

# A SLAVEHOLDERS' UNION

SLAVERY, POLITICS, AND THE CONSTITUTION  
IN THE EARLY AMERICAN REPUBLIC

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# 1

## FROM EMPIRE TO CONFEDERATION

During the years from 1770 to 1780, as Great Britain's control over its mainland American colonies declined and then collapsed, the wealthy and politically influential imperial institution of slavery became the subject of unprecedented controversy. The decade's disruptions had conflicting consequences for slavery as Americans used their new political freedom on that issue in clashing ways. But American slavery emerged from the Revolution stronger as a political institution than it had been within the British Empire just prior to the Revolution. This chapter explores how and why this occurred. It opens with a discussion of British imperial support for slavery and its character as an institution in the mainland American colonies shortly before the Revolution. Next, it analyzes a series of challenges to slavery in the years before the Revolution. Finally, it considers how the Revolution affected slavery and how slaveholders responded to its stresses, particularly their role in shaping the Articles of Confederation.<sup>1</sup>

A major challenge to imperial slavery arose from a court attack on its legality in England, the closely watched 1772 case of *Somerset v. Stewart*. Though it was technically a dispute over slavery in England, the decision had political effects far broader than its precise legal holding. Lord Mansfield, the most prominent jurist in the British Empire, used his decision in *Somerset* both to announce a novel conception of slavery's legal character threatening to slaveholders and to challenge its morality. As an unintended consequence, it brought slavery's legality under sharp attack in some mainland colonies. It contributed to political assaults on slavery, and added to the chronic problem of slave flight. Slaveholders vigorously attacked Mansfield's decision; it often strengthened their preexisting view

that arbitrary British government policies on slavery and taxation threatened their economic well-being and political freedom.

The obstacles encountered by mainland American slavery in the years prior to Independence also included widening slave freedom litigation, struggles over limiting slave imports, and new laws on slave manumission. Independence brought further threats. The Revolutionary War sharply increased the number of fugitive slaves, and the need to control slaves hampered American military efforts. State and Confederation controversies erupted over the use of slaves and free blacks in both the British and American armies. During the Revolutionary War alone, Vermont and Massachusetts banned slavery, Pennsylvania began abolition, Virginia liberalized its manumission laws, and Rhode Island banned the out-of-state sale of resident slaves.

Most historians agree that the Revolution was a turning point in slavery's history, but they have differed sharply on what it meant for slavery's evolution.<sup>2</sup> The important strides toward abolition and slavery reform in the war and its aftermath led prominent Americans to think that progress toward abolition would continue across the United States, yet that did not happen. Historians have offered varying explanations for this post-revolutionary decline. Most of these explanations share the view that the Revolution was an impetus toward abolition, which was then defeated by powerful opposing counterforces such as white racism or economic self-interest.

One group of historians sees the Revolution as creating a strong impulse toward freedom for slaves.<sup>3</sup> Ira Berlin and other historians view the Revolution's disruption and black agency as having transformed the basic conditions of life for both slaves and freedmen.<sup>4</sup> Others such as Gary Nash instead conclude that the Revolution either crystallized or was strongly influenced by white racism, which ultimately defeated its antislavery thrust.<sup>5</sup>

William Freehling thinks that the Revolution had equivocal implications for slavery because many Founders believed that Revolution principles of freedom and equality necessarily entailed an end to slavery, but were "conditional terminators," willing to end it only on conditions such as mandatory colonization of freed blacks that made abolition very difficult or impossible. The result, Freehling concludes, was that the Founders took important steps toward abolition while nearly simultaneously creating "bulwarks against antislavery."<sup>6</sup>

This chapter takes a different approach to assessing the Revolution's impact on slavery. It begins by considering slavery's ability to resist change, that is, its staying power as an institution. It asks what benefits for slavery and disruptions to slavery the Revolution actually created. And it closely examines how slaveowners and slave states responded to these pressures when they faced antislavery activism before the Revolution and participated in framing the Confederation government.

Historians increasingly recognize that slavery emerged from the Revolution stronger as a political institution than it had been within the British Empire just prior to the Revolution. But, contrary to the view of David Brion Davis and other leading scholars, the evidence reviewed here suggests that this result was not paradoxical.<sup>7</sup> The Revolution led to the creation of an American government that was far less capable of controlling slavery than the British Empire had been. It shifted the political balance of power in the new government in a direction strongly favorable to slaveholders. Revolutionary natural rights and egalitarian ideology had limited power to undercut slavery in the face of its powerful influence and of countervailing principles of thought about natural rights and limited government. The disruptive effects of slave flight and slavery's interference with American military operations during the Revolutionary War have been overstated.

As a result, in the crucible of the Revolution, slave state representatives obtained substantial protection for slavery from the new American government. The exceptionally decentralized federalism of the Articles of Confederation, ardently advocated by slave state representatives, meant that the continental government would have no legal power either to regulate or abolish slavery in the states or, as a practical matter, to control the slave trade or slave imports. And new evidence suggests that the Confederation also agreed in the Articles to protect slaveowners against state interference with their control over the interstate movement of slaves, including slave imports and the recapture of fugitives. Slave property was exempted from the Confederation's state taxation-quota calculations and excluded from its state military quotas. As a consequence of having met slave state demands, the Confederation was capable only of "stalemate government." Imperial collapse and political realignment in a decentralized polity in the midst of war had led Americans to take the first significant steps toward a slaveholders' union that preserved and strengthened slavery.

AMERICAN SLAVERY IN  
THE BRITISH EMPIRE CIRCA 1770

The institution of slavery had a prominent place in the economic and political affairs of the British Empire and its mainland American colonies just prior to the American Revolution. A major reason for American slavery's strength was its legacy of British imperial support. Slavery was given powerful protection by British and colonial law and policy and was directly linked to other important colonial institutions of social control.

