Somersett's Case, Slavery and the American Revolution

James Allison

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"James Somersett, a Negro slave belonging to Charles Stewart of Jamaica, was brought by his master to England. There Somersett ran away, but he was captured and put for safe-keeping on board a ship lying in the Thames. Friends of Somersett then obtained a writ of habeas corpus addressed to the captain of the vessel who, in the return of the writ, set forth the facts as above. Here follows the judgment of the court of the king's bench, stated by Chief Justice Mansfield. The counsel for Somersett pointed out that the only form of slavery known to English law was villeinage, which had disappeared from judicial proceedings since 1618 . . ." (Somersett's Case, Stephenson & Marcham, 1937.)

" . . . The only question before us is whether the cause on the return is sufficient. If it is, the Negro must be remanded; if it is not, he must be discharged. Accordingly, the return states that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different in different countries. The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created is erased from memory. It is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged." (Somersett's Case, Stephenson & Marcham, 1937.)

In the absence of any "positive law" that would have validated slavery, Somersett's Case in effect abolished slavery in England. However, Mansfield's decision should not have been surprising to lawyers. One of his associate justices on the King's Bench was William Blackstone, well known to colonial lawyers for his Commentaries on the Law of England. In 1765 Blackstone had this to say about English precedents on the subject of slavery: "And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a Negro, the moment he lands in England, falls under the protection of the laws and so far becomes a freeman." (Blumrosen & Blumrosen, 2005, p. 6.)
The law was quite different in France, where legislation had allowed colonists to bring their slaves into France without jeopardizing their ownership.

Edwards (2002) suggests that when our southern colonials heard about Somersett's Case (1772) they lost much of their ardor for their pursuit of the full rights and obligations of Englishmen: If Parliament saw fit to impose Somersett law on the colonies, the imposition would end the blessings enjoyed by slaveholders. Thus, if the northern colonials were motivated toward independence by the mercantile threat of the British East India Company, the southern colonials were motivated by Somersett's threat to slavery.

That is why the framers of the Constitution were so careful to validate slavery by means of the "positive law" embodied in the language of Article 4, Section 2: "No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of

any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." This is the part of Article 4, Section 2, that the Thirteenth Amendment changed soon after the Civil War.

Two researchers, both lawyers, take up this line of thought and examine it comprehensively in a recent book (Blumrosen & Blumrosen, 2005). What follows is my condensation of their book. A note on spelling: Some sources, especially older ones, spell the name "Somersett." Here I follow the Blumrosens' convention, "Somerset."

Kidnapped from his West African village, the nine-year-old boy eventually called "James Somerset" was shipped to Virginia in 1749 and sold to Charles Stewart, a merchant/slave trader. Stewart's sister Cecilia lived in England. When Cecilia's husband died, Stewart and Somerset moved to England in 1769 to help raise her children. In London Somerset found a large community of blacks, many from the British West Indies. Some were slaves to colonial masters, as Somerset was, but many others were free persons, former slaves or runaways employed as artists, singers, seamen or servants thriving among a friendly mob of pre-industrial Londoners sympathetic to freedom and liberty.

In August 1771 Somerset acquired three godparents in the course of his baptism. He ran away on October 1, but on November 26 found himself in chains aboard a Jamaica-bound ship whose captain proposed to sell him there. A week later his godparents prevailed on Lord Mansfield, chief justice of the Court of King's Bench, to issue a writ of habeas corpus that required Captain Knowles to explain Somerset's captivity. On December 9 the captain explained that Stewart had delivered his slave with instructions to have him sold in Jamaica. Mansfield set the final hearing for June 22, 1772, and freed Somerset on bail.

In the meantime Mansfield, whose favorite grandniece happened to be a light-skinned black woman, did his best not to decide the legality of slavery in England. Mansfield tried to persuade Stewart to free his slave, but West Indian planters who wanted a pro-slavery decision financed Stewart's defense in return for his promise to resist Mansfield. Mansfield tried to persuade godmother Elizabeth Cade to buy Somerset and set him free, but she insisted on nothing less than an anti-slavery decision.

