," or the "number of free inhabitants," and allowed for the members of the Convention to decide at a later time the details of representation. Randolph's resolution laid forth two points of controversy. First, the resolution was "committed to the notion that states, to maintain their 'sovereignty,' had to remain equal in the councils for the nation; it also invited an argument between those who wanted representation proportioned according to population and those who wanted to tie representation directly to wealth."³ Immediately upon this resolution being put forth, James Madison,

²Max Farrand, ed., The Records of the Federal Convention of 1787, (New Haven: Yale University Press, 1937, reprinted 1987), I, 20.

³Donald L. Robinson, Slavery in the Structure of American Politics: 1765-1820, (New York: Harcourt Brace Jovanovich, 1971), 182.

observing that the words <"or to the number of" free inhabitants" might occasion debates which would divert the Committee from the general question whether the principle of representation should be changed, moved that they might be struck out."⁴

Madison needed to assure the members that the debates should not be encumbered by this question of representation so early in the Convention. His fear of the Convention's possible dissolution was made clear by his continued attempted avoidance of this delicate issue. However, it was impossible to avoid. For this very question would determine the success or failure of the Convention. Eventually, Madison gently eased the Convention into facing it and made necessary comments to assist in a well-formulated resolution of the issue.

After Madison concluded his statement, Rufus King observed:

that the quotas of contributions which would alone remain as the measure of representation, would not

⁴The Records of the Federal Convention, I, 35-36 (emphasis added).

answer; because waving every other view of the matter, the revenue might hereafter be so collected by the general Govt. that the sums respectively drawn from the States would <not> appear; and would besides be continually varying.⁵

King was concerned that representation based solely on wealth would be unequally distributed; he realized, like other members of the Convention, that the Southern states were wealthier than the other states. Madison agreed with King that a better method should be found. It was then that Alexander Hamilton moved "to alter the resolution so as to read 'that the rights of suffrage in the national Legislature ought to be proportioned to the number of free inhabitants.'"⁶ This resolution was beginning to cause some duress for the Convention, and, consequently, Madison, Randolph, and Hamilton attempted to persuade the other members of the Convention "that the equality of suffrage established by the articles of Confederation ought not to prevail in the national Legislature, and that an equitable ratio of representation ought to be substituted."⁷

⁵Ibid., 36.

⁶Ibid.

⁷Ibid.

Under the Articles of Confederation, each state had an equal vote, regardless of size. This provision made it extremely difficult to conduct business because equal voting in all states required a great deal of cooperation to enforce the legislation passed by the general assembly. Thus, the leaders urged the other members of the convention to move forward. What Madison, Randolph, and Hamilton wanted to avoid was a full debate at this stage concerning the mode of representation. The above motion to postpone was seconded when George Reed from Delaware agreed that the whole matter of representation should be postponed, but he reminded the members that Delaware was "restrained by their commission from assenting to any change of the rule of suffrage, and in case such a change should be fixed on, it might become their duty to retire from the Convention."⁸ Thus the Convention was threatened very early, on the second day of its meeting, by the possibility of dissolution.

Gouverneur Morris expressed his interest in keeping Delaware at the Convention and pleaded with the state's delegation that this early "discord" would surely signal a negative position on the entire purpose of the Convention. Yet he reminded the delegates that they would need to resolve

⁸Ibid., 37.

the issue at a later time, but that this time was not the proper one. As the Convention forged onward, each proposal was tested for acceptance. The steps taken to draft this resolution were intentionally made slowly so as to not upset the Southern delegates.

JUNE 9

The problem of representation in the new government did not come up again until June 9, when the topic of electing the National Executive was on the floor. There was a fear by most delegates that unequal representation in either house would lead to an unfavorable outcome in the election of the National Executive. That is, if proportional representation were used in the National Legislature, the non-slaveholding states might be outvoted by the slave-holding states, if the latter were allowed to count their slave populations.

James Wilson held that proportional representation would be best, since "all authority was derived from the people, and equal numbers of people ought to have an equal no. of representatives, and different numbers of people different numbers of representatives."⁹ Wilson fought for representation to be based on population, not on state

⁹Ibid., 179.

sovereignty, as it was under the Articles of Confederation. He advocated the principle of one person, one vote. William Paterson added that "persons, not property" should be used as the rule for suffrage. He contended that 150 citizens in Pennsylvania were in fact equal to 150 citizens in the state of New Jersey, and therefore should be afforded the same representation. Wilson continued with the discussion of state "equality" and said the following:

We have been told that each State being Sovereign, all are equal. So each man is naturally a sovereign over himself, and all men are therefore naturally equal. Can he retain this equality when he becomes a member of civil government? He can not. As little can a Sovereign State, when it becomes of a federal Governnt. If N.J. will not part with her Sovereignty it is in vain to talk of Govt. A new partition of the States is desirable, but evidently & totally impracticable.¹⁰

This statement by Wilson seems to reflect some thoughts from John Locke's Second Treatise of Government, particularly where

¹⁰Ibid., 180.

Locke refers to the state "all men are naturally in";¹¹ he says man while in the state of nature is in "a State of perfect Freedom."¹² Yet, when man becomes covetous and infringes upon the rights and property of other men, the state of freedom becomes the state of war. It is because of this avaricious nature of man that civil government is necessary, and once it is formed it is compelled to protect the rights and property of all men who consent to be governed. Wilson, like Locke, understood that in order to form a civil government, each state and each individual must give up some freedom, in order to better protect society as a whole. The small states in the Confederacy did not trust the larger states to treat them fairly, and thus sought, as best they could under the Articles, to protect themselves from the encroachment of government.

Wilson continues his remarks and makes a point of clarification on what it means to be a sovereign state. The federal form of government proposed would require that each state be on equal grounds with every other, although it is evident that a state with a larger population would most

¹¹John Locke, The Second Treatise of Government, introduction by Peter Laslett, (Cambridge: Cambridge Press, 1987) 309.

¹²Ibid.

likely have more representatives. Yet, as each state becomes committed to this federal government, it will have to relinquish a part of its sovereignty in order to participate in the whole of government. Thus, the states will be parts of a whole, but would be unable to survive without the whole. Relinquishing part of their state sovereignty was not desired by some of the states, but was nonetheless a requisite for the establishment of an effective and enduring government based on equality.

JUNE 11

The morning of June 11 began with Roger Sherman's proposal that "suffrage in the 1st branch should be according to the respective numbers of free inhabitants."¹³ To this proposal John Rutledge replied that representation should be "according to the quotas of contribution," and concluded that, after all was said and done, money was power; thereby making the point that the wealthier states should carry more weight in the newly-formed government.

King and Wilson, in an attempt to bring some continuity to the debate, moved that "the right to suffrage" in the National Legislature should not lead to the same results that

¹³The Records of the Federal Convention, I, 196.

existed under the Articles of Confederation and that some other equitable ratio was necessary. This motion was passed seven to three, with one state divided. The question before the Convention then became the finding of an "equitable ratio" for representation.

It was at this time that Wilson put forward, for the first time in the Convention, the so-called Federal ratio of "three-fifths":

in proportion to the whole number of white & other free citizens & inhabitants of every age sex & condition including those bound to servitude for a term of years and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes, in each State.¹⁴

By proposing this resolution, Wilson resurrected the unsuccessful 1783 proposal in the Confederation Congress to amend the Articles of Confederation by changing the method of apportioning taxes among the states to a per capita basis that would include all free persons and "three-fifths of all other

¹⁴Ibid, 201.

persons."¹⁵ Also, in the motion presented, there is no hint or sign that slaves are excluded on the basis of not being persons by being counted as three fifths, and the simple fact that a person cannot be divided up into parts--and live--meant that slaves were considered persons under this resolution. Wilson and the other members of the Convention, agreed on this motion, by a nine-to-two vote. Although this formulation was not the final statement in the Constitution, it did seek to establish that the principle of representation should be based on population and not on property.

The rest of the day was spent discussing the resolution guaranteeing a "Republican form of Government" and the necessity of an amendment process, since:

The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence.¹⁶

¹⁵William Wiecek, "Three-Fifths Clause," in Leonard W. Levy, Kenneth Karst, and Dennis J. Mahoney eds. Encyclopedia of the American Constitution, (New York: Macmillan, 1987).

¹⁶The Records of the Federal Convention, I, 203-204.

Col. George Mason, an abolitionist, recognized early in the Convention that because of the compromise to be made with slavery, the Constitution itself might be tarnished because it allowed slavery to continue. Furthermore, Mason, along with other members of the Convention, likely foresaw that the Constitution to be formed would need the guarantee of a republican form of government in each state, along with a constitutional process for the addition of amendments. It is fortunate for America that the Framers of the Constitution did provide for an amending process, for without it, the regime they founded may have ended after the Civil War, if indeed, considering the demand for the substance of the first ten amendments, it had ever been ratified at all.

JUNE 13

A report was given on June 13 to the Committee of the Whole on the Virginia Plan, which allowed for the 7th resolution to be read as follows:

that the rights of suffrage in the 1st. branch of the national Legislature, ought not to be according to the rule established in the <A>rticles of <C>nfederation but according to some equitable ratio of representation, namely, in proportion to

the whole number of white & other free citizens & inhabitants, of every age sex and condition, including those bound to servitude for a term of years, & three fifths of all other persons, not comprehended in the foregoing description, except Indians not taxed in each State.¹⁷

After the report was read, the Convention adjourned until the next day to discuss the plan presented. The Virginia Plan had presented a threat to the small or less affluent states, and these states, particularly Rhode Island, were not content. The small states felt that they would be overpowered and out-governed by the larger and more affluent states. The expression of these feelings was to be a turning point for the Convention. Rhode Island, New Jersey, Connecticut, and Delaware threatened to leave the Convention if some compromise were not fashioned. Because of the hostility that was threatening to divide the Convention, the next day was spent discussing and accommodating the two distinct interests of the Northern and Southern states.

¹⁷Ibid., 236

JUNE 14

This day, according to the Convention notes, was spent in deliberating on the proposed Virginia Plan. The Virginia Plan favored wealth and population as a rule for determining representation, and did not allow the smaller, less affluent states to be equally represented in either house of the National Legislature. However, William Paterson commented that further time was needed "to contemplate the plan reported" and "to digest one purely federal, and contradistinguished from the reported plan."¹⁸ Therefore, the members adjourned, and it is most certain that they deliberated most of the day privately on the Virginia Plan, a radical plan for government.

JUNE 15

June 15 marks the date on which the New Jersey Plan was introduced into the Convention specifically to counteract the Virginia Plan. Most important to this thesis in relation to the New Jersey Plan is the question of representation given to those human beings referred to as "all other persons." The New Jersey Plan, with respect to the three-fifths clause, varied only in wording, but left the three-fifths clause intact. The New Jersey Plan says that whenever "requisitions"

¹⁸Ibid., 240.

are made by the United States Congress, they should ask for them in proportion

to the whole number of white & other free citizens & inhabitants of every age sex and condition including those bound to servitude for a term of years & three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes¹⁹

The article is nearly identical to the one found in the Virginia Plan and provides evidence that neither the Virginia Plan nor the New Jersey Plan supporters thought slaves could be counted as anything less than three-fifths of a person. Further, the insistence of those supporting the three-fifths rule is merely to distribute representation equitably in the immediate situation. The large slave-holding states, if allowed to count all their inhabitants, would most certainly outvote the non-slaveholding states, and representation was the reason that slaves were counted as three-fifths in both plans. Since both plans recognized the representation of slaves, the Southerners were moved to seek a better compromise for the protection of their property than the ones offered.

