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# 1787: THE CONSTITUTION AND "THE CURSE OF HEAVEN"

WALTER E. DELLINGER III\*

On Thursday, July 5, 1787, the Constitutional Convention, having recessed for two days in honor of Independence Day, resumed its deliberations, then nearly at deadlock over the allocation of power between large states and small. As the convention threatened to break apart, Gouverneur Morris of Pennsylvania gave voice to the hopes and fears of the delegates. "He came here," Madison recounts Morris as saying, "as a Representative of America; he flattered himself he came here in some degree as a Representative of the whole human race; for the whole human race will be affected by the proceedings of this Convention."<sup>1</sup> We may, in our time, seriously doubt whether Morris and his colleagues could in any meaningful sense "represent the whole human race"; we cannot doubt, however, that the whole human race was to be affected by the Convention's proceedings. "The Country," Morris went on, "must be united. If persuasion does not unite it, the sword will. . . . The scenes of horror attending civil commotion can not be described. . . . The stronger party will . . . make traitors of the weaker; and the Gallows & Halter will finish the work of the sword."<sup>2</sup>

The framers who met at Philadelphia were moved not only by such apocalyptic fears, but by hopes as well, and by visions of the grandeur and importance of America. To review the work of the Constitutional Convention of 1787, as reflected in James Madison's extensive daily notes, beginning with the first day, May 25, and continuing day by day, draft by draft, through the Philadelphia

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\* Professor of Law, Duke University. This article began as a comment presented in March 1987 at the Fourth Annual Bill of Rights Symposium at The College of William and Mary. It evolved in a series of lectures in the spring of 1987 delivered in New Orleans, Washington, and New York City to federal judges and members of the bar. Except for noting quotations and acknowledgments, I have left this largely in the form of those lectures.

1. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 529 (M. Farrand ed. 1911) [hereinafter Farrand].

2. *Id.* at 530.

summer until the Convention, its work completed, finally rose on September 17, is to enter into another time and place, and to gain a sense—clouded, obscure, partial to be sure—of a truly extraordinary event in human history. A study of the unfolding architecture of the Constitution exposes the reader to statecraft of the highest order. One sees, in the records of this Grand Federal Convention, political debate of a quality that leaves one embarrassed by the comparative poverty of the public discourse of our own generation. The work produced during these four months was a Constitution whose writ yet runs, and now reaches from Philadelphia to the Arctic Range of Alaska.

The Convention was the work of men who even in their own time were seen as unusually gifted. The French chargé d'affaires wrote to his government as the meeting convened: "If all the delegates named for this Convention at Philadelphia are present, we will never have seen, even in Europe, an assembly more respectable for the talents, knowledge, disinterestedness, and patriotism of those who compose it."<sup>3</sup> Their work has lasted longer and served better as a foundation for free government than any other constitution ever written.

And yet, when the proposed Constitution was first revealed to the public and sent to state conventions for ratification or rejection, it produced one of the most savage and divisive political contests in American history. It was at first defeated in North Carolina, and it passed by only a handful of votes in the critical states of Virginia, New York, and Massachusetts—states in which supporters of ratification literally had to come from behind to win ratification by votes on the order of 89 to 78 in Virginia<sup>4</sup> and 30 to 27 in New York.<sup>5</sup>

To those of us accustomed to the subsequent sanctification of the Constitution, the question naturally arises: "What did the opponents see that was so *wrong* with the Constitution?" This is not an idle question. If we are to learn something from the bicenten-

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3. 3 Farrand, *supra* note 1, at 15. This letter is translated into English and quoted in C. ROSSITER, 1787 THE GRAND CONVENTION 138 (1966).

4. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 654-55 (J. Elliot 2d ed. 1937) [hereinafter Elliot's DEBATES].