In 1770, the major slaveholding colonies of the British Empire, or "plantation America," accounted for 25 percent of the total private physical wealth of the empire, even though they contained only about 12 percent of its total population.<sup>8</sup> Slavery was the "principal means of wealth creation in plantation America" on the eve of the Revolution.<sup>9</sup> Crown policy, particularly in the eighteenth century, was designed to maximize British investment in colonial slave plantation agriculture, which most contemporaries believed necessitated protection for the slave trade and for slavery as well.

Britain had legalized and subsidized the slave trade beginning in the mid-seventeenth century.<sup>10</sup> By 1770, it had firmly supported its imperial slave trade for more than one hundred years. Britain dominated the eighteenth-century transatlantic slave trade, and its traders made thousands of voyages across the Atlantic during the century. Its participation in the trade maintained a reliable supply of relatively inexpensive colonial forced labor while also significantly enhancing British naval power. Most British supporters of the slave trade agreed with Malachy Postlethwayt that the trade was an "inexhaustible Fund of Wealth and Naval Power to this Nation."<sup>11</sup> British support for the slave trade in turn led it to protect slavery, not just in the colonies but throughout its empire, both by providing military support and by regulating slavery policy.

During the seventeenth and eighteenth centuries, these goals led the Crown to protect slavery by disallowing several American colonial efforts to limit slave imports; by carefully regulating and controlling the classification of slaves as particular types of property in different colonies; and by approving brutal, repressive colonial slavery laws that minimized the cost of slaveholding.<sup>12</sup> But Britain's intervention in the law and policy of slavery went beyond its direct supervision of colonial law. As to slavery, Britain departed from its general imperial policy of legal pluralism, or

“de facto federalism” between metropolis and colonies, and instead sought to impose a degree of uniformity.

In the eighteenth century, the Crown sought to have English law treat slaves as uniform “imperial” property, since British investors and creditors thought that they needed predictable legal rules to support what they perceived as risky investments in the slave trade and colonial plantations. The Crown’s two chief Law Officers, one of whom later rose to become Lord Chancellor of England, issued an opinion in 1729 that treated colonial slaves as property even when they were brought to England. Under that opinion, their owners could compel them to leave England and return to slavery. This effectively meant that slaves were “imperial” property, not just property under the law of individual colonies. The opinion, requested by slaveowner representatives, was widely published in the colonies.<sup>13</sup>

The goal of enforcing uniformity also led to one of Parliament’s very few substantive interventions in the law of slavery in a period of 250 years. In 1732, Parliament passed a “sweeping” statute that guaranteed uniform imperial treatment of slave property for debt-recovery purposes in England and its colonies, overriding all contrary colonial laws. Under this law, the Debt Recovery Act of 1732, “fiercely opposed” by Virginians, “Negroes” (slaves) in the colonies were classified as property for purposes of debtor-creditor relations. Creditors throughout the empire were given a broad range of remedies to protect their interests in such property. The law provided special evidence rules in such creditor actions. The act thus created a hybrid form of property valid throughout the empire. It effectively overruled a House of Lords decision that had respected colonial law in this area. It was the legislative analogue of the 1729 Law Officers’ (or Yorke-Talbot) Opinion’s conclusion that slave property had a uniform “imperial” status throughout the empire. The evidence suggests that colonial slave imports increased as a result.<sup>14</sup>

Through these policies, Britain sought to protect and encourage slavery by imposing at least the degree of imperial uniformity needed to support a smoothly functioning slave property system throughout the empire, despite the existence of a variety of local differences in the law of slavery. This meant, among other things, that slaves in one part of the empire were regarded as property anywhere within it. And, as the 1729 Law Officers’ Opinion shows, many thought that this included England itself.

In 1749, the Lord Chancellor of England, Lord Hardwicke (Sir Philip Yorke), decided that English law would recognize a trover claim for slaves—

that is, a common-law claim to recover slaves (more precisely, damages for their withholding) premised on the idea that slaves were property. Hardwicke held that the law in all colonies must therefore recognize such claims as well.<sup>15</sup> Hardwicke's decision reaffirmed the policy he had helped to establish in 1729 in the Law Officers' Opinion, that slave status did not change when slaves were brought to England. Hardwicke's position was shared by at least one leading contemporary legal treatise. Viner's *Abridgement*, a prominent treatise first published in 1746, stated that English law recognized trover claims for "Negroes" and treated as dissenting opinions on that issue early-eighteenth-century English court decisions holding that coming to England would end the slave status (if not necessarily the servitude) of blacks brought there.<sup>16</sup>

Throughout the first two-thirds of the eighteenth century, the institution of slavery had the largely unquestioning support of most members of the British and colonial political, legal, religious, and social elites. Their adherence meant that during that part of the eighteenth century there were only minor changes to colonial slavery as a legal and social system while the American mainland slave population grew significantly and slavery's imperial economic and political influence grew with it. Prior to 1770, no major British or colonial court seriously questioned the fundamental legality of either colonial slavery or the slave trade. Political interventions before then by Parliament and the Privy Council regarding slavery and the slave trade virtually always favored slavery's expansion.

Due in part to its strong imperial support, slavery had become a central economic institution in the mainland American colonies by 1770. Slaves had become a major economic asset class, with a conservatively estimated collective market value of about £14 million (about \$2.4 billion today).<sup>17</sup> Slaves constituted nearly 20 percent of total private wealth in the thirteen colonies in 1774. Slave prices in the Americas (including the mainland colonies) had steadily increased throughout the eighteenth century, with exceptions caused primarily by war, an important indication of the growing demand for slave labor.<sup>18</sup> The mainland American slave population nearly doubled between 1750 and 1770, a striking measure of slavery's growing economic significance there. By 1770, it had grown to about 470,000.<sup>19</sup>

But to understand the politics of slavery, it is also quite important to appreciate that slaves (and related wealth) were very asymmetrically distributed throughout the American colonies. By 1770, the overwhelming majority of mainland American slaves were concentrated in five colonies: Virginia, North and South Carolina, Georgia, and Maryland.<sup>20</sup> Slaves



were an average of 41 percent of their total populations. Slaves constituted more than 30 percent of all physical wealth in the southern colonies, which meant that as a class of assets they were nearly as large a share of southern wealth as the estimated value of all land in those colonies.<sup>21</sup>