¹⁹Ibid., 243.

JUNE 19

On this day in the Convention, the Committee of the Whole reviewed the propositions of Paterson, most notably those dealing with the existence of slavery and the "Republican Theory"²⁰ of government. The members of the Committee of the Whole were concerned with whether the plan would provide against insurrections within a state. Their concern was that in the New Jersey Plan there was no safeguard against these types of insurrections: "According to fact & experience, a minority may in an appeal to force be an overmatch for the majority."²¹ The members were most likely concerned with the argument, later raised in the Federalist, that a minority could at one time or another constitute itself as part of the majority, depending on the issue. Yet the major problem for the Committee to adjudicate was whether, in Madison's words, "Where slavery exists, the Republican Theory becomes still more fallacious."²² The general consensus of the Committee on the question of the "Republican Theory" and slavery seemed to be that the two were strictly incompatible. However, the concession made, whatever its justification on the level of political necessity, stretched "Republican Theory" to its

²⁰Ibid., 318.

²¹Ibid.

²²Ibid.

limits.²³ Along with any compromise made by the Framers on slavery, it is clear that the language used in the Constitution, especially the compromises made with slavery, "conveys a stance towards slavery that can be fairly characterized as a stance against it in principle."²⁴

JUNE 25

Discussion of the manner in which the upper house would be composed took place on this day, and resulted in a speech by Charles Pinckney about the people of America. The first segment of the speech most certainly anticipates the thoughts of a French traveler who visited America in 1832--Alexis de Tocqueville.²⁵

²³Edward J. Erler, "Slavery and the Constitution," (Forthcoming) [photocopy], 9.

²⁴John Alvis, "The Slavery Provisions of the U.S. Constitution: Means for Emancipation," Political Science Reviewer, 17 (1987): 246.

²⁵Alexis de Tocqueville, Democracy in America, (trans. George Lawrence, J.P. Mayer ed.) (New York: Anchor Books, 1969. Tocqueville explains that in America, "the natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together" (193); that is, to form political associations that will serve society through the democratic process of voting. Tocqueville further explains this by saying: "In a country with universal suffrage the majority is never in doubt, because no party can reasonably claim to represent those who have not voted at all (194)." Tocqueville understood that America's dream was to assure the right of majority rule to all men and allow them to be represented fairly.

Pinckney reminded the members of the Convention that in the nation "there were fewer distinctions of fortune & less of rank, than among the inhabitants of any other nation."²⁶ It seems that it was evident to the Founding Fathers that America was unique in its formation and would endure because of its people. Yet, it would only endure in the protection of liberty if a good government were to be instituted.

Pinckney expressed his confidence in the people of the United States when he alluded to their role in the new government.

Every member of the Society almost, will enjoy an equal power of arriving at the supreme offices & consequences of directing the strength & sentiments of the whole Community. None will be excluded by birth, & few by fortune, from voting for proper persons to fill the offices of Government...²⁷

Pinckney espoused the belief that, after the government is instituted and established, and as it begins to prosper, "none will be excluded by birth" who shall vote to fill the

²⁶The Records of the Federal Convention, I, 398.

²⁷Ibid., (emphasis added).

governmental offices. Although Pinckney was a Southerner, he seemed to advocate the greatest of republican principles--equality--but throughout the Convention he maintained a strong pro-slavery conviction. It was Pinckney's understanding that, because of wealth in the United States, its government should be able to secure the "blessings of civil & religious liberty" to all its citizens. Pinckney, like other slave-state delegates, was in favor of including every slave, just as any other inhabitant.²⁸ The slave states only argued for full representation for slaves so that they might count them for the sole purpose of gaining a stronghold in the National Legislature. Further, as Robert A. Goldwin points out, counting slaves as full persons would make a mockery of the principle of representation, since they would have no influence in the lawmaking process nor be represented in the legislature in any meaningful sense of the word.²⁹

JUNE 30

At this point in the Convention, the delegates were becoming more temperamental and seemed to be losing their direction. Madison attempted to reconcile them and put them

²⁸Robert A. Goldwin, "Why Blacks, Women & Jews Are Not Mentioned in the Constitution," Commentary, (May, 1987), 29.

²⁹Ibid., 29.

back on their task of forming a government. Madison argued for equal representation of states in the upper house because he felt:

that an equality of votes in the 2d. branch was not only necessary to secure the small, but would be perfectly safe to the large ones whose majority in the 1st. branch was an effectual bulwark. But notwithstanding this apparent defense, the Majority of States might still injure the majority of people.

1. they could obstruct the wishes and interest of the majority.
2. they could extort measures, repugnant to the wishes & interest of the majority.
3. They could impose measures adverse thereto; which the 1st will not participate."³⁰

Yet it was Madison's deep concern for the protection of both the majority and the minority which prompted him to admit that any "peculiar interest" of a citizen or state should be secured to the fullest extent. Protection against encroachments upon such interests necessitates a constitutional defense mechanism which will be a safeguard

³⁰The Records of the Federal Convention, I, 486.

against their invasion.³¹ Madison knew that slavery would not be abolished in the Convention, and so sought to persuade the delegates that it would be protected for a limited amount of time only if the Convention would set a date to abolish the evil. Madison then proceeded to explain why varying interests in the different states played a role in their lack of cooperation over the issue at hand. He contended:

that the States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from <the effects of> their having slaves. These two causes concurred in forming the great division of interests in the U. States.³²

³¹Madison's concern about encroachments of the majority or the minority is abundantly clear in Federalist No. 51: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government....In framing a government which is to be administered by men over men, the great difficult lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." (Clinton Rossiter, ed.) (New York: New American Library, 1961): 322.

³²The Records of the Federal Convention, I, 486.

Madison saw that the division on nearly all the issues debated by the Convention centered around the question of protecting the interest of slave-holding states. The slave-holding states feared that they might lose their property and eventually be forced to concede their property in human beings.

After Madison's speech and a few concluding remarks, the Convention seemed to be back on track, but only until the next dispute over the equality of the states occurred.

JULY 2

When the Convention convened on the morning of July 2, a resolution was moved and seconded "that in the Second Branch of the Legislature of the United States each state shall have an equal vote."³³ The vote on the motion was divided five to five, with one state undecided. This result brought about an immediate response from General Pinckney, in which he proclaimed the "equality of votes in the 2nd. branch inadmissible."³⁴ Pinckney argued that if there were equal representation in the "2nd. branch," then the Southern states would give preference to their combined interests, such as

³³Ibid., 509.

³⁴Ibid., 510.

trade in rice and indigo and slavery. He questioned how the Southern states would be prevented from administering the national government in any way they pleased, but was nonetheless "anxious" that something be done to rectify the situation. Pinckney, as well as others, was beginning to sense a possible breakup of the Convention. In sensing this, Pinckney most certainly realized that something had to be done to prevent the breakup; he moved that a committee be appointed, to be composed of one member from each state to "devise and report on some compromise".³⁵ Luther Martin and Roger Sherman were assured that a committee would most likely come to "some expedient,"³⁶ because they also did not want the Convention to dissolve without doing anything.

Gouverneur Morris then began to outline the proper functions and duties of the 2nd. branch of the National Legislature. Morris was persuasive in his argument for a "firm Government,"³⁷ which would protect the liberties of its citizens and which would be mindful of the general welfare of the United States. Yet, without any doubt, he desired a check on the National Legislature and said, "The only security agst.

³⁵Ibid., 511.

³⁶Ibid.

³⁷Ibid., 514.

encroachments will be a select & sagacious body of men, instituted to watch agst. them on all sides."³⁸ At this point, the Convention found it necessary to deal with the rule of representation. This sensitive issue needed to be addressed.

To Pinckney's motion to form a committee, Elbridge Gerry replied:

Something must be done, or we shall disappoint not only America, but the whole world. He suggested a consideration of the State we should be thrown into by the failure of the Union. We should be without an Umpire to decide controversies and must be at the mercy of events. what too is to become of our treaties--what of our foreign debts, what of our domestic? We must make concessions on both sides.³⁹

Gerry seemed to have understood the importance and urgency of the rule of representation in the 2nd. branch, and was insistent on a resolution that would alleviate the problem. The problem was, specifically, the manner in which the 2nd.

³⁸Ibid.

³⁹Ibid., 515 (emphasis added).

branch would be constituted and the mode of election of members. On the question of appointing a committee, the Convention voted nine to two in favor.

JULY 3

On July 3 the Grand Committee met and achieved three important compromises on representation. The first allowed for a representative for every 40,000 inhabitants in the lower House and required at least one from each state. Second, all bills for raising or apportioning money would be required to originate in the lower House. Third, in the upper House each state would have an equal vote. It was agreed by the Grand Committee that its report would be submitted on July 5.

The members agreed to adjourn until Thursday, since time was needed to prepare for the eleventh celebration of our "anniversary of independence." It goes without saying that at this most crucial and difficult time in the convention, the Framers made the time to reflect on their fight for independence.

JULY 5

Elbridge Gerry began this session with a report from the Committee, which advised the Convention to allow for one

representative for every 40,000 inhabitants in the first branch of the legislature, and to secure at least one for each state, regardless of population. Its second striking proposition was that "money bills" should originate in the first branch and could not be altered by the second branch. Last, it recommended "that in the 2nd. branch each State shall have an equal vote."⁴⁰ The Convention avoided taking a direct vote for eleven days, during which a temporary apportionment of seats in the first branch was worked out,... and they agreed that they would count as three-fifths of a person for purposes of both representation and direct taxation.⁴¹ The report was received with mixed feelings, and once again it was Madison who explained the compromise and its effect on the new government to be instituted.

He attempted to persuade the Convention that the results of its debates and propositions would need to be approved by the "enlightened and impartial part of America," and that they would judge the importance of the outcome by the system that the Convention established. Madison hoped that the Convention would agree on a plan that would be best for the people of

⁴⁰Ibid., 526.

⁴¹Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution, (Kansas: University Press of Kansas, 1985), 236.

America, one which might not be what all had anticipated, and yet one which nonetheless would be an effective and equitable plan for government.

Morris also noted that a solution was necessitated by the dilemma associated with this Convention, since Morris was certain that the fate of the world, and not just America, lay in the hands of these men. Morris saw himself as a representative of "the whole human race,"⁴² and therefore pleaded with the members to rely on "reflection and choice" rather than "accident and force" to decide the political fate of America.⁴³ Morris knew that without some agreement on a form of government, the fate of America would be destined to fail. He insisted that this nation should be united and that the Convention should be able to work out some compromise that would satisfy nearly all the states. Morris wanted a solution to the problem of government to assure that the American Revolution would not have been fought in vain.