5. 2 *id.* at 413.

nial of the Constitution, and if it is to serve as an occasion for renewal of a constitutional faith, not only do we need to attend to the virtues and arguments of those who drafted and supported the Constitution, but we should listen as well to the voices of those who opposed the Constitution and very nearly succeeded in defeating it. More importantly, we should reflect, by our own political and moral light, on those things that were wrong about our constitutional founding, even as we celebrate that which was profound, enduring and wise.

At the conclusion of my remarks, I want to recall those legacies of our constitutional founding that for me are most enduring: the institution of republican government, the vision of nationhood, and the very concept of constitutionalism itself. But in order to avoid an undue romanticization of the Constitution, let me begin by discussing the most troubling aspects of our constitutional origins: the framers' deep ambivalence about popular democracy and the founding generation's constricted view of who counted as a person, a constriction that reached in apogee in the Constitution's accommodation with the institution referred to by one delegate as "the curse of heaven."<sup>6</sup>

Listen, for a moment, to the framers' debate on May 31, 1787, when the Convention had not yet been sitting a week. The issue being discussed was whether the national House of Representatives should be elected by the people. According to Madison's notes, the debate proceeded as follows: "Mr. Sherman opposed the election by the people. . . . The people, he said, (immediately) should have as little to do as may be about the Government. They want information and are constantly liable to be misled."<sup>7</sup> Mr. Randolph of Virginia "observed that the general object [of the Constitutional Convention] was to provide a cure for the evils under which the U.S. laboured; that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy."<sup>8</sup>

These statements reflect the fact that one central issue in the minds of many of the framers was the need to curb the "excesses" of the state legislatures. In a real sense, the "problem" to which

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6. 2 Farrand, *supra* note 1, at 221.

7. 1 *id.* at 48.

8. *Id.* at 51.

the Convention was called in response was the problem of democracy—democracy in the state legislatures that was unchecked by any other power.<sup>9</sup> In the revolutionary ferment of 1776, and under the simple and democratic constitutions of that year, the middling and some lower classes—yeomen, farmers, mechanics—had achieved direct representation in the state legislatures.<sup>10</sup> To Madison, and to many of those gathered at Philadelphia, these newly constructed state legislatures exhibited the “inconveniences of democracy”<sup>11</sup> that flow from the expansion of the franchise. The populist, pro-debtor legislation enacted in many of the states was seen as a threat to vested rights and to what Madison candidly was to call in the tenth *Federalist* the “different and unequal faculties [that persons have] of acquiring property.”<sup>12</sup> As the delegates gathered in Philadelphia, rumors circulated that the Rhode Island assembly was considering legislation providing for the equal redistribution of all property every thirteen years. The framers’ fears of popular democracy and the strain of anti-egalitarian sentiment in the Convention can be seen in the remarks of Elbridge Gerry of Massachusetts: “The evils we experience flow from the excess of democracy. . . . [H]e was still . . . republican, but had been taught by experience the danger of the levelling spirit.”<sup>13</sup>

What are we to make of this? Was the Constitution a repudiation of the revolutionary spirit of 1776, an aristocratic document designed to benefit the few and the wealthy, as its opponents charged? Or did it fulfill the revolution by establishing a mature republican government that could preserve private rights, maintain stability, and facilitate progress?<sup>14</sup> These are questions that were not fully resolved in the ratification debates, nor have they been fully resolved in the two centuries that followed. They reflect a continuing dialogue in American political thought between the competing and often conflicting ideals of popular democracy, on the one hand, and vested rights on the other.

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9. Wood, *Democracy and the Constitution*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* 7 (1980).

10. *Id.* at 12.

11. 1 Farrand, *supra* note 1, at 135.

12. THE FEDERALIST NO. 10, at 58 (J. Madison) (J. Cooke ed. 1961).

13. 1 Farrand, *supra* note 1, at 48.