The major slave-colony economies were built in substantial part around the use of slave labor, principally in agriculture, often in crops that were particularly labor-intensive and intended for export. Largely as a result of slave agriculture, exports from the South in 1770 were roughly 50 percent higher in value than exports from the New England and the mid-Atlantic colonies combined, although the populations of the two areas were equal.<sup>22</sup> The slave colonies grew wealthy as a result. "At the time of the Revolution, total and per capita wealth levels of the slave colonies were far greater than those of their protofree [i.e., Northern] counterparts."<sup>23</sup>

In striking contrast, in the eight Northern colonies at about the time of the Declaration of Independence, slaves constituted only about 4 percent of the population. In New Hampshire and Vermont combined in 1770, there were about seven hundred slaves, while in Massachusetts, slave population was less than 2 percent of total population. Certain Northern states, particularly Connecticut and Rhode Island, had comparatively more slaves; there, between 3 and 6 percent of the population was enslaved.<sup>24</sup> In the New England colonies, slaves constituted less than 1 percent of total physical wealth.<sup>25</sup>

In the mid-Atlantic states, slavery was more prevalent than in New England. There, slaves constituted about 4 percent of total physical wealth, and about 16 percent of household heads had slaves or servants. For political analysis, it is also important to appreciate that slaveownership was not distributed equally geographically or in terms of economic function within the mid-Atlantic states.<sup>26</sup> For example, slaveholding was roughly three times as high in percentage terms in colonial East Jersey as it was in West Jersey. Certain counties in New York had populations that were more than 20 percent slave, nearly double the statewide average.<sup>27</sup>

Some historians argue that despite the limited slave populations of the Northern colonies, slavery was nevertheless central to their economies because they depended heavily on sales to markets that existed largely by virtue of slave-based production. As late as 1770, the British West Indies accounted for more than half of Northern-colony commodity exports. This trade had "immense" implications for Northern-colony economic development in areas such as ports and shipbuilding.<sup>28</sup>

This brief sketch of the economic position and geographic distribution

of American slavery might suggest that although slavery's influence was pervasive, it was more deeply economically and politically embedded in the Southern slave colonies than in the Northern and mid-Atlantic colonies just before the Revolution. As the later history of gradual abolition suggests, there is considerable truth to this observation. But British policies supporting and protecting colonial slavery to some extent masked these important regional differences. Two important aspects of British policy were the relative uniformity and broad social reach of the law of slavery.

In 1770, under British policy slavery in most colonies was "classical" chattel slavery, though there were various differences in colonial slavery laws.<sup>29</sup> Chattel slaves were deemed to be property for many legal purposes, and normally lacked civil rights of any kind.<sup>30</sup> (See appendix A.) The widespread adoption in British and colonial law of property-law principles as a basis for slavery law meant that slaveowners would have the widest possible markets for slave property, the strongest possible legal protection for it, and the fewest legal impediments to its use. But slavery's influence on colonial society was broader than even its imperial military and policy support, economic prominence, or protection through the law of slavery would suggest.

American slavery was not just a brutal, oppressive labor system. As historians have shown, it was a multidimensional institution of social control. In the mainland colonies, it served as a means of enforcing racial separation and subordination, of limiting the cost of poor relief for the unemployed and disabled, and of controlling crime.<sup>31</sup> These social-control functions of slavery embedded it deeply in American culture. But the reasons for colonial elite support of slavery went well beyond its substantial profitability and usefulness as a means of social control of blacks. As Edmund S. Morgan famously showed for seventeenth-century Virginia, slavery had profound social class and racial implications that had the potential to influence the basic structure of white majority politics.<sup>32</sup>

Colonial law supported and reinforced slavery's social- and political-control functions. Slavery was deeply interwoven with the poor-law system, virtually the only form of social-welfare provision that existed in the eighteenth century. Slaveowners' ability to manumit slaves was often significantly restricted by poor-law requirements, and slaveowners were required to support aged or infirm slaves to avoid poor-relief costs for other taxpayers.<sup>33</sup> Because colonial poor-relief laws typically made assistance for indigent residents a local responsibility, jurisdictions eager to avoid this taxation burden responded with stringent rules denying residence rights

to strangers such as runaway servants and slaves.<sup>34</sup> Slaveowners often had a legal duty to prevent crimes by their slaves and could be fined for failure to prevent them.<sup>35</sup>

In 1770, colonial slaveowners had the right forcibly to recapture a fugitive slave wherever the slave was found.<sup>36</sup> An owner could recapture a fugitive slave in another jurisdiction either by self-help or by seeking official assistance and making a claim for the slave. William Blackstone described this right's contours in English common law, terming it a right of "recaption."<sup>37</sup> English court decisions confirmed the existence of the right of recaption for slaves throughout the American colonies.<sup>38</sup> To protect slaveowners, the laws of several colonies made it unlawful to harbor fugitive slaves, and statutory rewards were given for their return. New Jersey adopted such legislation by 1694.<sup>39</sup>

Some of the harshest criminal punishments known to the law were placed there to prevent slaves from becoming fugitives. At least one colony permitted fugitive slaves to be proclaimed outlaws and as such to be killed with impunity, and provided for harsh punishments in cases of flight, including bodily dismemberment, in order to "terrify" slaves.<sup>40</sup> Slave conspiracies and rebellions, which inevitably involved flight, were deemed felonies, punishable by harsh penalties, including death in Virginia and North Carolina.<sup>41</sup> These draconian laws sought to hold down the cost of slavery by avoiding significant costs to slaveowners. The statutes reflected legislative recognition that the profitability of slavery depended in part on preventing large numbers of slaves from becoming fugitives.