⁴²The Records of the Federal Convention, I, 528.

⁴³These are quotations from the argument of Alexander Hamilton in Federalist No. 1. Hamilton celebrates the promise of American unity through the Constitution and reminds the people of America that there is no better time to form a union than now. See The Federalist, (New York: New American Library, 1961), 33.

Other delegates, such as Gunning Bedford, Oliver Ellsworth, Hugh Williamson, and William Paterson, agreed that if there were no compromise on this issue, then no Union would be established. Even worse than that, a foreign sword would in that event, likely resolve the differences. The members of the Convention faced a difficult time, one that would decide the fate of republican government all over the world. It seemed that the choice was theirs to make, either to compromise on the issue before them, or possibly to be subjected to foreign invasion in the near future. They had either to stand strong as one or to stand weak in a house divided.

JULY 6

The proceedings were beginning to turn to the question of how best to constitute the 2nd. branch and be equitable to all the states in doing so. The decision would either be based strictly on inhabitants or on some equitable ratio of "numbers of Inhabitants and of wealth, and not of either singly."⁴⁴ Most of the states were leaning toward some compromise on the subject so as to move along with the business of establishing a firm union.

⁴⁴The Records of the Federal Convention, I, 541.

Meanwhile, Pierce Butler and Charles Pinckney, both of South Carolina, were arguing in support of two different choices. Butler was insistent in his contention "that property was the only measure of representation."⁴⁵ As for Pinckney,

The number of inhabitants appeared to. [sic] him the only just & practicable rule. He thought the blacks ought to stand on an equality with whites: But would agree to the ratio settled by Congs.⁴⁶

Pinckney was attempting to influence the Convention in allowing for full representation of blacks into the ratio, in order to have a more favorable ratio of representation in his state. Nonetheless, it should be pointed out that Pinckney did not use the word slave or refer to blacks as articles of property, but referred to them in the same context that he referred to "whites." When Pinckney refers to "blacks" and "whites," in either case does he express a difference in their relationship as two equal human beings? No. Additionally, it is important to note that neither Pinckney nor other Southerners would regard slaves as their equals, but only

⁴⁵Ibid., 542.

⁴⁶Ibid.

argued the case of equal representation for them to secure the lower house in favor of the Southern states.

The members of the Convention were gravely concerned about how slaves were going to be represented, but realized that without some cooperation the experiment in government was doomed. The Convention envisioned that each state would cede part of its sovereignty in order to be part of the Union. And each in turn would receive protection and other benefits from the general government, while managing its own affairs as it chose, so long as it would not be contrary to the Constitution. This agreement was a great step for all the states, because as long as there was cooperation and trust among them, each would receive the benefits to which it was entitled under the Constitution.

JULY 9

Gouverneur Morris reported on the Committee that had been appointed to address the proper ratio of representation in the "1st. branch." It stated that the "1st. branch" would consist of 56 members, and that "the Legislature shall possess authority to regulate the number of Representatives in any of

the foregoing cases, upon the principles of their wealth and numbers of inhabitants."⁴⁷

The report was seen as unclear and vague by Roger Sherman, who wished to know the manner in which the representatives were to be chosen. Nathaniel Gorham responded that some sort of provision was necessary and that "the number of blacks & whites with some regard to supposed wealth was the general guide."⁴⁸ He also thought it would be up to the legislature to alter the formula from time to time "as justice & Propriety may require."⁴⁹ As for Luther Martin, he became more insistent on how the ratio was to be formulated, Gouverneur Morris and John Rutledge moved to postpone that particular part of the report and allow for a separate committee to review it and make a recommendation. The motion was passed, but several members of the Convention were already questioning the manner of representation.

William Paterson, a delegate from New Jersey, seemed to have disliked the report more than most; he saw the "estimate for the future according to the Combined rule of numbers and

⁴⁷Ibid., 559.

⁴⁸Ibid., (emphasis in original).

⁴⁹Ibid.

wealth, as too vague."⁵⁰ He would not regard negroes as anything less than property, and did not understand why they had to be represented in the General Government. Paterson could not comprehend why the "General Government" was going to allow for slaves to be represented when in most of the states their liberties were minimal, if not nonexistent.

Madison responded to Paterson by reminding him that his doctrine would never allow the small states an equal vote in either house, and would most likely abandon any hope of a republican form of government. Madison urged a compromise which would allow the first branch to be represented according to the number of "free inhabitants" in each state, and the second branch "according to the whole number of inhabitants, including slaves."⁵¹ Madison was attempting to gain acceptance on both sides and thereby move toward a compromise. However, this gambit illustrated that Madison and the Convention were consciously moving toward "aristocratic principles" in order to secure the Convention and establish the Union. That is, acknowledging that slavery was deeply embedded in the states and would not easily be abolished, the Framers sought a compromise that would protect it where it

⁵⁰Ibid., 561.

⁵¹Ibid., 562.

already existed, favoring the Southerners; yet leave no trace or evidence that it existed in the written Constitution, thereby making it easier to abolish it once the time was appropriate. John Alvis has pointed out "Those who insisted on keeping the offensive word off the pages of the fundamental law thereby succeeded in making the Constitution blush."⁵²

Rufus King closed the session that day with a reminiscent cry from the American Revolution: no taxation without representation. Nevertheless, when the Southern states were reminded of their wealth, they said they:

would not league themselves with the Northern states unless some respect were paid to their superior wealth. If the latter expect those preferential distinctions in Commerce [and] other advantages which they will derive from the connection they must not expect to receive them without allowing some advantages in return. Eleven out of 13 of the States had agreed to consider Slaves in the apportionment of taxation; and taxation and

⁵²Alvis, "The Slavery Provisions of the U.S. Constitution," 247.

Representation ought to go together.⁵³

King, in this passage, could not make it clearer to the Southern states that if they wanted to count their slaves for the purposes of representation, this would be acceptable, but they should expect to be taxed on them. This was thought to be only just, since there was basic agreement that taxation and representation are inseparable.

As the battle for the compromise continued, the debates became more intense. Discussion of the next segment of the debates will show the intensity of the differences between the North and the South, and their fight to protect the particular interest of each.

⁵³The Records of the Federal Convention, I, 562.

CHAPTER IV
FINAL DEBATES ON THE THREE-FIFTHS CLAUSE

The final debates concerning the three-fifths compromise and the proper "rule of representation" were bitterly conducted between July 11 and 13, and the final compromise was adopted on July 16. At this juncture, even more than during prior discussions, questions were raised about the role of slaves in America and how they were going to be represented in the new government, especially since the states were divided over the proper rule to adapt. It will be important to pay close attention to the prudence used by the Framers in the final compromise. That is, the Framers, and most specifically the Committee of Detail employed euphemism and circumlocution to avoid the use of the term "slave" or "slavery" in the Constitution.¹ The Framers, through particular provisions in the unamended Constitution, did provide and mean for the institution of slavery to be extinct by 1808.² As Alvis points out:

¹John Alvis, "The Slavery Provisions of the U.S. Constitution: Means for Emancipation," Political Science Reviewer," 17 (1987): 247.

²The three most important provisions of the Constitution (regarding slavery) are: Article I, section 2; Article I, section 9; and Article IV, section 2. The first, the three-fifths compromise, although it counts "slaves" as "three-fifths of a person," recognizes them as persons and not as property. The second, the slave trade clause, prohibits the importation of slaves after 1808, thereby giving the

Hence whenever grammar requires some reference to the unfortunate subjects of these regulations they are designated under such verbal camouflage as "all other persons" (Art. 2 Sec. 2, the "Federal ratio), "such persons as any of the States now existing shall think proper to admit" (Art. 1 Sec. 9), "Person held to Service or Labour in one State" (Art. 4 Sec. 2).³

The Framers, therefore, without directly acknowledging slavery, "disinfected" the Constitution as not to sanction property in man. As best he could, James Madison, the Father of the Constitution, guided the Convention on the proper course of establishing a strong union that embedded within it the principle to end the injustice of human bondage.

slave-holding states twenty years to rid the nation of the slave trade. The third, the fugitive slave clause, provides that run-away slaves be returned to their masters, upon demand. Yet the opening paragraph of Article I, section 2, says that a citizen in one state shall enjoy the same citizenship in another state and be granted "all the Privileges and Immunities of Citizens in the several States," thereby granting "Privileges and Immunities" to those people who are considered citizens in a particular state.

³Alvis, "The Slavery Provisions of the U.S. Constitution," 247.

Although slavery was allowed to exist in the United States, it should be noted that the Framers only compromised on the issue to allow the ends of government (liberty and justice) to be pursued, rather than destroyed. Later, this idea was best stated by Publius in the Federalist:

Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.⁴

It was the sentiment of the Framers to work constantly for equality among all men in America, and never to let this dream flounder. However, first things first: the establishment of a firm Union was essential to the pursuit of the republican principles of equality and liberty. Without a firm Union and good laws, the possibility of abolishing this dreaded evil may never have come to pass. As the final debates are reviewed, further close attention will be paid to the choice of words used and the techniques used by the leaders to convince the rest of the Convention that they had achieved the best compromise possible under the circumstances.

⁴The Federalist No. 51, (New York: New American Library, [1961]), 324.

The following examination will search the five most intense days of the three-fifths debate, and seek to clarify any misunderstanding about the Framers' intent regarding the three-fifths compromise.

JULY 11

The longest day spent deliberating the three-fifths clause was July 11, during which the South was determined to protect its "peculiar interest." As the day began, George Mason, from Virginia, found great difficulty in "fixing a proper rule of Representation,"⁵ since he was cautious about bestowing too much power on the National Legislature. Mason accepted the ratio of three-fifths, but was hesitant to support it fully unless a fair and precise standard of revision for the clause was established in the Constitution.

Mason viewed this problem of consolidated power by observing that the Southern states might hold three-fourths of the people in America, but because of the three-fifths clause, they would have fewer representatives in the National Legislature than they would if all inhabitants were counted fully. In other words, the clause would allow one-fourth of

⁵Max Farrand, ed., The Records of the Federal Convention of 1787, (New Haven: Yale University Press, 1937 reprinted 1987), I, 578.

the population of America, the Northern states, to rule over three-fourths of the people in the United States.⁶ He, as well as other members, could foresee why the Southern interests would complain. Therefore, for Mason:

Unless some principle therefore which will do justice to them <the Southern states> hereafter shall be inserted in the Constitution, disagreeable as the declaration was to him, he must declare he could neither vote for the system here nor support it, in his State.⁷

He thought that there had to be some type of equitable ratio authorized in the Constitution to preserve the fine balance between the two varying interests. In other words, he desired to keep the states, Southern and Northern alike, equivalent in their relationships as states. Hence, he insisted that any new states being admitted into the Union should be admitted as equals with all the other states. Mason said that these new states would "have the same pride & other passions which we have, and will either not unite with or will speedily revolt from the Union, if they are not in all respects placed

⁶Ibid., 578.