When Mansfield delivered his famous decision blacks in the audience rose and bowed to the Court. Later, 200 blacks threw a party to honor Somerset and celebrate the freedom of slaves in England. Others soon followed Somerset's example, and their English masters declined to give chase. Mansfield would have denied it, but word got around that he had abolished slavery in Britain—as indeed he had done in fact, if not in a narrow legal sense. As for James Somerset, he faded into London's black community unaware of the spark he had struck for the American Revolution.

News of Mansfield's decision soon appeared in the colonies, both north and south. In 1772 at least 20 newspapers printed at least 43 stories that said in one way or another that Somerset's Case had freed black slaves in England.

This was a serious development, one that threatened to rekindle the colonial fervor for independence. The recent unrest over taxation without representation and the Boston Massacre had already calmed down, but emotions about slavery ran too deep. In 1766

Parliament had adopted the Declaratory Act, which authorized Parliament to govern the colonies in all matters. Southern slaveholders got the message: If Parliament could control colonial slavery, and Somerset became colonial law, Britain might free colonial slaves. If reluctant to lose the income the slaves brought in, Britain might preserve colonial slavery but seek to fill her treasury by taxing the slave trade or controlling the export of goods produced by slave labor. The colonials knew that their own legislatures were obliged to enact only laws that were not repugnant to English ones; indeed, the Privy Council had recently revoked three such "repugnant" acts. It was no wonder that the Mansfield decision so disturbed the slaveholders of colonial America, many of whom were lawyers, legislators and land speculators. However, not all slaveholders were elite. Slavery owed much of its spread to a rebellion of poor whites in 1676, as a result of which Virginia, which had depended on slaves and white indentured servants, switched to slaves alone. Thus, many ordinary families found it useful to keep one or two slaves to help with everyday chores, and they too sensed a threat to the quality of their lives. The news about Somerset also reached the colonial blacks, some of whom responded by running away in search of a ship to take them to England.

The economic stakes were high. Slave ownership entailed several forms of wealth: the slaves' value as capital and as security for loans; the value of what they produced, including baby slaves; and the value added to the land they cleared and cultivated. In 1774 white slaveholders were the wealthiest group on the mainland. And the citizens of the south knew their security was shaky: The deplorable conditions of slavery engendered widespread resistance, both passive and active, and stories of revolts and murders circulated freely. Virginians thought that South Carolina had a perilous number of slaves, 80% of its population, and wanted to ban further African imports so as to boost both security and the sale of Virginia's surplus homegrown slaves.

There had been much talk of secession during the taxation crisis of 1765-1770. Somerset's Case recalled those thoughts of independence, this time as a way to secure slavery under American rule. Given Britain's power, secession would come about only if all colonies united in rebellion. Would the northern colonies join in?

Slavery was legal in all colonies, but more prevalent in the south than the north, although New York City depended heavily on slave labor. The north had its hardcore abolitionists who thought slavery a violation of natural rights, but it also had its shipyards that built New England bottoms for the transport of both slaves and the goods they produced-- ships crewed by Northerners who fed their families on the proceeds. Thus, to the Virginia politicians, as shrewd as any in American history, the overall northern sentiment seemed too unclear. The Virginians would not seek liberty from Britain without a guarantee of continued slavery at home. How could the southern politicians take the measure of their counterparts up north? The colonists had always celebrated their mutual independence, and there were no substantial lines of communication between northern and southern legislatures.

Thomas Jefferson had long questioned the legitimacy of British control over the colonies. He and four other young Virginia politicians began to meet in private to consider the state of things. As a first step toward uniting the colonies they proposed the formation of inter-colonial committees of correspondence that would take up matters of mutual concern. They began by persuading their influential friends in the Virginia House of Burgesses. The result was a proposed resolution in the House of Burgesses for the committees of correspondence. The

resolution included a roster of committee members recognizable as men who had long dominated the House of Burgesses, lawyers and slaveholders to a man: Peyton Randolph, Richard Henry Lee, Patrick Henry, Thomas Jefferson and several others of similar caliber. Presented on March 12, 1773, the resolution alarmed the British as a recipe for concerted colonial action.