Before the Revolution, no American colony provided any substantial legal protection to fugitive slaves against efforts to recapture them.<sup>42</sup> Moreover, in some colonies officials were required by law to assist slaveowners from other colonies, as well as those in their own, in recapturing their slaves.<sup>43</sup> Colonial newspaper advertisements show that slaveowners expected that citizens in their own colony and in others would assist in recapturing their fugitive slaves for a suitable reward.<sup>44</sup> At the time, there was no legal doctrine within English or colonial law that would have emancipated fugitive slaves fleeing from one British colony to another. Nevertheless, there were well-known circumstances in which a fugitive slave could become free. Since the end of the seventeenth century, Spanish Florida had emancipated fugitive slaves from the English colonies who converted to Catholicism. As a result, Berlin concludes that Spanish Florida had become notorious as what he calls a "magnet" for fugitives.<sup>45</sup>

Yet despite slavery's economic and political importance to the British

Empire, by the mid-1760s, legal and political challenges to it were beginning.<sup>46</sup> By then, British law had developed to the point where slaves were sometimes able to seek their freedom through court actions, rather than by risking death through flight. And American colonies were increasingly seeking to curb slave imports and considering liberalized slave manumission in the decades before the Revolution.

#### COLONIAL LEGAL AND POLITICAL CHALLENGES TO SLAVERY

By the mid-eighteenth century, throughout the empire the law recognized an exception to the general rule that slaves were “rightless” persons: slaves could challenge the legal basis of their captivity, though only on narrow grounds. There were numerous court actions seeking freedom for individual slaves in the decades just before the Revolution, both in England and in the United States. As historian John Wood Sweet concludes, the changing character of these challenges over time provides evidence of increasing political strains on the institution of slavery. By the 1770s, some of these cases involved lengthy legal battles that embroiled all of the major political institutions of an entire colony, while others involved challenges to the scope of slavery in an entire jurisdiction. A good example of the former is the extensive legal efforts of Henry Marchant, a prominent Rhode Island attorney (who eventually became its first United States federal district court judge), on behalf of a Connecticut slaveowner in *Randall v. Robinson*, a case discussed by Sweet.<sup>47</sup>

Beginning in the late 1760s, Marchant was forced to spend five years trying to obtain legal authority for his client John Randall, a Connecticut man, to purchase several Rhode Island slaves from the estate of Susannah Hazard. As shown by her will, Hazard’s clear intent had been that her slaves, an African American woman named Esther and her children, would be freed when she died, but her will did not provide for the filing of a manumission bond required by law before the slaves could be freed. After Hazard died, the slaves were sold to Randall by her executors instead, because her heirs wanted the money from the sale. Then in late 1768, a prominent abolitionist attorney, Matthew Robinson, personally provided the manumission bond to protect the slaves, seeking to block their sale to Randall by freeing them.

In 1769, Marchant therefore sued Robinson personally, bringing an

action of trover and seeking large damages as a means of trying title to the slaves, in *Randall v. Robinson*. Robinson represented the slaves' interests without charge. Before the case was resolved in 1774, Marchant had been forced to make three successful appeals to the Rhode Island legislature to maintain favorable jury verdicts for Randall and to overturn court rulings against Randall that would have freed the slaves or granted them new trials. On Marchant's last appeal, in 1774 the legislature effectively ordered the court to enter judgment for Randall, which it then did. The case's tortuous course, pitting the courts against the legislature and popular juries, makes clear the wide gulf between popular opinion and elite judicial opinion in Rhode Island regarding slavery at the time.<sup>48</sup>

There was considerable colonial slave freedom litigation in the 1760s and 1770s. Legal historian Robert Cover analyzes such freedom suits in Massachusetts, where he found that juries were "somewhat notorious" by 1765 for favoring slave freedom, and in Virginia.<sup>49</sup> Sweet notes that historians have also found freedom lawsuits in New England, New Jersey, and Pennsylvania, and he analyzes several significant freedom cases in Rhode Island.<sup>50</sup> Another freedom suit, involving Peter Lee, a fugitive slave from Massachusetts, was heard in 1764 in New Castle County, Delaware.<sup>51</sup> Lee contended that he had been born free in Massachusetts, but had been enticed to Delaware and then sold into slavery. The court agreed to consider his claim. In most of these freedom cases, challengers accepted the legitimacy of slavery as an institution, but argued that a particular slave or slaves had been freed as permitted by law (e.g., manumission), or had been illegally enslaved.

However, as Cover concludes, some slave freedom cases in the 1770s also posed novel challenges to the scope or regulation of slavery within an entire jurisdiction, and in those cases some courts demonstrated an increased willingness to place restraints on slavery. In 1770, in *Howell v. Netherland*, the Virginia Supreme Court summarily rejected a fundamental attack on the legality of slavery by Thomas Jefferson, a challenge Jefferson had made the basis of his effort to free a slave.<sup>52</sup> In 1772, however, the same court in *Robin v. Hardaway* rejected the argument that Native Americans were slaves in Virginia. The court based its decision on its review of the history of Virginia's slavery laws, in the face of an allegedly long-standing custom that Native Americans could be held as slaves there.<sup>53</sup>

Similarly, in *Randall v. Robinson*, the court appeared willing to "interpret"—that is, effectively to alter—Rhode Island law to give effect to the testator's intent to free her slaves despite the fact that the contested will's

manumission directions did not technically comply with Rhode Island law (noncompliance meant that the slaves would not have been freed and could therefore be sold). The court's position showed a newfound willingness to favor freedom for slaves over the normally sacrosanct financial interests of white heirs, and its tenaciousness in persisting in its position in the face of legislative reversals was quite striking.

In an equally remarkable unreported 1773 case, the Rhode Island Supreme Judicial Court, on its own initiative, ordered an investigation into the circumstances of the original capture in Africa of several slaves brought to Rhode Island. The court then declared them free and ordered their return to Africa after concluding that they had been kidnapped by Rhode Island slave traders.<sup>54</sup> As these Rhode Island and Virginia cases show, colonial courts in the early 1770s were willing to constrain slavery in at least some respects. And in the years before the Revolution, colonial legislatures were also increasingly seeking to limit slave imports. Those efforts were often frustrated by British policy, but they usefully illustrate the complexity of antislavery opinion and coalitions before the Revolution.