⁷Ibid.

on an equal footing with their brethren."⁸ He realized that the nation would be expanding quickly and that new states might be economically more successful than the old Atlantic states, and would eventually control them. Furthermore, it was Mason's belief that "numbers of inhabitants; though not always a precise standard of wealth, was sufficiently so for every substantial purpose."⁹ He was convinced that this ratio for the rule of representation would be the best compromise for all the delegates.

After Mason concluded with his proposal, Hugh Williamson asked if the Convention could postpone Edmund Randolph's proposition in order to consider his:

that in order to ascertain the alterations that may happen in the population & wealth of the several States, a census shall be taken of the free white inhabitants and $\frac{3}{5}$ ths of those of other descriptions on the 1st year <after this Government shall have been adopted> and every year thereafter;

⁸Ibid., 579.

⁹Ibid.

and that the Representatives be regulated accordingly.¹⁰

Williamson was concerned over the swift change in population that would occur shortly after the new nation would become operational. To protect against population increases within the states and the resulting disproportional representation in the National Legislature, Williamson wanted to keep the states as equal as possible regarding representation. He, like other delegates, feared the strength of the all-powerful legislative body, since the Southern states would likely have an advantage. It seems that many of the delegates, especially those of the Southern states, hesitated to relinquish power to the National Legislature since they were uncertain how the government would actually function.

The resolution that was proposed by Williamson--with which Randolph agreed--allowed the legislative power of the United States not to be concentrated in only a "part of America."¹¹ Randolph argued that to empower "that part of America" would be inappropriate, since that particular "part of America" would not always be entitled to it. Randolph

¹⁰Ibid.

¹¹Ibid.

sought to have as equitable and as just a relationship as possible regarding representation. He realized that if fair representation among the states could not be achieved, then problems would surely arise from the unstable foundation established by the Framers. Randolph's own argument best illustrates this point

If equality between great & small States be inadmissible, because in that case unequal numbers of Constituents wd. be represented by equal numbers of votes; was it not equally admissible that a larger & more populous district of America should hereafter have less representation, than a smaller & less populous district. If a fair representation of the people be not secured, the injustice of the Govt. will shake it to its foundations.¹²

All that Williamson and Randolph desired was an equitable ratio of representatives that would keep all the states balanced. Both gentlemen felt the necessity to seek a compromise, because without it, the new nation would most likely be doomed to being ruled by fortune rather than reason. Also, both men agreed that new states should be on equal

¹²Ibid., 579-580.

footing with the original states and, concerning the census, that the National Legislature should be given the means to administer and direct it, not the state legislatures. If the states were not given equal footing, constant complaints would arise and nothing would be done in the National Legislature. As for the census, they were insistent that it be authorized by the National Legislature because they believed that state legislatures would abuse this power.

Although the argument revolving around the census was stirring commotion, Pierce Butler and General Pinckney were still uncertain about the proper rule of representation and "insisted that blacks be included in the rule of Representation, equally with the Whites."¹³ That is, both duly insisted that all their inhabitants (including blacks) be counted for the purpose of representation, thereby establishing what they believed to be a equitable ratio for the National Legislature. Although these Southerners desired to count their "black" inhabitants "equally with Whites," they did not want to be taxed on them. Again, the Southerners were not accepting blacks or slaves as their equals, but seeking to gain a majority in the National Legislature.

¹³Ibid., 580.

To this proposition, Elbridge Gerry reminded the members "that 3/5 of them was to say the least the full proportion that could be admitted."¹⁴ To Gerry, the rule of representation could only be three-fifths, since that was really the only equitable ratio of compromise; any other would be unfair to the non-slave-holding states.

Adding to Gerry's remark, and rebutting Butler, General Pinckney and Nathaniel Ghorum reminded the delegates that the ratio had been proposed under the Articles of Confederation "as a rule of taxation,"¹⁵ thereby allowing "wealth," an aristocratic measure, to be calculated into the rule of representation for a republican form of government. Ghorum recognized what the Southerners were exacting, and assured them that blacks, for the purpose of representation, "are equal to freemen."¹⁶ This remark best illustrates the understanding of the Framers concerning blacks, and their relationship to the new government. That is to say, they would be counted as "persons," but would not be counted as whole persons, since the Southerners would then greatly control the process that would otherwise lead to their

¹⁴Ibid.

¹⁵Ibid.

¹⁶Ibid.

freedom. The mere fact that the terms "slave" or "blacks" was not used to identify "all other persons," is again evidence that the Framers sought to leave the Constitution color blind and inevitably lead to their freedom without altering the entire Constitution.

Pierce Butler combatted this notion of an equitable ratio by saying: "that the labour of a slave in S. Carola. was productive & valuable as that of a freeman in Massts."¹⁷ Butler attempted to make an argument that labor is labor and that it makes no difference by whom the labor is performed, a slave or a freeman. Further, Butler explained that since this government is "instituted principally for the protection of property,"¹⁸ his (and that of other Southerners) property in slaves should be protected. In other words, he wanted slaves to be counted wholly as persons, but, at the same time, he also wanted to consider them as property in order to secure his protection for them. This view taken by the Southerners is essentially the conscious aristocratic compromise regarding the three-fifths clause that was made. The point was to allow slavery to continue where it existed, count three-fifths of the slaves for the purpose of representation, and select a

¹⁷Ibid.

¹⁸Ibid., 581.

date that would curtail the iniquitous trade of human beings.

Mason did not agree to the motion by Butler and General Pinckney because "the Southern <S>tates have this peculiar species of property, over & and above the other species of property common to all the States."¹⁹ Mason, although technically a Southerner, did not consider slaves to be a peculiar species of property as other Southern statesman claimed. Although Mason recognized the slaves' potential and benefit to those concerned, he did not think it proper to regard slaves as property; rather, they were to be regarded as human beings.

This debate over what fraction was actually going to count as a black human being was beginning to boil when finally Williamson began to compromise. Whereas he had earlier contended for blacks to be counted as "5/5ths" of a person, he was now ready to settle for the ratio of "3/5th's."²⁰ However, there were still other questions that needed to be addressed prior to reaching a solid decision on the matter.

¹⁹Ibid., 581 (emphasis added).

²⁰Ibid., 581.

Butler's motion to count blacks as equal to whites for the purposes of representation was brought to the floor and voted on. The vote was seven to three, with Delaware, Georgia, and South Carolina voting in the affirmative. The other seven states therefore agreed that the most equitable ratio for preserving fair representation would be three-fifths.

Gouverneur Morris made three objections to the plan proposed by his colleague:

1. It fettered the Legislature too much. 2. it would exclude some States altogether who would not have a sufficient number to entitle them to a single Representative. 3. it will not consist with the Resolution passed on Saturday last authorizing the Legislature to adjust the Representation from time to time on the principles of population and wealth or with the principles of equity.²¹

What Morris was fighting for was a better rule of representation, rather than using wealth as a guide. Slaves were either going to be regarded as inhabitants or some sort

²¹Ibid.

of "peculiar species of property" (wealth), but, according to Morris, they could not count as both. Although his greatest objection to the plan "was that the number of inhabitants was not a proper standard of wealth,"²² Morris' objections were well received by Rufus King, yet King was ready to compromise on the issue merely "for the sake of doing something."²³

It seems as though each time a member of the Convention was willing to compromise, especially on this day, the arguments would rekindle about the manner by which representatives were going to be apportioned, by wealth or number of inhabitants. John Rutledge commented that wealth should be used to determine representation. Because the "Western States will not be able to contribute in proportion to their numbers, they shd. not therefore be represented in that proportion."²⁴ He reasoned that most of the Atlantic states might not go along with him, so he thought that both wealth and population could be used to estimate the rule of representation and that a census could determine the equitable ratio.

²²Ibid., 582.

²³Ibid.

²⁴Ibid.

However, it was Sherman who "thought the number of people alone the best rule for measuring wealth as well as representation."²⁵ His belief was that to allow the legislature to be ruled by wealth, an estimate of the number of inhabitants would be needed for the proper equation. Aside from his sentiments, on the proper "rule of representation," he argued strongly that the "periods & the rule of revising Representation ought to be fixt by the Constitution."²⁶ The members aspired to fix the "federal number," to assure that the National Legislature could not haphazardly change the number as it pleased.

At the same time, the delegates did not want the National Legislature to be helpless with respect to revision of this clause, but neither did they want it to be completely confined to a stringent set of regulations. Therefore, it became difficult to decide how much power the legislative branch of government should and should not have over this question.

Concerning the dispute, Ghorum realistically pointed out that:

²⁵Ibid.

²⁶Ibid.

If the Convention who are comparatively so little biased by local views are so much perplexed, How can it be expected that the Legislature hereafter under the full bias of those views, will be able to settle a standard.²⁷

This statement reaffirmed to the delegates that they, being the least biased assembly of the several states, needed to settle upon a "standard." This "standard" would serve as a bulwark against possible encroachment by the National Legislature. Ghorum felt that this convention of men could make a reasonable concession on the issue than those in the future who might be more biased and prone to making unjust laws. Most of the Framers agreed that the question of the proper rule of representation needed to be settled because if left to the first legislature an equitable compromise might not be achieved. That is, the assembly would be larger and the lifting of the veil of secrecy would not allow them the candor used in the Convention.

Morris, at least during this particular debate, seemed always to reiterate the questions and concerns raised about

²⁷Ibid., 583.

representation. Once again it was Morris' words that resounded in the hall:

If we can't agree on a rule that will be just at this time, how can we expect to find one that will be just in all times to come. Surely those who come after us will judge better of things present, than we can of things future."²⁸

Morris realized the perplexity of arriving at a solution, but also sensed a bit of distrust for those people who would judge this Convention in the future. That is, the Convention must establish particular standards which would forever be standards of the Republic, but in doing so, it must realize that some circumstances would change that would necessitate possible amendments to the Constitution. Also, those who come after the Framers would not necessarily be the best to judge the circumstances of representation. Just as politicians today, the Framers recognized that whatever the outcome of the Convention, their names would forever be remembered for either founding a nation or contributing to its utter demise. It was extremely important to resolve the question of representation and move onward toward forming the "more perfect union."

²⁸Ibid.

Regarding the proper "rule of representation," Morris made two objections, which he stated in detail.