14. See Wood, *supra* note 9, at 3.

If there is a unifying theme to the Convention, it is the quest for the proper remedies for the threat of tyranny by legislative majorities. To Madison and others who supported the adoption of the Constitution, one of its great advantages was that it replaced the more simple and more direct democracy of the state legislatures with an overarching, complex government, national in scope, that provided for a filtration of popular views through men of supposedly greater learning and sophistication. In our own time, however, many are likely to respond with some sympathy to the arguments of the opponents of the Constitution, such as Willie Jones in North Carolina, Melancton Smith in New York, and Patrick Henry in Virginia, patriots too, but largely lost to history.<sup>15</sup>

One of the provisions of the proposed Constitution to which its opponents most strongly objected was the small size of the national House of Representatives. Fighting against ratification in New York, Melancton Smith argued that this size—sixty-five members for a nation of three million, with each congressman representing 46,000 people in districts that covered a vast terrain, would never be able to represent—that is, literally, to *re-present*—the people themselves.<sup>16</sup> There were more than a thousand state legislators in those thirteen loosely allied states. They were elected annually to packed legislative halls from small constituencies made up of friends and neighbors who very often knew them personally. With the adoption to the proposed Constitution, power was shifting from these state legislators to sixty-five national congressmen and twenty-six senators. In arguing against the creation of a national government in which these few legislators would each represent tens of thousands of voters, Melancton Smith revealed a conception of representation that rested on a vision quite different from Madison's. He spoke as follows:

The idea that naturally suggests itself to our minds, when we speak of representatives, is, that they resemble those they represent. They should be a true picture of the people, possess a knowledge of their circumstances and their wants, sympathize in all their distresses, and be disposed to seek their true interests.

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15. See H. MAYER, *A SON OF THUNDER: PATRICK HENRY AND THE AMERICAN REPUBLIC* (1986). Mayer's compelling biography of Patrick Henry will redress this imbalance. *Id.*

16. 2 Elliot's *DEBATES*, *supra* note 4, at 249.

The knowledge necessary for the representative of a free people not only comprehends extensive political and commercial information, such as is acquired by men of refined education, who have leisure to attain to high degrees of improvement, but it should also comprehend that kind of acquaintance with the common concerns and occupations of the people, which men of the middling class of life are, in general, more competent to than those of a superior class.<sup>17</sup>

As an example, Smith noted: "To exercise the power of laying taxes . . . with discretion, requires something more than an acquaintance with the abstruse parts of the system of finance. It calls for a knowledge of the circumstances . . . of the people—a discernment how the burdens imposed will bear upon the different classes."<sup>18</sup> He then argued that from these huge national congressional districts spanning great distances, only a famous planter or prominent person of great repute could be elected. "A substantial yeoman of sense and discernment, will hardly ever be chosen. . . . [I]t appears that the government will fall into the hands of the few and the great."<sup>19</sup>

If the opponents of the Constitution were for simple, popular democracy, and government as close to the people as possible, does it follow that the Constitution and those who framed and supported the Constitution were antidemocratic? That would be too simple a rendering of Madison's views. Madison was, to be sure, troubled by turbulent democracy in the state legislatures, and by the threat it represented to rights of property and contract and to other individual liberties. The problem with simple direct democracy, in his view, was tyranny by the majority. The great object for Madison was "[t]o secure the public good and private rights, against the danger of [the majority] faction, and at the same time to preserve the spirit and the form of popular government."<sup>20</sup> He did not believe that the cure for the "follies of democracy" was to be found in excluding the people from the government altogether.<sup>21</sup> In that early June debate, the source of those startling denuncia-

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17. *Id.* at 245.

18. *Id.*

19. *Id.* at 246-47.