Similar unrest, with a motive wholly different from the Somerset decision that had driven the Virginians, was brewing in Massachusetts at about the same time. Benjamin Franklin, in Britain acting as the agent for Massachusetts, came into possession of letters written in 1769 by Thomas Hutchinson, lieutenant governor of Massachusetts, to a well- connected British friend. These letters seemed to advocate a restriction on colonial liberties. Published in June 1773, they persuaded Samuel Adams, John Adams and other northern patriots that it was time to move toward independence. Thus, in the summer of 1773 leaders of both Virginia and Massachusetts, filled with a common spirit of rebellion in defense of seemingly different objects, slavery and liberty, found a legitimate means of communication, beyond the grasp of colonial governors, in the Virginia House of Burgesses' call for inter-colonial committees of correspondence.

The Virginia Resolution alluded to reports of "proceedings" that might deprive Virginians of "ancient, legal, and constitutional rights." (Blumrosen & Blumrosen, 2005, p. 58.) Such wording could summon unpleasant associations throughout the colonies: in the south thoughts of Somerset's Case and in the north, thoughts of taxation and the quartering of troops.

It alluded to common interests among the colonies that would require inter-colonial communication of "sentiments." This directly opposed the British policy of dealing with each colony separately from the others.

The resolution made it clear that the document had the endorsement of Virginia's political leadership, both the senior and junior members of the House of Burgesses. It followed that the proposed committee was both legitimate and extra-governmental. It would discuss with other committees of correspondence any British actions that irritated any colony. It would mobilize public opinion and serve as a model that other colonies could and did follow.

As a sign of solidarity with northern colonies, the resolution instructed the Virginia committee of correspondence to investigate an incident in Rhode Island—notorious for its smugglers--wherein the British demanded that the culprits who burned the Gaspee, a British anti-smuggling ship, be sent to London for trial. Its gesture to "Rogues' Island" was pure propaganda, but the document wrought the desired effect: The Virginia Resolution aroused great popular support, and emboldened colonial legislatures everywhere.

In the meantime, British policy continued to go wrong. In the spring of 1773 the British East India Company was on the brink of bankruptcy. Parliament tried to bail it out by approving a plan to dump a mountain of surplus tea on America. The Company would sell cheap tea directly to the colonists without paying taxes. This would be fine for the Company and the few fortunate colonists chosen to distribute the tea, but the other merchants and colonists saw a predatory monopoly in the making. They also saw a possible end to their lucrative smuggling trade with the Dutch. Thus, Parliament managed to radicalize a lot of conservative New York

merchants and give the southern colonies a chance to excoriate the intrusive British without mentioning slavery. This mistake inspired the Boston Tea Party in December 1773, justly famed but probably less important than the Americans' refusal to land tea anywhere in the colonies—Americans' first concerted action against British commerce.

In May 1774 the British compounded their mistake by closing the Port of Boston, sending in troops of occupation and appointing a military governor. This dispelled any lingering illusions about colonials' rights as Englishmen. In response, the Virginia committee of correspondence queried the other committees about the need for a general congress, and urged support of the people of Boston. The Massachusetts reply proposed a meeting in Philadelphia on September 1. The colonies agreed, the delegates were chosen, and the Virginians received their instructions: Insist that each colonial legislature had the sole right to determine its colony's internal policies. The language had room for compromise: Britain could regulate trade if it relinquished its control of internal colonial affairs. But the Virginians meant to preserve slavery in Virginia, and they would veto anything else.

These developments were moving fast toward a joining of northern and southern interests in terms of liberty and property. As they thought slaves were property, the southerners made no overt demands for slavery in the colonies. In the words of the authors: "Had the colonies based their claims only on the issue of Parliament's power to tax, that issue could, and probably would, have been resolved along the lines of the two previous British efforts at taxation in the 1760s. The South made that impossible by its demand for internal freedom of action. In that sense, American liberty could be defined as the desire to protect black slavery." (Blumrosen & Blumrosen, 2005, p. 71.)

John Adams was one of Massachusetts' delegates to the first Continental Congress in Philadelphia. Benjamin Rush had come out from the city to forewarn him, but Adams already knew he had to be careful among the other delegates. Because Britain blamed Massachusetts, Boston and the Adams cousins, Sam and John, for the disturbances in the colonies, he knew it might appear too self-serving if he took the lead in the drive for independence. Many of the delegates were known as probable opponents of any serious action against the British. The Virginians, who had already demanded independence from Parliament, also needed to be careful for fear that a too aggressive stance might provoke the charge of treason.