The 1. was they would be unwilling to revise at all.
The 2 that by referring to wealth they would be bound by a rule which if willing, they would be unable to execute. The 1st. objn. distrusts their fidelity. But if their duty, their honor & their oaths will not bind them, let us not put into their hands our liberty, and all our other great interests. let us have no Govt. at all. 2. if these ties will bind them. [W]e need not distrust the practicability of the rule.²⁹

Although Morris did not want the National Legislature to decide the fate of this proposal, he envisioned that the Northern and the Southern states would need to trust one another, even though they would be inappropriately apportioned with respect to their wealth. Nonetheless, Morris went so far as to say that if they could not trust each other, then no government should be established, since the states would never be able to reconcile with one another. His concluding remark ended up in contradiction with his previous statements,

²⁹Ibid., 583-584 (emphasis in original).

because he said that he believed the best course was to leave this decision up to the representatives who would be directly accountable to the people. The contradiction consists in that Morris putting forth an argument in which he distrusts the representatives, but then concluding that it might be best for them to decide the fate of the rule of representation. Morris, unclear in his statements, proved unable to distinguish which rule he desired most. The debate over representation was a complex and complicated issue, and seemed, at times, to confuse the delegates. However, it is clear that each delegation sought to protect its own vital interest, but was attempting to compromise on a matter that was controversial and threatening to the Southerners. The compromise that was finally achieved must have taken a great amount of deliberation outside the formal Convention meeting.

At this stage in the Convention, James Madison sought to speak his piece. Madison recorded himself as saying that he "was not a little surprised to hear this implicit confidence urged by a member who on all occasions, had inculcated so strongly, the political depravity of men, and the necessity of checking one vice and interest by opposing to them another vice & interest."³⁰ Moreover, Madison could not comprehend

³⁰Ibid., 584.

Morris' position, especially since the latter contradicted himself within his own argument. As noted above, Morris was not really sure how he wants the "rule of representation" addressed, but seemed to say in his last remark that he would let the representatives decide. This Madison could not believe, because the truth of the matter is "that all men having power ought to be distrusted to a certain degree."³¹ Madison could not be clearer on the subject of investing too much power in the National Legislature, and therefore strongly concerned himself with "checks" against those powers granted.³² Madison could not believe that Morris could possibly imply that the Northern and Southern gentlemen would work harmoniously together when the Northern states would be holding the majority of representatives, and the Southern the minority.

An objection which the Southerners had regarding the admission of new states is that the latter should not be counted as equals with the original states, since their wealth would not be equivalent to that of the others in the

³¹Ibid.

³²Later, in Federalist No. 51, Madison explains the entire problem of power being concentrated in the National Legislature and the need to control the governed first, and, second, for government to control itself. Please see The Federalist No. 51, 266.

beginning. Subsequently, the new states would gain wealth because of their fertile and open land and might someday overpower the original states. Madison explained, however, that this fear would not be realized, because better transportation and communication would provide for an abundance of trade throughout the Union and that wealth would be to a good extent distributed fairly. After all, he reasoned that with an increase in population, there would be a reciprocal effect on taxation. However, wealth could only be used as a standard when labor is allowed to be "easy & free,"³³ so as to command a greater amount of intercourse between the various states. This intercourse would destroy any inequalities that existed prior to "easy & free"³⁴ commerce among the colonies. Ergo, the institution of slavery hinders "free & easy" commerce between the states, if slavery were prohibited, commerce and enterprise would prosper throughout the states, North as well as South.

By the end of this day, the delegates had realized the

³³The Records of the Federal Convention, I, 585. This remark by Madison, seems to imply that commerce among the various states of the Union would be much more productive and profitable if the labor were performed by free and enterprising men. That is, not slave labor, but at least entrepreneurs or people who could secure a salary for their labor.

³⁴Ibid., 585.

importance of this single issue in the new government and began to scrutinize its possible effects more closely. Though the first part of this day was spent trying to figure the proper rule, the next half was spent specifically on the three-fifths clause itself.

King opened the discussion on the three-fifths clause, in opposition "to fixing numbers as the rule of representation,"³⁵ primarily on account of blacks. According to King, "the admission of them alone with Whites at all, would incite great discontents among the States having no slaves."³⁶ It was King's view that "the Southern <S>tates had received more than the number of their white & three fifths of their black inhabitants entitled them to."³⁷ To King it seemed inappropriate, if not unjust, to give "Southern <S>tates" an advantage in representation merely because they held human beings in bondage. He did not see how the members of the Convention could stand for such an atrocity. To King's remarks, Roger Sherman responded, haphazardly that the growth of the Southern states--for example, Georgia--necessitated their having more representatives. Sherman desired to base

³⁵Ibid., 586.

³⁶Ibid.

³⁷Ibid.

his argument on the likely growth of slavery, strictly speaking, and not necessarily on the growth and advancements in industry of a new and flourishing nation.

Ghorum then joined the argument and argued for "establishing numbers as the rule."³⁸ Further, he observed that the best estimates had occurred when both "numbers & property"³⁹ were included in the rule of representation, much as in Massachusetts. Nonetheless, he reminded the members of the Convention that in the Confederation where this "three-fifths" ratio was used, negroes in this proportion "were then to have been a rule of taxation only."⁴⁰ That is, they were only considered for taxation purposes to allow for a more equitable tax ratio. In other words, slaves were counted in the Articles of Confederation, but for the purpose of taxation only, and were afforded nowhere in the Articles a delivery to freedom. This lack of prospective freedom for the slaves was an intrinsic defect of the Articles and thus necessitated a promise of freedom in the new regime. Hence a consequence of this Convention was going to be the start of the gradual abolition of slavery, and the rule for

³⁸Ibid., 587.

³⁹Ibid.

⁴⁰Ibid.

representation was the touchstone to ending this inherent evil of slavery.

Since the matter of just representation was unclear, Wilson asked for clarification on the three-fifths clause. Wilson wanted to know whether blacks were going to be allowed as citizens. And if they were, were they going to be equal to "White Citizens"?⁴¹ Or were they, rather, going to be admitted as property, and thus allowed "into the computation"?⁴² Wilson saw some difficulty with the "integration" of the blacks into the white cities, and foresaw grave problems arising with sudden liberation of the blacks. Also, Wilson thought it undesirable to consider a ratio of inhabitants as a correct "measure of wealth"⁴³ and supposed that an "aggregate" number of inhabitants would best determine the contributions and wealth of the states.

Even though Wilson was representing Pennsylvania, he felt "compelled to declare himself reduced to the dilemma of doing injustice to the Southern <S>tates,"⁴⁴ and uphold the laws of

⁴¹Ibid.

⁴²Ibid.

⁴³Ibid.

⁴⁴Ibid., 588.

"human nature."⁴⁵ Morris wanted to compromise on this issue, but was torn between standing up for liberty or preserving human bondage. Morris went on to say that

he could never agree to give such encouragement to the slave trade as would be given by allowing them a representation for their negroes, and he did not believe those States would ever confederate on terms that would deprive them of that trade.⁴⁶

Morris was adamant; he did not, under any circumstances, want to allow for the continuance of the slave trade. He saw it as a complete negation of the American Revolution, which was the event that ultimately led to the Convention. Morris, like Lincoln after him, did not want to see the nation divided into two fundamentally opposed interests.

The question came before the convention to "include 3/5 of the blacks,"⁴⁷ and the proposal was turned down by a vote of six to four. Since the Convention lacked the delegations from New Hampshire, Rhode Island, and New York, they were

⁴⁵Ibid.

⁴⁶Ibid.

⁴⁷Ibid.

unable to provide any type of representation, three-fifths or otherwise, to the slaves.

Donald L. Robinson who went so far as to call this day a "fiasco," said:

The federal ratio was temporarily set aside from the resolution on apportionment by the votes of the commercial coalition, [and this] carried a lesson the South Carolinians were not slow to appreciate: that their commercial allies were the strongest antislavery men in the union, not out of conviction so much as circumstance, and that, though they shared many aims with these fellow merchants, they had first to be certain that their slave were safe before joining in pursuit of these other goals.⁴⁸

JULY 12

Gouverneur Morris began the morning with a motion to empower "the Legislature to vary the Representation according to the principles of wealth & number of inhabts.,"⁴⁹ that is,

⁴⁸Donald L. Robinson, Slavery in the Structure of American Politics: 1765 - 1820, (New York: Harcourt Brace Jovanovich, 1971), 203.

⁴⁹The Records of the Federal Convention, I, 592.

a "proviso that taxation shall be in proportion to Representation."⁵⁰ Morris attempted to combine the rule of representation with aristocratic and republican principles; that is, to base representation on wealth is an aristocratic principle but to base it on the number of inhabitants would invoke a republican principle, by which the people (wealthy or not wealthy) are represented. Accordingly, a mixture of both was necessary to compromise on the sensitive issue of representing slaves in a nation founded on the principle of equality. Slavery is strictly an aristocratic tenet, which is incompatible with republican virtue: aristocratic and republican principles were only combined because conscious efforts were made to dilute, as much as possible, the notion of protecting property in man. The Framers of the Constitution were cognizant about their compromise with slavery, and further understood that its abolition, in 1808 would correct the aristocratic savor of the Constitution.

As noted before, Frederick Douglass said that after the abolition of slavery "not a sentence or syllable would need

⁵⁰Ibid.

be altered."⁵¹ Douglass understood the dilemma that the Framers faced trying to compromise the "peculiar interests" of the Northern and the Southern states. Further, once it was time to end slavery, if any harsh sentiments on the status of blacks remained after the end of slavery, they would be restricted to the hearts and minds of men, not the United States Constitution. However, at stake at the Convention on July 12 was the compromise that would settle the appropriate and just manner of representation.

When the discussion began, Pierce Butler agreed with Morris' motion, and Butler still maintained that all the inhabitants, including blacks, should be represented. Moreover, Butler continued in his persistence concerning full representation for all inhabitants, in order to allow the Southern states the decisive role in the National Legislature.

A concern for George Mason was the problem of implementing and collecting taxes. He was uncertain as to how the system would actually function. Morris answered Mason's concern about taxation by saying that in his motion "direct"

⁵¹"Address for the Promotion of Colored Enlistments, "July 6, 1863, in The Life and Writings of Fredrick Douglass, ed. Philip S. Foner (New York: International Publishers, 1950), 3:365.

should be inserted regarding the appropriate means of taxation. As for the "indirect taxes on exports & imports & on consumption,"⁵² this rule would not apply since the consumption of these imports was nearly equal throughout the Union.

General Pinckney approved of Morris' idea and only added that the National Legislature should have a fixed number\ratio. Thus General Pinckney became more compromising and more likely to support the new government. However, he was still apprehensive about there being a tax on exports which were the result of slave labor; he could not understand why the National Legislature would tax the state of South Carolina for its exports. Accordingly, he hoped that a clause could be inserted in the Constitution to prohibit export taxes altogether. Although General Pinckney wanted to count "three-fifths of all other people" for the purpose of representation, he still did not want to count them for the purpose of taxation.

At this point in the Convention, William Davie thought "it was high time now to speak out"⁵³ over this dispute:

⁵²The Records of the Federal Convention, I, 592.

⁵³Ibid., 593.

He saw that it was meant by some gentlemen to deprive the Southern states of any share of Representation for their blacks. He was sure that N. Carola. would never confederate on any terms that did not rate them at least as 3/5. If the Eastern States meant therefore to exclude them altogether the business was at an end.⁵⁴

Davie thought that this "ratio" was fair and was the least which the Southern states would allow; to him it would have been unimaginable to think that the Southern states would easily accept the counting of slaves as anything less than three-fifths in order to satisfy the Northern states, especially since this was an acceptable ratio under the Articles of Confederation. The Southern states clearly recognized their potential for increased representation based on their slave population and fought to assure that slaves would be counted. The Southern states were willing to go without a Union in order to protect their "peculiar interest," and would rather confederate with other states that shared the same interests, than confederate with states that did not value it.