20. THE FEDERALIST No. 10, *supra* note 12, at 61.

21. 1 Farrand, *supra* note 1, at 51.

tions by many delegates of the "follies of democracy," Madison argued successfully for having the people themselves elect the House of Representatives. Madison was, in his words, "an advocate for the policy of refining the popular appointments by successive filtrations, but thought it might be pushed too far"<sup>22</sup> and the people lost sight of altogether. "He thought too that the great fabric to be raised would be more stable and durable if it should rest on the solid foundation of the people themselves. . . ."<sup>23</sup>

For Madison, the mediated Constitution, with its filtration of popular views, represented the last, best hope for the survival of republican government. Although the framers of the Constitution did not fully share the populist views of their opponents, they at least recognized that a just government ultimately had to rest on popular consent—an idea that was itself relatively unique in the world of nations in the eighteenth century. Those who drafted the Constitution and supported its ratification did not by any means reject the bedrock principle of the consent of the governed. That principle, after all, was what both sides were fighting for in the battle over ratification.<sup>24</sup>

As we celebrate the bicentennial of the Constitution, we need to recall that the immediate success of the Constitutional Convention rested in part on one literally unspeakable compromise of principle. The issue of slavery did not simply slip past an inattentive Convention. For much of the Convention the delegates dared not speak slavery's name as they dealt with those who were euphemistically referred to as "three fifths of all other Persons,"<sup>25</sup> but the division over slavery burst upon the Convention in late summer when Gouverneur Morris of Pennsylvania delivered a thunderous attack on the what he called "the curse of heaven."<sup>26</sup> In his notes for August 8, Madison wrote:

The admission of slaves into the Representation when fairly explained comes to this: that the inhabitant of Georgia and S.C. who goes to the Coast of Africa, and in defiance of the most

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22. *Id.* at 50.

23. *Id.*

24. See Berns, *Does the Constitution "Secure These Rights?,"* in *HOW DEMOCRATIC IS THE CONSTITUTION?*, *supra* note 9, at 75.

25. U.S. CONST. art. 1, § 2, cl. 3.

26. See *supra* note 6 and accompanying text.

sacred laws of humanity tears away his fellow creatures from their dearest connections & dam[n]s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind, than the Citizen of Pa or N. Jersey who views with a laudable horror, so nefarious a practice.<sup>27</sup>

Now one might legitimately ask why one should even talk about slavery on the occasion of the bicentennial of a Constitution from which this particular stain has long since been removed. My response is that both slavery and race have had an enormous impact on the development of the American Constitution, and we cannot fully understand our present constitutional conflicts over the permissible use of race unless we understand the role of race in our constitutional origins and throughout our constitutional history. It is also important to view our constitutional tradition with a modicum of humility, and to do that we must never lose sight of the fact that our Constitution was, in this respect, conceived in original sin.

The critical moment came on August 29. The Southern states at the Convention wanted to guarantee their freedom to import yet more slaves from the coast of Africa. The New England states wanted Congress free to enact, by simple majority, "navigation" legislation to provide protection to the New England shipbuilding and shipping industries—protective legislation that would be costly to the exporting South. Perhaps, it was suggested, if sent to a committee, these subjects—slavery and navigation—might form the basis of a bargain.<sup>28</sup> And so they did.<sup>29</sup> The two-thirds requirement for navigation legislation was dropped,<sup>30</sup> Congress was prohibited from interfering with the importation of slaves before the year 1808,<sup>31</sup> and the slave trade clause was subsequently en-

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27. 2 Farrand, *supra* note 1, at 222.

28. 2 Farrand, *supra* note 1, at 374. The suggestion was made, surprisingly, by Gouverneur Morris, who had previously expressed opposition to slavery in the strongest terms of any delegate to the convention. *Id.*

29. *Id.* at 400.

30. *Id.* at 453.

31. *Id.* at 414-15.

trenched, immunized from the amendment process until the year 1808.<sup>32</sup>

Before the business was finally done, however, one last provision was added. Before quoting this provision, let me note that throughout the process of drafting the Constitution, every draft of every provision used the pronoun "he." It is a commonplace observation that "he" is used in the Constitution in its generic sense as encompassing both genders. This is, of course, technically true. But this next draft provision casts a very different light on the Constitution's use of the pronoun "he." For this provision, adopted unanimously for the next-to-last draft of the Constitution, uses the phrase "he or she." Although the pronouns drop out altogether from the final wording of this provision of the Constitution, it is nonetheless extraordinary to find the Convention unanimously adopting a draft provision using the phrase "he or she." At the conclusion of the compromise over navigation and slavery, Mr. Butler moved to insert the following clause: "If any person bound to service or labor in any of the U—States shall escape into another State, *he or she* shall not be discharged from such service or labor . . . but shall be delivered up to the person justly claiming their service or labor."<sup>33</sup> Throughout the Constitution and all its drafts, "he" is used to refer to President, Vice-President, Senator; "she" appears but once in the evolving drafts of the Constitution, and "she" can be one, and only one thing: a fugitive slave.