Just before the Revolution, significant numbers of colonists regarded the African slave trade and resulting slave imports as unmitigated evils both for Africans and for Americans. As legal historian Lawrence Friedman concludes, there was "widespread agreement that the slave trade was an abomination . . ."<sup>55</sup> Slave-import taxation laws were virtually the only laws limiting slavery enacted prior to the Revolution. Such import taxes (some of which amounted to bans because their rates were so high) in both Northern and slave states frequently were supported by coalitions. Opposition to the slave trade and antislavery motives played a significant role in support for import limits. But prominent members of those coalitions sometimes had motives other than opposition to slavery for supporting them, as the following examples from Pennsylvania, New York, and Virginia illustrate.

In 1761, Pennsylvania imposed a restrictive £10 duty on the importation of slaves (today, this would be somewhere in the range of \$1,250 per slave, or perhaps 20–25 percent of the slave's market value). The duty was justified in part by the argument that preventing slave imports would protect white laborers who could provide military service, while slaves could not do so. The duty was imposed over the opposition of Philadelphia merchants who argued that slaves were needed to meet labor demand.<sup>56</sup> Because the 1761 duty amount was a significant fraction of total slave prices, it is likely that the purpose of that duty was not simply to produce revenue, but also to

curtail demand for slave imports. In 1773, Pennsylvania increased its duty to £20, a clearly prohibitive level; the increase was disallowed by the British Lords of Trade in 1774.<sup>57</sup>

New York chose to base its more relaxed eighteenth-century slave-import duty laws on a discriminatory rate schedule designed to prevent the importation of slaves deemed socially undesirable. These were slaves from the West Indies and other colonies that New Yorkers believed should be discouraged from supplying “the Refuse of their *Negroes*.” Historian Arthur Zilversmit describes the reasoning behind New York’s approach: “The West Indian planters, the New Yorkers bitterly observed, sent them slaves who would have been executed for their crimes ‘had not the Avarice of their Owners, saved them from the publick justice by an early Transportation into these Parts, where they not often fail of repeating their Crimes.’”<sup>58</sup>

New York writing just before the Revolution illustrates the sharp political distinctions drawn at the time between slave imports and slavery. A 1773 essay strongly favoring a tighter New York ban on slave imports distinguished it from the undesirable abolition of slavery. The writer claimed that even New Yorkers who were “enemies to slavery” not only understood that immediate emancipation would be “impracticable, as it affects property too much,” but also believed that “it would be actually detrimental both to society in general, and to the persons thus made free in particular.” Emancipation would harm society because it would drive up poor-relief costs.<sup>59</sup>

Virginia’s prerevolutionary efforts to limit slave imports were based on opposition that “came initially” from “large slaveholders of the Eastern Seaboard” who hoped to obtain “thereby a monopoly position in the supply of slaves with consequent high prices.”<sup>60</sup> This conclusion is supported by the reaction to leading Virginia slaveholder and politician Richard Henry Lee’s effort to tax slave imports to Virginia. During the Seven Years’ War, Lee proposed a 10 percent import duty on African slaves imported into Virginia in order to raise revenue. According to his biographer,

New gentry men and small planters . . . denounced the plan because it would force them to pay higher prices for their slaves to large planters who already had a surplus slave population. . . . Opponents . . . criticized Lee by suggesting that his motivation was to increase his own fortune by selling his slaves without having to worry about competition from slave traders. . . . The governor [Fauquier]

summarized the dispute . . . as a “contest” between “the old settlers who have bred great quantities of slaves and who would make a monopoly of them by a duty which they hoped would amount to a prohibition” [and others].

The proposed duty failed to pass the House of Burgesses.<sup>61</sup>

A recent study of Virginia slavery concludes that “at least from the 1760s Virginia leaders tried to curtail the slave trade in order to strengthen their economy.”<sup>62</sup> British leaders at the time saw the effects of such curtailment quite differently. King George III instructed the royal lieutenant and governor general of Virginia in December 1770 to disallow any future increase in slave-import taxes there similar to the one that had been disallowed by the Privy Council in 1769. But he also specifically instructed the Virginia governor that “upon Pain of our highest Displeasure” the governor should veto any other law “by which the Importation of Slaves shall be in any respect prohibited or obstructed.” British policy was to require Virginia to remain open to slave imports, whether Virginia wanted to do so or not. Among the reasons given in the king’s instructions were that curtailment of slave imports would harm the “Cultivation and Improvement” of Virginia and “prejudice and obstruct as well the Commerce of this Kingdom . . .”<sup>63</sup>

Britain saw the effects of slave-import limits as detrimental to Virginia’s and Britain’s economy, while Virginia slaveowners saw them as positive. The eventual 1778 Virginia slave-import ban was a continuation of earlier efforts to protect Virginia’s slave economy that “arose more from the economic interests of eastern Virginia’s elites than from the ideals of the Revolution,” though both motives contributed to the ban.<sup>64</sup> Because they would benefit from such political “rent seeking,” which aided existing slaveowners by artificially increasing slave prices through restrictions on slave supply, major slaveowners like Virginia’s George Mason could support import bans while also opposing abolition.<sup>65</sup>

British policy barring colonial slave-import limitations protected the interests of British slave plantation investors, slave traders, and colonial slave purchasers in maximizing the supply of slaves at the lowest possible prices. But British policy also harmed colonial economies by depressing slave prices and tax revenues, so it was unpopular in places like Virginia and South Carolina. It was equally unpopular in other colonies that wanted to ban slave imports for other reasons, such as protecting white laborers or encouraging white immigration, or from humanitar-



ian concerns about the slave trade. And British policy on slavery itself was beginning to change just before the American Revolution in ways that would also prove threatening to American slaveholders. The clearest indication of this potentially far-reaching shift in the direction of policy was the most notorious prerevolutionary slave freedom case of all, the 1772 case of *Somerset v. Stewart*.