As they got to know one another John Adams and the Virginians, notably Richard Henry Lee, formed bonds of friendship, mutual admiration and trust. The result was a durable alliance between Massachusetts and Virginia known as the "Adams-Lee junto." The southerners learned that Adams was no abolitionist, and that he was prepared to defer to them on the issue of slavery. This is not to say that Adams was pro-slavery. Like Thomas Jefferson, Patrick Henry and many other Virginians Adams thought slavery an abomination that must eventually be abolished. They professed to oppose immediate emancipation as a crueler fate than slavery, a gradualism that is sometimes hard to distinguish from mere temporizing. They saw preservation of slavery for the time being as the necessary price for union and independence. With Boston under British occupation, the South held the strong bargaining hand. Had Adams or anyone else questioned the legitimacy of slavery, the southerners could have folded their cards and left Massachusetts to its own fate. Slavery was not debated at the first Continental Congress in 1774.

Adams himself took part in the drafting of Article IV of the Declaration of Rights and Grievances. Observers on both sides of the Atlantic saw Article IV as a declaration of independence from Parliament and a purely nominal obeisance to the King. Many historians consider Article IV the true causus belli of the revolution. More important for American history after the revolution, Article IV specified that individual colonies held the legislative power. Thus, Article IV foreshadowed a weak federal government and the states' rights doctrine that would preserve southern slavery until the Civil War, and white superiority well into the 20th century.

In October 1774, over the objections of delegates who favored more moderate proposals, the Congress adopted the declaration that denied Parliamentary control of the colonies. The Virginians, recalling Somerset, were ready to abandon English law. Adams was ready for John Locke's natural law, which replaced the divine right of kings with the concept of social equals consenting to form a government that would protect their interests. The stage was set for Jefferson's Declaration of Independence.

With hostilities already begun, in 1775 the Second Continental Congress met in Philadelphia to make war on the British in Boston. In Virginia Lord Dunmore, unable to cope with the local militia, promised to free all slaves who were willing and able to bear arms against the rebels. Many slaves accepted his offer, which Samuel Johnson, in Britain, thought quite sensible as a cheaper and easier way to subdue the rebels than to send a big military force. Virginia, which took the offer as an incitement to race war, offered amnesty to slaves who returned and death to those who fought.

The Continental Congress urged the colonies to adopt their own constitutions. In May 1776 a Virginia Convention met to shape a new government for the state. It instructed its delegates to the Second Continental Congress in Philadelphia to propose a declaration of independence from Britain. In Philadelphia Richard Henry Lee proposed the declaration on June 7, and a committee was formed to draft the declaration: John Adams, Benjamin Franklin, Thomas Jefferson, Robert Livingston (New York) and Roger Sherman (Connecticut). The committee outlined the structure and soon thereafter, probably June 23, asked Jefferson to write the first draft.

Back at the Virginia Convention, George Mason was asked to draft a declaration of rights and principles of Virginia government. A pure expression of Lockean natural law, his draft became a model for several state constitutions, but it did not quite suit the Virginians. It said that all men were born equally free with certain inherent natural rights of which no one could deprive them or their posterity, including the enjoyment of life and liberty--a statement that some delegates saw as an invitation to a slave rebellion and a denial of their claim on children born to their slaves. They filibustered Mason's draft for two days, until Judge Edward Pendleton came to the rescue with a revision that would leave slavery intact: "All men are equally free and independent and have certain inherent rights, of which, when they enter a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." (Blumrosen & Blumrosen, 2005, p. 130.) The Virginia Convention adopted Mason's revised draft on June 12.