What did the Constitution mean for human freedom? The adoption of the Constitution meant that for the first time there would be a national union in which free states were under a constitutional mandate to return fugitives back into slavery. The importance of this was not lost on the Southern delegates. In their report to the Governor of North Carolina, written the day after the Convention adjourned, the North Carolina delegates cited, as one of the advantages of the proposed Constitution, that "[t]he Southern States have also a much better Security for the Return of Slaves who might endeavour to Escape than they had under the original

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32. *Id.* at 559.

33. *Id.* at 453-54 (emphasis added).

Confederation.”<sup>34</sup> Moreover, with the new Constitution, there would now be a national government empowered for the first time to suppress insurrections, and therefore capable of putting down slave revolts. In his August 8 “curse of heaven” speech, Gouverneur Morris asked rhetorically, “And What is the proposed compensation to the Northern States for a sacrifice of every principle of right, of every impulse of humanity. They are to bind themselves to march their militia for the defense of the S. States; for their defence agst those very slaves of whom they complain.”<sup>35</sup> The year 1787 thus marks the occasion—the first—of formal *national* complicity in the maintenance of the institution of slavery.<sup>36</sup>

What, in the end, may be said about the Constitution and human freedom? Is it possible that the adoption of a national Constitution in fact doomed the institution of slavery? Is it possible that the Constitution, which at critical points both acquiesced in and facilitated slavery, contained in its larger philosophy of government the seeds of slavery’s demise? What I mean to suggest is that the Constitution both drew upon and helped create a conception of republican government with which slavery was inherently incompatible. The Constitution was in this sense a document at war with itself.

The creation of a government that rested on the fundamental premise of consent of the governed, and which had among its central values human dignity and individual liberty, made slavery a constitutionally variant institution even in 1787. The constitutional institution of slavery became even more precarious when the Bill of Rights was proposed by the first Congress and adopted by the states. I mean this, in part, in a somewhat technical legal sense. Consider, for example, the problems that would be posed for the rendition of fugitive slaves if one were to take the Bill of Rights seriously. The text of the Constitution certainly invites arguments

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34. 3 Farrand, *supra* note 1, at 84 (letter from William Blount, Richard D. Spaight, and Hugh Williamson to Governor Caswell, September 18, 1787).

35. 2 *id.* at 222.

36. For excellent accounts of the consideration of slavery at the Constitutional Convention, see D. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765-1820* (1979); Finkleman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 188-225 (1987).

that when a person of color present in a free state was alleged to be a fugitive slave, he or she was entitled, under either the sixth or seventh amendments to the Constitution, to a trial by jury, to the right to confront witnesses, and to the right to be brought before an article III judge if the proceedings were federal. Enforcement of these rights would have rendered return of fugitives difficult, and in some areas of the country impossible. Juries in the free states often would have stood in the way of return. A powerful argument could be made, moreover, that slavery could not constitutionally be maintained in any of the territories of the United States after the addition of the fifth amendment, which provided that "no person" could be deprived of "liberty" by the federal government "without due process of law."<sup>37</sup>

Proslavery lawyers could, and did, marshal arguments on the other side of these specific legal questions. Indeed, they could argue that the due process clause of the fifth amendment guaranteed the slave owner's property right in his slaves against federal deprivation. They could argue, as Chief Justice Taney did in *Dred Scott v. Sandford*, that the right to hold slaves was "distinctly and expressly affirmed in the Constitution"<sup>38</sup>—a clearly erroneous statement—and that every debatable constitutional question should therefore be resolved in favor of protecting the institution of slavery, and that the powers granted to Congress, such as the power to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States"<sup>39</sup> must be read to contain an unstated exception precluding regulations that would limit slavery.