#### THE SOMERSET DECISION AND ITS AFTERMATH

*Somerset v. Stewart* directly challenged the legitimacy of slavery as an imperial institution.<sup>66</sup> In that case, the English Court of King's Bench, in an opinion by Chief Justice Lord Mansfield, decided the fate of a fugitive slave, James Somerset, who had been brought to England from America by a high British North American customs official, Charles Steuart (or Stewart). Some time after coming to England, Somerset fled and was then recaptured by slave hunters. Somerset was in chains aboard a ship in London awaiting transportation to Jamaica for sale when the action seeking his freedom was brought.

It was generally understood from the outset of the case that Mansfield's ruling might create a precedent that would affect as many as fifteen thousand blacks then held in "near slavery" in England, and could even be broad enough to affect slavery in the colonies. As a result, the case was argued by the leaders of the London bar, and the defense of the slaveholder's position was directly controlled by West Indies slaveholding interests. Mansfield's decision consisted of a series of rulings (or "holdings") that had broad, disruptive implications for imperial, not just English, slavery. In some respects, this was probably a result more of surrounding prerevolutionary political circumstances than it was of Mansfield's intentions.

Mansfield held that Somerset's status in England was governed by English law and not by colonial law. It was of profound importance to the history of slavery that in so holding Mansfield conceived of a slave primarily as a person whose legal status was slavery, not as a form of property. Mansfield apparently thought of slavery as an extreme form of master-servant relationship (though slaves were regarded as property for certain legal purposes). Because slavery was a status, its character could change as a slave moved from one jurisdiction to another, depending on the new jurisdiction's laws. As Mansfield was aware, this novel conception of slavery rejected an important aspect of the eighteenth-century British imperial

slavery policy created by Mansfield's mentor, Lord Hardwicke, that the status of slaves brought to England did not change in England.<sup>67</sup>

Mansfield's decision devalued slave property by rejecting slaveowner contentions that slavery had a uniform character throughout the empire, determined by its status as property under colonial law. He also rejected the idea that slavery had any foundation in natural law, holding that it could be legitimated solely by positive law (i.e., statutory law or its equivalent in express, exceptionally long-standing custom). Under both English law and the law of nations, Mansfield concluded, the legality of slavery, an "odious" condition, was to be determined solely by positive law, as opposed to common law. As Mansfield put this, deliberately emphasizing the breadth of his conclusion, "in no country or age" can the origin of slavery "be traced back to any other source."<sup>68</sup> That conclusion raised substantial questions about slaveowner rights to compensation if slavery were curtailed or ended.<sup>69</sup> And if colonists possessed English constitutional rights (as they increasingly asserted), that holding implied that in the colonies slavery would exist only if it were established by positive law.<sup>70</sup> If so, *Somerset* itself might operate to bar slavery in some colonies.

Finally, Mansfield held in *Somerset* that English law did not permit anyone held in servitude, even someone claimed as a slave, to be taken forcibly out of the country. Again assuming that colonists had English rights, this holding implied that a colonial fugitive slave could not be forcibly recaptured in and then removed from another colony. If a slave's status depended solely on positive law, the decision in *Somerset* would also have meant that a Virginia fugitive slave who fled to a free jurisdiction could have become free. Unlike the situation before *Somerset*, a Virginia slaveowner would have had no claim to the slave in the free jurisdiction.<sup>71</sup>

In areas other than slavery, eighteenth-century British imperial policy was a form of de facto federalism, because it usually respected legal diversity between the metropolis and the colonies. Mansfield's decision adopted a federalist approach for slavery, implying that slavery was legal in some colonies even though unauthorized in England. A rule recognizing legal diversity would potentially allow each colony (subject to British imperial authority) to decide for itself whether it would recognize slavery or protect fugitives. But Mansfield's decision also removed any doubt that if Parliament chose to limit or end the slave trade or colonial slavery, it could do so, and meant that colonial slaveholders could not argue that their property or contract rights prevented such action.<sup>72</sup>

Mansfield's decision also had considerably broader political ramifica-

tions, whether he intended all of them or not.<sup>73</sup> The political impact of *Somerset* was not limited to England, although many historians conclude that it was intended as a legal matter only to apply to slavery there. The decision ignited a substantial controversy in the American colonies. The wider political implications of *Somerset* were even broader and more important than its direct legal effects.

The decision was bitterly attacked by colonial slaveowners in the 1770s as a surprising and destabilizing reversal of at least half a century of prior English law, which they argued (with some justification) had deemed slaves “imperial” property with a largely uniform status throughout the empire.<sup>74</sup> West Indian slaveowners attacked the *Somerset* decision because they thought that it would damage colonial slavery, not because they cared about whether slaves could be brought to England. Pamphlet wars regarding the decision erupted in England, and opposing pamphlets were advertised for sale in the mainland colonies.

The arguments and decision in *Somerset* were widely reported in the mainland colonies. A survey of twenty-four operating colonial newspapers for which a full year’s editions have survived (out of a total of thirty-two operating papers) showed that twenty-two out of the twenty-four newspapers contained reports of the arguments, an account of the decision, or both. The longest such coverage consisted of well over two thousand words.<sup>75</sup> This extensive transatlantic reporting shows that it was widely believed that the *Somerset* decision could have colonial impacts. Events in the colonies after *Somerset* provided several forms of immediate and vivid evidence of the decision’s mixed but potentially powerful implications for colonial slavery and politics: new slave freedom litigation, slave flight, strongly intensified political debate over slavery, and reinforcement of slaveholder antipathy to Crown policy on slavery and taxation.