⁵⁴Ibid.

Although William Samuel Johnson "thought that wealth and population were the true, equitable rule of representation,"⁵⁵ he viewed population as the best measure of wealth. He thought that above all, people will long for a state that is blessed with fertile land and is capable of developing commercial wealth so as to provide abundance for its inhabitants. As Johnson saw it, men would not gather where there was not wealth; therefore, where there is wealth, there will likely be men. Because of this connection between wealth and population, he thought it necessary to include blacks "equally" with whites so as best to represent the wealth of each state. In a particular manner, Johnson's reasoning seems correct; that is, all the inhabitants (blacks and whites) should be counted because they each represent wealth. Yet, neither he nor others like him, were going to allow the slaves full representation and full participation in government affairs.

Morris thought it was also time for him to speak out, and observed that concerning his reasons for attending the Convention that:

⁵⁵Ibid.

He came here to form a compact for the good of America. He was ready to do so with all the States: He hoped & believed that all would enter into such a Compact.⁵⁶

Morris believed that a government should be formed among all the states represented in the Convention. He regarded it as naive for the Eastern states to think that the Southern states would enter into a compact which would not at least minimally protect their "peculiar interest." He said that it was similarly fallacious for the Southern states to believe that they might be allowed to dominate the new government. For these reasons Morris and Madison would later argue that the three-fifths compromise was the best that either side could ever hope to get.

After the point was nearly settled, Randolph, as if not hearing anything said previously, once again fought for the full representation of slaves in the rule of representation. Nonetheless, he did argue regarding a point which was raised shortly before this, that the holders of this "species of property"⁵⁷ needed the protection of that property in order to

⁵⁶Ibid.

⁵⁷Ibid., 594.

feel secure under the new government. The Northerners had realized that the Southerners were not going to form a union unless their particular species of property was going to be protected, and that, unless some concession was made, the Convention and the hope for a new government would be lost.

Rufus King raised objections once again about allowing too much power in the legislature regarding the "rule of numbers." He was uncertain about the "index of the relative wealth"⁵⁸ regarding the states and also about how it might change in the future. The changes that would occur in population and wealth would certainly put some part of the Republic at an "unjust advantage,"⁵⁹ King argued, adding that the ratio for representation should be fixed and that the National Legislature should not be able to change it. Last, King warned against threats being given by the Southern states. He said:

If they <the Southern states> threaten to separate now in case injury shall be done them, will their

⁵⁸Ibid., 595.

⁵⁹Ibid.

threats be less urgent or effectual, when force
<numbers> shall back their demands?⁶⁰

King spoke regarding the Southern states and the power they would have if they gained control of the National Legislature. If they threatened during the Convention, what would they have done if they had gained control? Perhaps, the Civil War would have been fought earlier. In 1860 Southern states did not have total control over the Union, but threatened to withdraw and succeeded in withdrawing from the United States because of the continuation of slavery, the same issue that perplexed the Convention.

Pinckney again advocated that blacks should be considered equal with whites in determining the basis for representation since their labor counted just as much as any white's. He reasoned that, like the "pecuniary resources of the North,"⁶¹ slaves were the peasants in the South, thereby making North and South equal with respect to wealth. At this point, it seemed as though Pinckney was trying anything to convince other Southerners that they should not settle for anything less than blacks to be considered as wholes. Although he

⁶⁰Ibid., 595-596.

⁶¹Ibid., 596.

continued to make this argument, this type of demand from the delegates began to lose support throughout the Convention.

This day concluded with a vote to consider Pinckney's motion for allowing "equal representation." The vote was eight to two in the negative. Subsequently, the Convention seemed to be in agreement with the three-fifths ratio. The last vote taken was:

On the question on ye. whole proposition; <as proportioning representation to direct taxation & both to the white & 3/5 of black inhabitants, & requiring a census within six years--& within every ten years afterwards.>⁶²

This motion passed, by a vote of six to two, with South Carolina and Massachusetts divided. After this debate on July 12, and having settled the ratio of representation (three-fifths) for the purpose of taxation, the members began to work toward a second compromise on how to establish representation, on the "rule of numbers" or on wealth.

⁶²Ibid., 597.

JULY 13

As the session opened this morning, Elbridge Gerry moved:

That from the first meeting of the Legislature <of the U.S> till a census shall be taken all monies to be raised <for supplying the public Treasury> by direct taxation, shall be assessed on the inhabitants of the <several> States, according to the <number of their> Representatives <respectively> in the 1st. branch.⁶³

Gerry thought this to be the best mode of truly adhering to the principle of conjoining taxation and representation. In Gerry's attempt to apply the principle equally, George Read reminded him that some of the Southern states were particularly hesitant to take their full representation, since they would be taxed on the basis of it. Read had suspected that the Southern states wanted to avoid taxation; however, they still favored the aggregate number of inhabitants being counted for the purpose of representation. They wanted the census to be taken after a longer period of time so as to postpone settling the question.

⁶³Ibid., 601.

In attempting to resolve the problem of augmentation, James Madison reminded the convention as did Morris, that the genuine

difference of interest in the U. States lay not between the large & small, but the N. & Southn. States, and finding that the number of members allotted to the N. States was greatly superior, he should have preferred, an addition of two members to the S. States, to wit one to N & to S. Carla. rather than of one member to Virginia.⁶⁴

Madison was persistent throughout the Convention in recalling to his colleagues that the real difference was between the Northern and Southern states over slavery. Aside from all the other differences, this one was involved in every important decision that the convention made. Madison agreed that the three-fifths compromise, along with his scheme of representation, was the best the Convention could hope for, seeing that it "tended to moderate the views both of the opponents & advocates for rating very high, the negroes."⁶⁵ Madison realized that this issue was very sensitive and had

⁶⁴Ibid., 602.

⁶⁵Ibid.

to be dealt with cautiously, yet sternly, so as not to allow the Southern states to gain enduring benefit from the resolution.

The gentleman from Connecticut, Oliver Ellsworth, did not join with the opinions of Madison or of Morris, since "fractions" could not be utilized properly in the apportionment of representatives. Ellsworth failed to recognize that the fraction was to remain constant, but that the number of representatives would vary with the population. Nonetheless, Roger Sherman, along with others, continued to argue that Congress would still have too much power over the principles of liberty.

At this time, the Convention decided to return to the motion made by John Randolph on July 9 and to change it slightly, to exclude the word "wealth" and "adjust the resolution to that requiring periodical revisions according to the number of whites & three fifths of the blacks"⁶⁶ The motion was as follows:

But as the present situation of the States may probably alter in the number of their inhabitants,

⁶⁶Ibid., 603.

that the Legislature of the U.S. be authorized from time to time to apportion the number of representatives: and in case any of the States shall hereafter be divided or any two or more States united or new States created within the limits of the U.S. the Legislature of U.S. shall possess authority to regulate the number of inhabitants; according to the provisions hereafter mentioned.⁶⁷

Therefore, the provision merely stated that the National Legislature would "from time to time" be allowed to alter the number of representatives as the number of inhabitants would rise in the respective states. However, the method used to determine representation would be by, first, taking a census of all free inhabitants along with three-fifths of all other people and, second, determining by that number the state's net population. Also, this provision would allow the National Legislature to determine the ratio of representatives per number of inhabitants.

This provision was immediately rejected by Morris, who thought it incoherent. Morris demanded clarification on whether or not "negroes" were to be counted as inhabitants or

⁶⁷Ibid.

as property. He thought that if they would count as inhabitants, then they should be "added in their entire number, and not in the proportion of 3/5."⁶⁸ Yet, if the negroes were to be calculated as property, then "the word wealth was right, and striking it out would produce the very inconsistency which it was meant to get rid of."⁶⁹ Morris, along with Madison, asserted that the Convention was severely divided between the Northern and Southern states. He saw that the Southern gentlemen were being persistent once again and would "not be satisfied unless they see the way open to their gaining a majority in the public Councils."⁷⁰

Morris believed that the true distinction between the states was either "fictitious or real"⁷¹ and said:

if fictitious let it be dismissed & let us proceed with due confidence. If it be real, instead of attempting to blend incompatible things, let us at once take a friendly leave of each other. There can be no end of demands for security if every

⁶⁸Ibid., 604.

⁶⁹Ibid.

⁷⁰Ibid.

⁷¹Ibid.

particular interest is to be entitled to it. The Eastern States may claim it for their fishery, and for other objects, as the Southn. States claim it for their peculiar objects.⁷²

Hence, in the statements made by Morris and Madison regarding the "peculiar objects" of the Southerners, neither of them reasoned that these "peculiar objects" should be protected by law, especially not by the law of the Constitution. However, it is apparent from the records that Morris and Madison knew that the Constitution would have to tolerate slavery where it already existed. Also, it is important to emphasize that Morris reminded the Convention that the Convention cannot "blend incompatible things," such as, the two distinct interests of the Northern and Southern states. In clear terms, the Northern states did not consider slaves to be "property," whereas the Southern states did not care as much as did the Northern how they were defined, as long as the South was allowed to keep slaves and continue profiting from them. The South seemed to consider slaves as property or persons, depending on which definition was more appropriate to assure protection of their interest.

⁷²Ibid.

Pierce Butler once again made a strident plea on behalf of the Southern states to say that "their negroes may not be taken from them which some gentlemen within or without doors, have a very good mind to do."⁷³ Butler insisted that the Southern states could not be made to give up their "peculiar interest," since this would be depriving them of their wealth. Further, Butler contended that the "people & Strength of America are evidently bearing Southwardly & S. westerly."⁷⁴ Butler, like other "Southern gentlemen," did not realize that slavery would only hinder the growth of the nation to new territories and would eventually bring about a much greater conflict than already existed. However, among the Framers were those cognizant of the limits to abolishing slavery, and they still sought to reach the best compromise possible.

James Wilson also saw the problem as arising between two distinct interests and did not want to give in to the demands of the Southern states:

Conceiving that all men wherever placed have equal rights and are equally entitled to confidence, he viewed without apprehension the period when a few

⁷³Ibid., 605.

⁷⁴Ibid.

states should contain the superior number of people. The majority of people wherever found ought in all questions to govern the minority. If the interior Country should acquire this majority they will not only have the right, but will avail themselves of it whether we will or no.⁷⁵

Wilson could see that since there was such a large dispute over who (or what part of the nation) would govern, jealousies would set in and could destroy the new nation before it ever became operable. It also seems clear that Wilson understood the deeply-rooted resentment on the two sides and foresaw a possible separation, since each sought to protect its own special interest. This situation necessitated a compromise which would allow neither side to gain the superior advantage.

Wilson asked why, if numbers were not the best rule, no one had come up with a better idea. He reminded the delegates that since 1783, Congress had not been able to devise a better plan, since the "rule of numbers, does not differ much from the combined rule of numbers & wealth."⁷⁶ And he further explained that:

⁷⁵Ibid.