The fact that those who wrote the Constitution took great pains never to speak slavery's name cuts against Taney's argument that the Constitution should be read throughout in light of a principle of affirmative approval of slavery. Efforts were in fact made at the Convention to avoid any such sense of a generalized approval of slavery. The fugitive slave clause, for example, was amended at the end of the Convention to take out the phrase "a person *legally* held to service in one state" and replace it with the phrase "a per-

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37. U.S. CONST. amend V.

38. 60 U.S. (19 How.) 393, 451 (1856).

39. U.S. CONST. art. IV, § 3, cl. 2.

son held to service in one state *under the laws thereof*.”<sup>40</sup> The change was made to avoid saying that anyone could lawfully be held to slavery in any natural law sense, to avoid any suggestion of constitutional approval, and to merely state the positive law fact that some persons were held to service not “legally” but merely “under the laws” of some states.<sup>41</sup>

When I refer to the incompatibility of slavery and the Constitution, moreover, I am referring not merely to the particular problems of jury trials for fugitives, or the potential unconstitutionality of slavery in the territories, but more fundamentally to the deep conflict between slavery and the very nature of the kind of polity the framers had created. In a sense, the failure of the Founders was not that their Constitution accorded too little dignity to “persons,” but that they and their generation had a far too constricted view of who was a person in the real sense.

My suggestion that slavery was fundamentally incompatible with the principles underlying the Constitution resonates with Lincoln’s bold argument that slavery was incompatible with the philosophy of the Declaration of Independence. Lincoln drew upon the Declaration and the republican and libertarian principles of the founding as he articulated his aspirational views in the great debates with Judge Douglas in 1858. Appealing to “the better angels of our nature,”<sup>42</sup> Lincoln asked how his opponent and his audience could reconcile slavery and the principles of America’s foundational covenants.

I adhere to the Declaration of Independence. If Judge Douglas and his friends are not willing to stand by it, let them come up and amend it. Let them make it read that all men are created equal except negroes. Let us have it decided, whether the Declaration of Independence, in this blessed year of 1858, shall be thus amended.<sup>43</sup>

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40. 2 Farrand, *supra* note 1, at 628 (emphasis added).

41. According to Madison’s notes, “the term ‘legally’ was struck out, and ‘under the laws thereof’ inserted . . . in compliance with the wish of some who thought the term (legal) equivocal, and favoring the idea that slavery was legal in a moral view. . . .” *Id.*

42. Lincoln used this phrase in his First Inaugural Address. 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 12 (J. Richardson ed. 1897).

43. CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 81 (P. Angle ed. 1958).

Now Lincoln was a good enough lawyer to know that, notwithstanding the sweeping language of the Declaration, its authors had no intention in 1776 of freeing the slaves. No one thought that the Declaration of Independence was an emancipation proclamation. But Lincoln insisted on referring to the general principles of republican liberty and equality embedded in the Declaration. He refused to assume that the framers were simply being hypocritical in proclaiming liberty and equality while acquiescing in slavery. And perhaps he knew this greater truth. Perhaps he knew, in a phrase uttered by Charles L. Black, Jr., in another context, that "hypocrisy may commit itself beyond easy retraction. . . . [Indeed,] . . . it may turn out that what seemed hypocrisy was commitment all the while; no more than persons do nations fully know their minds all at once."<sup>44</sup>

A commitment to republican principles of government cannot be cabined easily. If the framers adopted a Constitution that seemed to strengthen slavery, they also gave us larger principles of government that those who came later could invoke to set that institution on the road to ultimate extinction.<sup>45</sup>

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44. Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1103 (1986).