Some colonists believed that Mansfield had decided that English common law prohibited slavery not just in England but wherever that law applied. Significant numbers of colonists believed English common law applied throughout the colonies, at least where English fundamental rights were concerned. As a result, in Massachusetts, *Somerset* was cited as legal authority supporting a slave’s suit for freedom in a 1774 case. This meant that the slave’s attorney contended that the decision’s principles were intended to apply in Massachusetts. That claim would in turn necessarily have been founded on the further arguments that Massachusetts had no positive law establishing slavery, and that under *Somerset*, this meant that slavery did not exist there.<sup>76</sup> The continuing political force of this line of

reasoning in the prerevolutionary debate over slavery (and over the justifications for colonial resistance to British rule itself) can be seen in the eloquent argument made by a Pennsylvania writer in mid-1774:

We declare with a joint voice, that ALL *the inhabitants of America* are entitled to the privileges of the inhabitants of Great-Britain; if so, by what right do we support slavery?—The instant a slave sets foot in England, he claims the protection of the laws, and puts his master at defiance; if British rights extend to America, who shall detain him in bondage? . . .

I contend that, by the laws of the English constitution and by our *own declarations*, the instant a negro sets his foot in America, he is as free as if he had landed in England.<sup>77</sup>

This writer contended that if colonists insisted that their possession of British rights meant that they were exempt from “the controul of Parliamentary power,” to be consistent they must also accept that the same British laws and constitution that protected them from Parliament abolished slavery in America as well as in England. If not, there would be no reason for the people of England to respect the colonists’ own rights.

Others in both England and the American colonies took the narrower view that in *Somerset*, Mansfield had decided that slaves became free upon coming to England.<sup>78</sup> In the colonies, slaves from Massachusetts to Virginia appear to have been encouraged to seek their freedom by the decision.<sup>79</sup> According to historian William Wiecek, some Massachusetts slaves sued their masters for freedom and back wages based on *Somerset*.<sup>80</sup> A recent account of the Massachusetts reaction to *Somerset* reports that slaves in Boston petitioned the legislature for their freedom in 1773, asserting that they had a natural right to freedom that had not been abrogated by contract or positive law in Massachusetts, a position that may have been based on, and in any event was certainly consistent with, *Somerset*.<sup>81</sup> At least some Virginia slaves who learned of the decision concluded that it meant they would be free if they could escape to England. As historian Paul Finkelman describes these events, “One Virginia slave attempted ‘to board a vessel for Great Britain . . . from the knowledge he has of the late Determination of Somerset’s Case.’ Another Virginia master complained that his runaways were bound for England ‘where they imagine they will be free (a Notion now too prevalent among the Negroes, greatly to the vexation and prejudice of their Masters).’”<sup>82</sup> When one combines the Massachusetts and Virginia accounts, it seems fair to conclude that among slaves the word about

the *Somerset* decision had “gotten around” from one end of the colonies to the other.

But in the longer run, *Somerset*'s implications went well beyond contributing to slave freedom litigation and slave flight. It quickly became part of an expanding American colonial debate over slavery and encouraged anti-slavery action.<sup>83</sup> Reactions to the decision in the American colonies ranged from approval to determined opposition. The decision strongly interested American abolitionists, who participated in an ecumenical transatlantic antislavery network. A key member of that network was Granville Sharp, a leading English abolitionist who had been a principal force behind English legal actions against slavery in the 1760s and 1770s that had effectively set the stage for *Somerset*. Sharp promptly sent information about Mansfield's decision and related English political developments to fellow antislavery activists in the American colonies, who soon took advantage of it in their antislavery publicity and legislative action.

In a widely circulated pamphlet first published in 1772 in Philadelphia and then republished in Boston, Sharp's Philadelphia ally Benjamin Rush gleefully seized upon *Somerset* to support his argument that American political freedom was inextricably intertwined with freedom for slaves. He relied on the decision as evidence that Britain intended to abandon its support of slavery: “We have the more reason to expect relief from an application [to bar slave imports] at this juncture, as, by a late decision in favor of a Virginia slave at Westminster-Hall, the clamors of the whole nation are raised against them [slave importers].”<sup>84</sup> Anthony Benezet, a prominent antislavery writer based in Philadelphia, received Sharp's information and provided the materials to prominent New Jersey attorney Samuel Allinson.<sup>85</sup> Encouraged by Mansfield's decision, Allinson and his allies soon undertook legislative abolition efforts.

American slaveholders reacted to *Somerset* either with criticism or with public silence.<sup>86</sup> There were attacks on the *Somerset* decision published in Rhode Island, Connecticut, Massachusetts, and Virginia newspapers, some of them quite extensive.<sup>87</sup> One British newspaper's “correspondent's” views were widely reprinted in American newspapers. He argued that *Somerset* was wrongly decided because colonial slave property must be treated as imperial property that retained its unchanging character as property even as it changed jurisdictions.

This Cause seems pregnant with consequences extremely detrimental to those Gentlemen, whose estates chiefly consist in slaves; It would

be a means of ruining our African Trade. . . . [I]f the purchase of the slaves was . . . made in countries which allow of the traffic, then our Correspondent strenuously asserts, that no change of climate can abrogate the bargain; for it appears at first sight incongruous to suppose that a change of climate [jurisdiction] can deprive a person of that property, for which he gave a valuable consideration.<sup>88</sup>

A 1774 South Carolina pamphlet attacked *Somerset* as a dangerous inroad on South Carolina laws and customs. “A Back Settler,” its anonymous author, clearly referring to *Somerset*, accepted that English law now freed anyone of “human Form” who came to England, resulting in a “general Manumission of Negroes” there. Back Settler used this doctrine, which would “complete the Ruin of many *American* Provinces, as well as the *West India* Islands” if adopted there, as an important reason why Americans would not want to adopt all English liberties as his fellow colonists were now claiming should be done.<sup>89</sup>

Although press coverage alone is a limited measure of public opinion, the Virginia press coverage of the decision suggests that slavery opinion there may have been somewhat divided. A prominent Virginia newspaper published a detailed attack on *Somerset*.<sup>90</sup> But another newspaper there reprinted an anonymous comment challenging Parliament’s authority to legalize slavery in England, though on grounds that many Virginians would probably have rejected. The author argued that “the Laws of God” required that “a Negro cannot be less free than a man of any other Complexion,” and that permitting enslavement of blacks on racial grounds would inevitably lead to its extension to “every mulatto,” and then “the Portuguese” and “the French,” and even the “brown complexioned English.”<sup>91</sup>