⁷⁶Ibid.

The cultivation & improvement of the human mind was the most noble object. <of government> With respect to this object, as well as to other personal rights, numbers were surely the natural & precise measure of Representation. And with respect to property, they could not vary much from the precise measure.⁷⁷

Wilson recognized that this compromise was the best that could be made under the difficult circumstances presented by the two distinct interests. As Madison noted, the split between the Southern and Northern interests required that both sides be accommodated. Thus, allowing the "rule of numbers" to persist, the Framers deviated from their sacred principles of liberty, but produced a document that sought to attain eventually the liberty which had been fought for so gallantly in the American Revolution.

To close the day, a motion was made to vote on the "question to strike out wealth" from the plan. It was passed by a vote of nine to one, leaving Delaware divided. This vote, on the proper manner of representation, was a major hurdle whose overcoming meant that the delegates were nearly finished with the task which they had set out to accomplish.

⁷⁷Ibid.

JULY 15

The Grand Committee met on this day for final resolution of the rule of representation. The Committee was agreed that they would concede to the Resolution of Congress in April of 1783, that is, the federal ratio of three-fifths. Moreover, they composed a plan that would allow for the second branch to have equal representation. Additionally, the first branch would be represented proportionally as established by the federal ratio, and all money bills would originate in the first branch. But when a vote was taken by the Committee on July 15, the plan failed to pass and was subsequently reported to the whole Convention to decide upon.

JULY 16

As the Convention met on the morning of July 16, the question for agreeing to the report from the Grand Committee was taken, passing five to four, with one state divided. The resolution⁷⁸, in brief, set forth the original formation of

⁷⁸According to the Convention's Journal the resolution adopted on July 16 read as follows: "Resolved -- That in the original formation of the Legislature of the United States the first Branch thereof shall consist of Sixty five members -- of which New Hampshire - three. Massachusetts -eight. Rhode Island - one. Connecticut -five. New York - six. New Jersey - four. Pennsylvania - eight. Delaware - one. Maryland - six. Virginia -ten. North Carolina -five. South Carolina - five. And Georgia, three. But as the present situation of the States may probably alter in the number of their inhabitants the Legislature of the United States shall be authorized from time to time to apportion the number of

the first branch; required that representation ought to be proportional to taxation; required that a census be taken six years after the first meeting of the first legislature and subsequently ten years thereafter; and required that the three-fifths ratio recommended by Congress in their resolution of 1783 would be used for the purpose of representation. It also gave the power of raising or apportioning money for the

representatives: and in case any of the States shall hereafter be divided, or enlarged by addition of territory, or any two or more State united, or any New States created within the limits of the United States the Legislature of the United States shall possess authority to regulate the number of representatives: in any of the foregoing case upon the principle of their inhabitants, according to the provisions hereafter mentioned, namely.

Provided always that representation ought to be proportional according to direct Taxation; and in order to ascertain the alteration in the direct Taxation, which may be required from time to time by the changes in the relative circumstances of the States -- Resolved that a Census be taken within six years from the first Meeting of the Legislature of the United States, and once within the term of every Ten years afterwards of all the inhabitants of the United States in the manner and according to the ratio recommended by Congress in their resolution of April 18, 1783 -- and that the Legislature of the United States shall proportion the direct Taxation accordingly.

Resolved That all Bills for raising or apportioning money, and for fixing the salaries of the Officers of the Government of the United States shall originate in the first Branch of the Legislature of the United States, and shall not be altered or amended by the second Branch -- and that no money shall be drawn from the Public Treasury but in pursuance of appropriation to be originated by the first Branch.

Resolved That in the second Branch of the Legislature of the United States each State shall have an equal vote."

government to the first branch and required its approval on all money drawn from the public treasury. Last, it apportioned each state an equal vote in the second branch of the legislature.

THE GREAT COMPROMISE

Although the Convention continued its debates after July 16, the Great Compromise had allowed the Framers to put at rest, at least until 1808, the question of slavery in the new republic. The Great Compromise on representation was fundamental.⁷⁹ It altered the defects of the Articles of Confederation and gave shape to the legislature, the central organ of republican government.⁸⁰ The Compromise determined the scheme of representation for each state and provided for proportional representation in the first house and equal representation in the second house. On the surface, it seemed as though the Southerners, even with the Great Compromise, had managed to protect their peculiar species of property. Although the protection was offensive to most, the Constitution allowed for it to be limited to states where it already existed. However, the Northwest Ordinance, which was

⁷⁹Donald L. Robinson, Slavery in the Structure of American Politics: 1765-1820, 205.

⁸⁰Ibid.

being drafted as the Convention itself was deliberating, sought to prohibit the slave trade in the United States, as well as slavery in all future territorial acquisitions.

CHAPTER V

CONCLUSION

The goal of this study has been, in illustrating how the three-fifths compromise affected the basic character of the Founding, to explore the question of: [W]hether the compromise with slavery was fundamental or was incidental? If fundamental, Justice Marshall and Brennan would have been correct in denigrating "original intent." If incidental, they would have not. This question was essentially answered in the opening chapter, by recalling the words of Frederick Douglass: "Abolish slavery to-morrow [sic], and not a sentence or syllable of the constitution need be altered... If in its origin slavery had any relation to the Government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed."¹ Through "the magnificent structure," Douglass paid tribute to the United States Constitution by acknowledging that it gave "no claim, no sanction to the claim of property in man,"² and that once the institution was abolished, the Constitution would remain untarnished with respect to the inherent evil. It was added

¹"Address for the Promotion of Colored Enlistments, : July 6, 1863, in The Life and Writings of Frederick Douglass, ed. Philip S. Foner (New York: International Publishers, 1950), 3:365.

²Ibid.

that the Constitution must be read in light of the Declaration to distinguish the scaffolding from the Constitution's structure. As noted by Herbert J. Storing,

"Scaffolding" catches the intention exactly: support slavery strong enough to allow the structure to be built, but unobtrusive enough to fade from view when the job was done.³

This view is in concurrence with Edward J. Erler, when he writes: "The clauses dealing with slavery in the Constitution are indeed scaffolding that can be removed without doing violence to the structure itself."⁴ The paramount needs were to establish a constitution that would be built on the principles of the Declaration; to keep building, even after its ratification through the amendments of the people; and, when the "magnificent structure" was complete, to remove the "scaffolding" of slavery and find that the structure had no fundamental flaws.

³Herbert J. Storing, "Slavery and the Moral Foundations of the Republic," in The Moral Foundations of the American Republic, ed. Robert H. Horwitz, (Charlottesville: University Press of Virginia: 1987), 321.

⁴Edward J. Erler, Slavery and the Constitution, (Forthcoming) [photocopy], 34.

In the opening chapter, this thesis distinguished two thoughts on the question of "original intent," in light of the occasion of the celebration of the Bicentennial of the United States Constitution. The first view, represented by Justice Thurgood Marshall, contended that he "cannot accept an invitation to celebrate the Bicentennial, because it has no real historical or political significance to American political discourse." Yet, as this thesis has shown and as it was argued by former Attorney General Edwin Meese III, it is necessary to celebrate and to study the thoughts and actions of the Framers, because "[W]e have an obligation today--a moral obligation--to restore those institutional arrangements that the Founders knew to be essential to the nurturing of public virtue."⁵ That is to say, there is an obligation for citizens to reflect upon the founding principles of the regime and be fair in our criticism of the statesmen who sought to construct a nation based on the simple proposition that all men are created equal.

Justice Marshall cannot see, as Frederick Douglass before him saw, that the compromise with slavery was a "political necessity," to establish a union that would be firm enough to

⁵Edwin Meese, III, "The Moral Foundations of Government," in Still the Law of the Land, ed. Joseph S. MacNamara, (Hillsdale: Hillsdale College Press, 1987), 76.

eliminate slavery from the nation. Without the Constitution it is likely that slavery would have remained long after 1865. If there had been no compromise on the issue of representation in the Constitution, and nothing had been accomplished in the summer of 1787, the "nation" would have been left to be governed by the Articles of Confederation. Since the government under the Articles was incapable of enforcing laws that its Congress passed, the annulment of slavery would have been a moot point, because only the interest of the stronger would have prevailed. Justice Marshall would have been more accurate if he had described the Articles of Confederation, not the Constitution, as "defective from the start." However, Frederick Douglass, a former slave, held that the Constitution was not "defective from the start," because nowhere in it did it give the claim to property in man. Who better to describe the Constitution than a former slave, who, like Lincoln, held that the Constitution was the vehicle necessary to abolish slavery?

But it was Abraham Lincoln who best understood the Framers' intent with regard to the toleration of slavery. At his address at the Cooper Union, he said the following about the Framers:

Let all who believe that "our fathers, who framed the Government under which we live, understood this question just as well, and even better, than we do now," speak as they spoke, and act as they acted upon it. This is all Republicans ask--all Republicans desire--in relation to slavery. As those fathers marked it, so let it be again marked, as an evil not to be extended, but to be tolerated and protected only because of and so far as its actual presence among us makes that toleration and protection a necessity. Let all the guaranties those fathers gave it, be, not grudgingly, but fully and fairly maintained.⁶

To Lincoln, the Framers understood the compromise they made with slavery and representation; their primary mission was to establish a Union and secondly, to concern themselves with the eradication of the evil in the states.

Again, Lincoln in the Cooper Union address, when analyzing the thoughts of the Southerners and their assumptions that they could take slaves into the federal

⁶Collected Works of Abraham Lincoln, Roy P. Basler ed., (New Brunswick: Rutgers University Press, 1953) III, 535.

territories and hold them as property, said:

...no such right is specifically written in the Constitution. That instrument is literally silent about any such right. We, on the contrary, deny that such a right has any existence in the Constitution, even by implication.⁷

That is, Lincoln like Alexander Hamilton, Rufus King, James Madison, Roger Sherman, Hugh Williamson, and other Framers understood the positions of Frederick Douglass, William Newell, and Thaddeus Stevens that, without the Constitution, no real government would have been possible, and, further, that the principles of the Declaration of Independence would never have been fully realized.

When the Framers of the Constitution sought to compromise on the sensitive issue of representation and how to count slaves, they took adamant positions based on their distinct species of property. Robert Morris understood the dilemma of the Southern states when he said, he "did not believe that those [the Southern states] would confederate on terms that

⁷Ibid., 343.

would deprive them of that trade."⁸ William Davie agreed with Morris, but went further and explained that

He saw that it was meant by some gentlemen to deprive the southern States of any share of Representation for their blacks. He was sure that N. Carola. would never confederate on any terms that did not rate them at least as 3/5. If the Eastern States meant therefore to exclude them altogether the business was at end.⁹

Although Davie thought the federal ratio fair, neither the Southern states nor he seemed to want to confederate without at least counting their distinctive species of property as three-fifths. This was the least they would grant. Yet it was Robert Morris who essentially spoke of the true distinction between the states when he said that they were either "fictitious or real":

if fictitious let it be dismissed & let us proceed with confidence. If it be real, instead of attempting to blend incompatible things, let us at

⁸Records of the Federal Convention, I, 588.