45. I would argue that nothing in the text of the original Constitution stood in the way of national action abolishing or virtually abolishing slavery, even in the absence of the Civil War amendments. I tested this proposition by asking on my 1987 constitutional law exam the following hypothetical question:

The year is 1858. You are a young lawyer who has agreed to assist a candidate for the United States Senate from Illinois. The candidate is opposed to slavery. If his party were to gain majority power in the Congress, he would want the national government to do all that is constitutionally possible to place slavery "on the path of ultimate extinction." He asks you to prepare a memorandum that briefly summarizes the present constitutional status of slavery and then suggests and analyzes every step the national government might take, under the Constitution as it is now written in 1858, to limit, control, and wherever possible to abolish slavery and the trade and commerce in slaves.

He assumes that it is unlikely that three-fourths of the states could be persuaded to ratify an amendment abolishing slavery [a very realistic assumption in 1858]. That is why he wants to know what could be done by national legislation (or judicial decisions) under the existing Constitution if a majority of Congress were determined to do all within its constitutional power to oppose slavery. He is aware of the recent decision in *Dred Scott* holding, among other things, that Congress lacks the power to abolish slavery in the territories. What problems does that decision pose and what arguments could be made that it was decided wrongly?

Two aspects of the Constitutional founding that are unrelated to human freedom have made an enduring contribution: the triumph of national vision and the concept of constitutionalism itself. From the vantage point of 1776, the Constitution that emerged from the 1787 convention was a truly extraordinary creation.<sup>46</sup> The coming together of the American colonies into a single nation was more difficult than we can now easily imagine. None of the revolutionary leaders ever publicly contemplated erecting over all of America a truly national government with the power to operate directly on individuals.<sup>47</sup> John Adams, at the time of the Continental Congress in 1775, wrote to Abigail describing “ [f]ifty gentlemen meeting together all strangers . . . not acquainted with each other’s language, ideas, views, designs. They are therefore jealous [suspicious] of each other—fearful, timid, skittish.”<sup>48</sup> Although to us they stand at a beginning, initiating a history, “they saw themselves as defenders of a history accomplished; taking risks that might end, rather than launch, a noble experiment.”<sup>49</sup> They came as repre-

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Without fully exploring this question, let me simply suggest that the great national powers of Congress imminent in article I (as we have come to view them) would, properly read, provide ample authority for Congress to bring a virtual end to slavery. The powers to raise armies and to regulate the land and naval forces, for example, are one source of Congress’ authority to take slaves away from slave states. But all the power Congress might need could be found in the commerce clause, which gives to Congress the power to regulate all the economic activity that “affects more states than one,” to use the phrase from *Gibbons v. Ogden*, 22 U.S. ( 9 Wheat.) 1 (1824). Congress not only could have forbidden slavery in the territories and in the District of Columbia, it also could have forbidden the interstate transportation or sale of slaves. And it could have forbidden the interstate transportation or sale (or international export) of any and all products produced by slave labor, or by any farm or factory that utilized slave labor. After all, the Congress was able to preclude the interstate shipment of goods made under conditions of “wage slavery”; that is, goods produced by those paid less than a congressionally specified minimum wage. *United States v. Darby*, 312 U.S. 100 (1941). It could therefore surely use the commerce power to preclude the shipment of goods made by actual slaves. The objection to this use of the commerce power would no doubt be that Chief Justice Taney was right that an implicit constitutional commitment to slavery precluded any clause from being read to permit the curtailing of slavery. I am simply arguing against this reading. I should emphasize that I am not suggesting that a congressional abolition of slavery was even remotely a historically realistic possibility in 1858; I am only arguing that abolition by Congress would have been consistent with the text of the original Constitution as it has come to be interpreted in modern decisions.

46. Wood, *supra* note 9, at 4.

47. *Id.*

48. Letter from John Adams to Abigail Adams, *quoted in* G. WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* 34 (1978).

49. *Id.* at 38.

sentatives of legislative assemblies nearly a century old that had been more trading rivals than partners and had fought the war as allies, not as a union.