Scholars believe that Jefferson had access to Mason's draft as he worked on his own declaration in Philadelphia, and the authors suggest that he saw that neither Mason's original version nor the one the Virginians adopted would do. His own statement was meant for readers at home and abroad, among whom those opposed to the revolution would use the term "property" as evidence that the colonies were seeking liberty in order to oppress slaves. At that particular time Jefferson opposed not only the concept of slave property, but also the property rights of primogeniture (all to the oldest son) and entail (the indivisibility of real property). He erased "property" and substituted "pursuit of happiness." For the term "born," which had so inflamed the delegates to the Virginia Convention, he substituted "created"—a lofty reference to a natural/spiritual agent untainted by any awkward connotation of birth by a woman. Finally, with the substitution of "among these" for "namely," he held open the possibility of other rights in the future.

Some historians attribute Jefferson's revisions of Mason's draft to the economy and craft of sheer literary genius. Here is the passage in question:

"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 among these are Life, Liberty and the Pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

The rest of the declaration, approved July 4, 1776, need not concern us here. Not all parts of Jefferson's draft pleased the delegates to the Second Continental Congress. He criticized the King for having both enslaved blacks and incited them to harm their masters, but the delegates struck that part out, among others. Indelible traces of Somerset appear throughout the declaration. An allusion to "unwarrantable jurisdiction" calls to memory the Somerset Case, the Declaratory Act of 1766 and the repugnancy clause of the colonial charters, all of which converged as a threat to slavery. In the words of Judge A. Leon Higginbotham, "From the perspective of the black masses, the Revolution merely assured the plantation owners of their right to continue the legal tyranny of slavery." (Blumrosen & Blumrosen, 2005, p. 143.) Indeed, the same Congress that adopted the Declaration of Independence soon made it clear that slaves were property, and that the principles of the Somerset decision would have no place in American government.

The occasion was Lee's motion for independence, which required that the Second Continental Congress form a national government in place of British rule. The task fell to John Dickinson (Pennsylvania), who prepared a draft that the Congress began to debate on July 12, 1776. Dickinson envisioned a central national government in charge of the defense and welfare of each colony, whose control of its internal affairs would be subject to the central government. To southern sensibilities Dickinson's proposal was altogether too reminiscent of the British Declaratory Act, with its Parliamentary control of the colonies in all cases whatsoever, which of course would include slavery.

The southerners prevailed. The Congress adopted the Articles of Confederation in November

1777 under president Henry Laurens of South Carolina, planter and former slave-trader who supposedly abhorred slavery and planned to free many of his own slaves. According to the articles as adopted, "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States, in Congress assembled." Under the Articles of Confederation, Congress could not regulate slavery within a colony.

But that was not enough. Something had also been done about fugitive slaves. They had been taken care of by an amendment, written by Richard Henry Lee (Virginia), Richard Law (Connecticut) and James Duane (New York), which provided that a slave could not become free by entering a free state. With this direct repudiation of the Somerset decision, the victory was complete: The American colonies' secession from Britain had given the South precisely what it wanted.

Historians have not missed the irony of the South's insistence on one state's right to protect slavery in some other state that sought to exclude slavery. In this particular proviso of the Articles of Confederation they have also seen the precursor of the fugitive slave clause in the U.S. Constitution, the Northwest Ordinance and other federal laws.

Upon Maryland's ratification the Articles of Confederation took effect on March 1, 1781, seven months before the British surrender at Yorktown. In 1783 the Treaty of Paris gave the United States almost 900,000 square miles to govern under the Articles of Confederation, safely beyond the reach of Somerset's Case. About 62% of that vast territory lay west of the colonies. The states with western land claims, mainly Virginia and New York, had ceded them to the Continental Congress. There were fortunes to be made in the unsettled territory, but how would slavery be handled there? It was generally accepted that unless the law were changed, slavery was lawful in the lands ceded by the southern states.

Massachusetts had abolished slavery by judicial decision in 1783, and by 1784 Pennsylvania had set a gradual course toward abolition. The issue of slavery in the territories arose in 1783, thanks to Thomas Pickering of Massachusetts, the quartermaster general of the Revolutionary Army and an ardent lifelong foe of slavery. He petitioned Congress to buy some ceded land for a new state in the Ohio country to be settled by veterans to whom Congress had given worthless scrip as soldiers' pay. Slavery would be prohibited there. Nothing came of his petition, but it showed the thinking of many veterans. Religious and revolutionary talk had raised popular opposition to slavery. White workers knew it would be hard to compete with the "free" slave labor the planters could muster in the difficult work of settling and defending the uncleared lands.