⁹Ibid., 593.

once take a friendly leave of each other. There can be no end of demands for security if every particular interest is to be entitled to it. The Eastern States may claim it for their fishery, and for other objects, as the Southn. States claim it for their peculiar objects.¹⁰

The Framers realized the clashing of two distinct interests and thus sought to bring about the best compromise possible. Yet it should be remembered that their compromise was not accidental, but consciously thought out. That is, by merely reflecting upon the fact that the Constitution does not sanction property in man and uses euphemism and circumlocutions to avoid usage of the terms "slave" or "slavery," one can clearly see that they did not want the Constitution to be tainted. Further, it should be noted that in all references to blacks, the terms "person" or "persons" are used, indicating that extreme care was taken to leave no sign of slavery in the Constitution. Once again, Lincoln best expressed this concern:

If they had only pledged their judicial opinion that such right is affirmed in the instrument by

¹⁰Ibid., 604.

implication, it would be open to others to show that neither "slave" nor "slavery" is to be found in the Constitution, nor the word "property" even, in any connection with language alluding to the things slave, or slavery, and that wherever in that instrument the slave is alluded to, he is called a "person;" [sic]--and whatever his master's legal right in relation to him is alluded to, it is spoken of a "service or labor which may be due,"--as a debt payable in service or labor. Also, it would be open to show, by contemporaneous history, that this mode of alluding to slaves and slavery, instead of speaking of them, was employed on purpose to exclude from the Constitution the idea that there could be property in man.¹¹

In speaking about the Framers, Lincoln, unlike Justice's Marshall and Brennan, argued that the Constitution was wholly necessary for the extinction of slavery in the United States. Lincoln, rebutting Stephen Douglas about the Framers' intent in the matter of the prohibition of slavery, said,

¹¹Collected Works of Abraham Lincoln, III, 545.

[T]hat the fathers of this government did not make it part slave and part free to remain permanently so, he would bring forward a few facts tending to show a reasonable and unbiased mind, that it was expected at that time that the institution of slavery would gradually come to an end. If they intended it to endure forever, why did they hedge it into its then existent limits? There is nothing said about it in the Constitution. The word slave or slavery is not mentioned in it. This was very singular if it was the intention that slavery should become a permanent institution... it was not done by accident but by design--as every one could see the framers of the Constitution expected that the institution would die.¹²

The Framers of the Constitution acted overtly rather than covertly. That is, the Framers recognized the concessions made to slavery in the Constitution, but left no sign of its existence to be found after slavery's abolition. More persuasively, it was explicit in the Constitution that the slave trade would end after 1808.

¹²Ibid., 466.

Frederick Douglass believed that the Constitution was anti-slavery and that it gave no claim or sanction to property in human beings, and one wonders how Justice Marshall can deny Douglass' assessment of the American Founding? Douglass said that the Federal Government was "in its essence" never anything but an antislavery government. So where can we find the "essence" of the Constitution? Does it lie in the provisions protecting chattel slavery? No. The "essence" of the Constitution is best remembered constantly by Abraham Lincoln, who at Gettysburg began by reminding everyone of the Declaration of Independence.

Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.¹³

From 1863, "Four score and seven years ago," translates into 1776, and refers to the date of the signing of the Declaration of Independence. The essence of the Constitution, therefore is to be found in its expression of the principles of the

¹³Collected Works of Abraham Lincoln, VII, 22.

Declaration of Independence derived from human nature¹⁴ and, in the words of the great Declaration, from "the laws of nature and of nature's God."

Justice Marshall, unlike Douglass or Lincoln, fails to see the "essence" of the American regime embodied in the Declaration and exemplified in the written Constitution. Douglass and Lincoln both saw the natural law teaching of the Declaration as the soul of the American polity--the standard maxim of its political life. Both not only believed in the sacred principles of the Declaration, but revered them as the best road to eradication of slavery in America.

However, Justice Marshall believes that we should not give the Framers of the Constitution any credit but would rather give credit to the framers of the Fourteenth Amendment. Justice Marshall evidently does not know that these latter-day framers, like William Newell, believed that in writing the Fourteenth Amendment they were fulfilling the promise of the Declaration. On this point, Harry V. Jaffa has written:

The leaders of the Revolution were well aware that there were inconsistencies between their principle

¹⁴Erlor, "Slavery and the Constitution," 31.

and their practices. Paradoxically, those inconsistencies were, in a certain sense, enjoined by the principles themselves. The Declaration of Independence propounded more than a doctrine, it propounded a problem as well. The doctrine of human equality condemns, not only slavery, but the government that is not grounded in the consent of the governed. In fact, it condemns government in opposition to the consent of the governed as itself slavery.... The Declaration itself indicates what it is that must mediate between its principles and their application: that it dictates prudence, ... present in the Declaration.¹⁵

Neither Justice Marshall nor Justice Brennan accept, as Douglass and Lincoln did, that the Declaration must "mediate between its principles and their application" through the notions of prudence, "present in the Declaration." According to Edward J. Erler, "[W]hat the Framers expected--and indeed what happened--was that the climate of opinion, constantly formed and shaped by the principles of the Declaration, would

¹⁵Harry V. Jaffa, American Conservatism and the American Founding, with an Introduction by Charles R. Kesler (Durham: Carolina Academic Press, 1984), 246.

eventually come to see slavery as inconsistent with the Founding principles of the nation."¹⁶

It is therefore a requirement, when interpreting the Constitution of the United States, to rely on the principles of justice, equality, and liberty set forth in the Declaration of Independence. Those principles, that Justices Marshall and Brennan believe can be improved upon, were, as stated earlier, already examples of virtue. Further, the reality that slavery had been instituted in the nation prior to both the Declaration of Independence (1776) and the United States Constitution (1787) must be remembered. Slavery before 1776 and after was protected, for the most part, by local laws. Although the Constitution protected slavery where it already existed, it limited its expansion into the federal territories. As mentioned above, the Framers believed that, over time, the part of the nation that held men in bondage would repudiate the belief that it was moral or legitimate to hold human beings as slaves. And, it was Lincoln's continued adherence to the doctrine of the Declaration that formed his thoughts and actions to finally fulfill the promise of equality to the nation conceived in liberty.

¹⁶Erler, "Slavery and the Constitution," 32.

It must be remembered that while "the Constitution was undoubtedly only an incomplete expression of the principles of the Declaration, it places no obstacles whatsoever in the way of their full implementation."¹⁷ Nowhere in the Constitution does it affirm property in a human being, nor does it prohibit blacks the right to vote or hold office. These prohibitions only existed as a matter of state jurisdictions. As Edward J. Erler has stated:

...the Constitution--and the politics it generates--must be properly seen as a means to the accomplishment of those ends that had been enunciated in the Declaration. For, it is only in the light of the Declaration that the rights and obligations that the Constitution was intended to secure can be seen as something more than mere positive law, subject to the rule of simple majorities.¹⁸

Therefore, to understand properly the Framers' intent it is necessary to keep in mind the principles of the Declaration,

¹⁷Ibid., 36.

¹⁸Ibid., 37.

because its teaching generates the cognizance of the natural law doctrine in the Declaration.

As for the Declaration of Independence, if any doubt is left about the Framers' intent with respect to the equality of all men, it is fitting to note that both slave owners and non-slave owners signed the document. Even though South Carolina, Georgia and Virginia balked at the language condemning the slave trade, George Anastaplo has rightly stated that

slave-owners signed the Declaration of Independence as readily as those who did not own slaves. But this does not cast light so much on the meaning of the "created equal" language as it does on the inability of men to give full effect to their principles in the circumstances by they are confronted. Whatever the private views on slavery of the authors of the Declaration, the public language they employed provided, and continues to provide, the classic statement of the maxim to which the Emancipation Proclamation and the thirteenth,

fourteenth and fifteenth amendments are decisive contributions.¹⁹

This comment well illustrates the point that slavery, although acknowledged in the Constitution, was only going to continue if some there had not been a concession in the Constitution as to its inevitable abolishment.

This thesis has attempted to promote understanding that the American Founding was dedicated to the equality of all men, as expressed in the Declaration, and that, because of necessary political compromise, slavery could not be eradicated prior to the development of a strong central government. Slavery stood directly in conflict with a government based on equality and intended to derive its powers from the consent of the governed. As Erler has said, "[I]f one accepts the idea--as [Frederick] Douglass did--that the Declaration provides the architectonic principles of the Constitution--then the decision [about slavery] is relatively easy."²⁰ Slavery is decisively against the principles of the

¹⁹George Anastaplo, "The Northwest Ordinance of 1787: Illinois' First Constitution," Illinois Bar Journal (November, 1986): 123, as quoted in Edward J. Erler, Slavery and the Constitution, 41-42.

²⁰Erler, "Slavery and Constitution," 34.

Declaration; the laws of nature and of nature's God prohibit the right to property in a human being.

So then are the "provisions regarding slavery in the United States Constitution consistent with the principles of liberty and equality set forth in the Declaration of Independence?"²¹ John Alvis answers well when he says:

We ought not forget that in a sense the entire frame of government established by the Constitution is a provision against slavery. The idea of higher written law, of limitations upon the powers of those who govern, of responsibility to the people, and of separation of executive, legislative, and judicial powers, all answer to the one great theme of rule of law. The essence of the ideal of rule of law is the conception of the act of governing as the product of reason rather than will.²²

To this comment might be added the famous words of Chief Justice John Marshall in his opinion in McCulloch v. Maryland,

²¹John Alvis, "Slavery Provisions of the U.S. Constitution: Means for Emancipation," Political Science Reviewer, 17 (1987): 264.

²²Ibid.

[17 U.S. (4 Wheat.) 316, 4 L.Ed. 579]. He wrote that the people of the United States, by adopting the Constitution, had expressed that "[T]his Constitution, and the Laws of the United States, which shall be made in Pursuance thereof, shall be the supreme Law of the Land." The "supreme Law of the Land" sought to abolish the slave trade by the year 1808, but politics kept postponing the inevitable day.

There is perhaps no more beautiful phrase by which to finish this thesis than one used by Abraham Lincoln, from Proverbs, 25, 11, to describe the relationship between the Declaration of Independence and the United States Constitution:

A word fitly spoken, is like apples of gold in pictures of silver.

To Lincoln, the "word fitly spoken," the apple of gold, to which we have devoted so much attention, was the assertion of principles in the Declaration of Independence. "The pictures of silver are the Union and the Constitution subsequently framed around it."²³ The pictures, said Lincoln, "were made

²³Harry V. Jaffa, How to Think About the American Revolution, (Durham: Carolina Academic Press, 1978), 140.

for the apple--not the apple for the picture." So let us act, he continued, "that neither picture or apple, shall ever be blurred, or broken."²⁴

²⁴Ibid., also see, Collected Works of Abraham Lincoln, IV, 168.

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