From this uneasy alliance of simple state governments, the framers forged a powerful new national government, continental in scope, with the authority not only to create its own armies, but to operate directly on individuals, to regulate commerce, and for the first time to impose taxes directly on citizens. They created a constitution that unmistakably made this powerful new national government supreme, and said so in terms unmistakable and addressed directly to state court judges who would be on oath to support it: "This Constitution, and the Laws of the United States . . . made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>50</sup> The federalist vision was best expressed by John Marshall two decades later in *McCulloch v. Maryland*, in which he imagined that "[t]hroughout this vast republic, from the St. Croix to the Gulph of Mexico, revenue is to be collected and expended, armies are to be marched and supported."<sup>51</sup> To this end "[t]he sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation are entrusted to its government."<sup>52</sup>

For some, the federalist vision was one of the grandeur and importance of the American nation. For Madison, the extended American republic was also a means by which the rights of individuals could gain some measure of protection from the force of majority sentiments. The proper remedy for tyranny by the majority, as Madison wrote in the familiar tenth *Federalist*, was to extend the governing republic across the entire nation.<sup>53</sup> This way, potentially vicious local majorities would be submerged in a larger nation, and their danger lessened. He wrote: "The influence of factious leaders may kindle a flame within particular States, but will be unable to spread a general conflagration through other

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50. U.S. CONST. art. VI, cl. 2.

51. 17 U.S. (4 Wheat.) 316, 408 (1819).

52. *Id.* at 407.

53. THE FEDERALIST No. 10, *supra* note 12, at 63-64.

States.”<sup>54</sup> A religious sect might control one State, but not a continental nation. “In the extent and proper structure of the Union, therefore, we behold a Republican remedy for the diseases most incident to Republican Government.”<sup>55</sup> Because the framers had set us on the road to nationhood—and because they had provided a mechanism for constitutional change that permitted the notion of who counted as a person and a citizen to be expanded through the Civil War amendments—we were, far too late in our history to be a cause for unabashed celebration, able as a nation to bring national standards of justice and equality to bear on those areas where legal inequality reigned.

However unintended or unanticipated it might have been, Madison’s idea of the extended republic as a source of national amelioration of the local tyranny that might be practiced by local majorities can be seen at work in the civil rights movement in the American South. The triumph of nationalism was a precedent to that movement, as was the notion of constitutionalism itself, the idea that government must be guided not by whim, preference, or raw power, but by the necessity of justifying its actions in terms of previously agreed upon principles, binding even on government itself.

All these themes come together for me in one moment of our constitutional history, in Montgomery, Alabama, in the winter of 1955. Mrs. Rosa Parks had been convicted and fined for violating the city’s segregation code after refusing to give up her bus seat for a white man. The next day the historic Montgomery bus boycott was under way, and late in the afternoon, Dr. Martin Luther King, then only twenty-six years old and recently arrived in the city, accepted the presidency of the boycotting organization, the Montgomery Improvement Association. He was to address the first mass meeting of the movement that night, and he had only twenty minutes to prepare. What kind of argument does one make in that setting to show the wrongness of the “preferences” of those with majority power, and the rightness of the cause of the local minority? The best of the American constitutional tradition provided Dr. King with a kind of argument that is not available in many of the

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54. *Id.* at 64.

55. *Id.* at 65.

world's political cultures. This is what he said to thousands packed inside and outside the Holt Street Baptist Church on that November night:

If we are wrong, the Supreme Court of this nation is wrong.

If we are wrong, the Constitution of the United States is wrong.

If we are wrong, God Almighty is wrong.<sup>56</sup>

My whole point comes down to this: the drafting of the Constitution in the Grand Federal Convention in Philadelphia in the summer of 1787 did not mark the creation of a just and democratic society, but only the beginning of a quest not yet complete.

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56. Address by Dr. Martin Luther King, Jr., Montgomery, Alabama (Dec. 5, 1955), *quoted in* S. OATES, *LET THE TRUMPET SOUND* 71 (1982).