In 1784 Jefferson proposed to tolerate slavery until 1800, after which there would be no slavery or involuntary servitude, except for punishment of crimes. His proposal fell one state short of adoption: Voting in favor were Massachusetts, Connecticut, Rhode Island, New Hampshire, New York and Pennsylvania; voting against were Maryland, South Carolina and Virginia. Jefferson blamed New Jersey delegate John Beatty, who stayed home with a cold. Pickering tried again in 1785, when he urged Rufus King, a member of the Continental Congress, to forbid slavery in the territories before they were settled, as it would be more difficult afterward. Congress rebuffed King on a straight North-South split, even after he added a fugitive slave clause and a permit of slavery for 15 years. Similar efforts came and

went until the Constitutional Convention in 1787.

The Articles of Confederation had created a frail government that proved ineffectual. There was no executive branch. As Congress could not levy taxes, it had to beg the states for money. It could not keep states from taxing goods from other states. A single state could veto any change to the Articles.

Twelve states answered Virginia's call to convene in Philadelphia to strengthen the federal government by amending the Articles. The Virginia delegation to the Constitutional Convention—George Washington, Edmund Randolph, James Madison, George Mason and George Wythe, a mentor of Jefferson—came prepared to dominate. They envisioned a strong national government that could levy taxes and impede the states' interference with government programs. Governor Randolph presented the Virginia plan on May 29.

The larger states—Virginia, Massachusetts and Pennsylvania--would control national affairs, because the power would be based on population. Specifically, Congress would have a two-part national legislature: a House of Representatives elected by the people and a smaller body, a Senate, elected by the House of Representatives from candidates nominated by the State Legislatures. The number of each state's representatives in both House and Senate would depend on the state's contribution to the federal budget, which depended in turn on population. In the calculation of population each slave would be counted as three fifths of a person. Elbridge Gerry, of Massachusetts, suggested that if slaves were property, they should count no more than cattle and horses. Nevertheless, Gerry went along with the majority of the committee that passed the proposal on to the convention at large.

As the states that contributed more to the federal budget would obviously dominate both House and Senate, the smaller states fought the plan. Roger Sherman and Oliver Ellsworth, from Connecticut, proposed that states have equal voting power in the Senate. Virginia's James Madison argued that equal voting power would repeat the flaws of the Articles of Confederation. The big free states and the slave states got together and defeated the Sherman-Ellsworth proposal. Other small states came back with a similar proposal, but it too was defeated. The committee recommended adoption of the Virginia plan, and the debate went back and forth for days as the temperature rose and tempers flared. Benjamin Franklin, perhaps the least religious of the delegates, suggested prayer as the solution to the deadlock, but the Convention had no money for a minister.

On June 29 Connecticut's Ellsworth moved that each state have an equal vote in the Senate, but proportional representation in the House. Some saw his motion as a compromise, others as a perilous ultimatum: Compromise, or dissolve the union. This time around, it was the North that held the upper hand. The war had been hard on the South. A quarter of its slaves had gone over the British, it had no navy, it faced threats from Native Americans and foreigners alike: the Spanish in the south, and the British in the west. It worried about slaves in revolt and poor whites angry about debts, as in Shays' Rebellion.

Madison answered the next day. This dispute was not between large states and small states; it was really about slavery. His analysis struck a chord among the delegates, and got them thinking about alternative systems of representation. On July 2 the convention deadlocked on

Ellsworth's motion to allow each state one vote in the Senate. This tie vote shocked many delegates with the realization that the Convention was going to fail, the union dissolve. The New York delegation left the Convention, and a despairing George Washington asked Hamilton to return. As northern and southern spokesmen squabbled back and forth, returning again and again to the issue of slavery, the Continental Congress, meeting in New York, came up with a solution to the problem. The most probable catalysts were Benjamin Franklin and Richard Henry Lee, who was not a member of the Convention but was probably privy to some of its secret proceedings. Early in July Lee and four other southerners, all members of the Continental Congress and, except for Lee, all members of the Convention, left Philadelphia to join the Congress in New York.

Back in May, 1787, the Congress had considered an ordinance pertaining to the western territory. On July 9 the ordinance was referred to a new committee: Richard Henry Lee and Edward Carrington (Virginia), Nathan Dane (Massachusetts), Melancton Smith (New York), and John Kean (South Carolina). Dane, who drafted the ordinance, sensed a fresh disposition to do business, and attributed much of that to Lee's arrival from Philadelphia. The committee took only two days to expand the ordinance. The new draft, prepared by Dane, Lee and Smith, had its first and second readings on July 11 and 12, and was adopted July 13 with an ease that surprised Dane. Freshly named "An ordinance for the temporary government of the territory of the U.S. NW of the River Ohio," it is known today more simply as "The Northwest Ordinance." Its passage must have especially pleased Smith, an antislavery land speculator with a special interest in the Ohio Company proposal to buy several million acres in the affected territory. The ordinance prohibited slavery in the northwest—except for fugitive slaves—and guaranteed its protection in the southwest. It thereby assured a political balance between slave and free states.

Historians have had a field day on why the South so readily adopted The Northwest Ordinance. In the northern winter climate slavery would not be cost effective. The northwest territory had plagued the British, and Virginia had ceded the place with a good riddance to conflicting claims, Indian troubles and foreign intrigues. Virginian James Monroe, apparently no great judge of territory, had toured the area and reported that the land itself was not worth the candle. Southerners may have seen the ordinance as a way to keep Yankee troublemakers north of the Ohio. Whatever the reasons, the ordinance sailed right through.

News of its adoption quickly made its way from New York to Philadelphia. By June 14 or 15 the northern delegates to the Constitutional Convention knew that slavery had been banned from the northwest territory, and the overheated Convention suddenly cooled down. By July 16 northern resistance to the three-fifths rule had evaporated and the Connecticut compromise was adopted, five states to four. States would have equal Senate representation, and a House representation proportional to the free population plus three-fifths of the slaves. Connecticut, New Jersey, Delaware, Maryland and North Carolina voted for the compromise. Pennsylvania, Virginia, South Carolina and Georgia, all opposed to equal representation in the Senate, voted against. Massachusetts was divided and New York was absent, but would have voted for the compromise. In addition to equal votes in the Senate, the northerners had gained a big western territory where their constituents could settle free of rich planters and the slave labor that might threaten the settlers' own jobs or

wages.

The compromise the delegates had made on July 16 guaranteed the further success of the Convention. On July 26 it adjourned to make way for a committee of detail and reconvened August 6 to work through the committee's report, which structured the rest of the Convention. Slavery came in for heated discussions in August and September, but not as the burning issue it had been in early July. The delegates became adept at referring difficult issues to committees.

As for slavery, the delegates voted to allow another 20 years of slave trade, until 1808. They also adopted a relatively complex fugitive slave clause. Specifically, a slave escaping to a free state would have to be returned upon the claim of the owner (Article IV, Section 2). This clause would help southerners retrieve runaway slaves or discourage slaves from running away, and assure northerners that former slaves would offer no serious competition to their white labor force. However, if a slave had come to a free state or territory with his master and refused to return, the Somerset rule would apply: The issue would be decided by the law of the jurisdiction where the question of freedom arose (Article IV, Section 2, the privileges and immunities clause). The Dred Scott decision was to overturn this nicety in 1857, when the Supreme Court held that slavery was lawful everywhere in the land—a decision that pushed the nation toward civil war.

After the Constitution had been ratified, the First Congress confirmed the line on slavery in 1789 when it ratified the Northwest Ordinance. It did so again in 1790, when it made the ordinance applicable to territories south of the Ohio with the proviso that slavery would be permitted there.

The concluding chapter is entitled "How Then Should We View the Founding Fathers?" In the words of the authors, "Our nation was born partly to protect race slavery, and grew to maturity with a decision to limit that slavery. We have a collective responsibility to view this history from our own perspective. While personal guilt is not in question, personal responsibility for the condition of people of color continues. Whites are the beneficiaries of the totality of the decisions made by our founders. Where, in the light of more modern views, they erred, we have the same obligation they assumed; to build in our time a society that better accords with our fundamental values than the one that we inherited." (Blumrosen & Blumrosen, 2005, pp. 259-260.)

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