One observer claimed that the *Somerset* decision would threaten colonial slaveowners because massive freedom litigation would result, especially in the West Indies. This “correspondent’s” views appeared in New York and Massachusetts newspapers: “The late decision with regard to Somerset the Negro . . . will occasion a greater ferment in America (particularly the islands) than the Stamp Act itself; for slaves constituting the great value of (West Indian) property (especially) and appeals from America in all cases of a civil process to the mother country, every pettifogger will have his neighbor entirely at his mercy. . . .”<sup>92</sup>

But the political implications of *Somerset* went far beyond the possibility of further freedom litigation, as can be seen from the reaction to the decision of a well-informed colonial official, Henry Marchant. Marchant,

the attorney for the slave purchaser in the Rhode Island slave freedom case discussed above (*Randall v. Robinson*), had gone to England as the colonial attorney and agent for Rhode Island in 1771. While in London, Marchant personally attended the early 1772 opening court arguments in the *Somerset* case. An experienced attorney trained in Massachusetts, Marchant concluded that the arguments made by Somerset's attorneys for his freedom would apply just as well in the colonies as in England, a conclusion that would have been very threatening to any colonial slaveholder.<sup>93</sup> Marchant saw no legal distinction between the British slave trade, which was unquestionably legal under English law and thus essentially unchallengeable under colonial law, and the use of a slave in a business, which he thought was under attack in *Somerset*. He saw the abolitionist argument in *Somerset* as a mere "plausible pretence" to "cheat an honest American of his slave."<sup>94</sup>

Both Henry Marchant's reaction and the published attacks on *Somerset* provide evidence that American slaveholders thought that the decision was an arbitrary ruling that destroyed their valid property rights. This unfairly deprived Americans of their "honest" property, and made them second-class subjects. For slaveholders, this made *Somerset* a direct and wholly unpalatable parallel to British legal scholar (and Mansfield ally) William Blackstone's conclusion, in his widely read *Commentaries on the Laws of England*, that the American colonies had been British conquests, and therefore were not governed by (or protected by) English common law.<sup>95</sup>

*Somerset* also created an important problem of political "jurisdiction" for slaveowners. As is well known, Mansfield's views on parliamentary supremacy and virtual representation were anathema to many Americans. But they would have become of immediate practical concern to colonial slaveholders when he made English slavery, and quite probably imperial slavery as well, subject to future parliamentary control in *Somerset* by denying that courts had authority to authorize it because slavery was purely a creature of positive law.<sup>96</sup> There were immediate practical consequences of this shift in "political jurisdiction." While *Somerset* was under consideration, in May 1772 Parliament declined a request by slaveowners to legislate to legalize slaveholding in England. Parliament's action, like the result in *Somerset* itself, showed that antislavery activism was having some success in England.<sup>97</sup>

American slaveholders were thus threatened by *Somerset* with diminished imperial protection for slavery—through threatened invalidity of their property rights outside their colonies and even inside some colonies—at the same time that Britain was blocking their own colonies' policies in-

tended to maintain slave prices by limiting imports through taxation. But in American slave colonies, white majorities sought to end arbitrary British government policy on slavery not by abolishing slavery, but by insisting on local autonomy over it, including its taxation.

Thomas Jefferson's opinions on slavery in his *Notes on Virginia* notwithstanding, many American slaveholders just before the Revolution had no great qualms about considering existing slaves as property, as their colonies' laws and customs had done for more than a century. As Jefferson himself explained to a correspondent many years later, few prominent Virginians doubted then that slaves were "as legitimate subjects of property as their horses and cattle."<sup>98</sup> Consider, for example, the conduct of Richard Henry Lee, the Virginia leader who moved the formal congressional resolution declaring American independence in June 1776. There is no evidence that Virginians had thought it ridiculous for Lee to conduct a public parade in Virginia against the Stamp Act's "chains of slavery" while literally using his slaves to hold his protest banners.<sup>99</sup> In mid-1772 when *Somerset* was decided and Virginia's legislature was opposing continued slave imports, Lee was attempting to engage in an international slave-trading transaction with his brother in London as his partner.<sup>100</sup> From this, it appears that for Lee the central Revolutionary-era political issue raised by slavery was not its morality or expediency, but instead Virginia's right to control it without British interference. As is shown by their views in forming the Confederation, leaders such as Lee and Patrick Henry, like Revolutionary leaders in other major slave colonies, saw their state's untrammelled ability to control slavery as a central part of what the Revolution was about.<sup>101</sup> As Landon Carter, a major Virginia slaveowner, wrote in a different but analogous context to George Washington in 1776, the right to "do as we please with our own property" is "the very basis of the American contest."<sup>102</sup>

Leaving aside general attacks on arbitrary British policy, which many of them saw as damaging to slavery, many slaveowners were publicly silent on slavery in the period just before the Revolution. But they were often successful in opposing efforts during that period to take direct steps toward abolition. And they were successful in protecting slavery in important ways in the Articles of Confederation once the Revolution had begun, even as abolition began.

Colonial antislavery efforts that failed are nevertheless very informative about the political dynamics of slavery abolition. In 1773, encouraged by the *Somerset* decision, New Jersey legislator Elias Boudinot led an effort with Quaker leader Samuel Allinson and others to convince New Jersey



to move toward the gradual abolition of slavery.<sup>103</sup> Boudinot sought to negotiate consensus antislavery legislation with slaveowners' representatives, whose objections to abolition were "altogether founded" on the perceived "ill consequences of having free Negroes in a Neighbourhood where there are Slaves," as "they would greatly corrupt them."<sup>104</sup>

As a result of the Boudinot alliance's efforts, between 1773 and 1775 the New Jersey legislature considered two slavery-related bills. Both bills failed. The fate of the manumission bill is particularly instructive about New Jersey public opinion. Instead of substantial liberalization of the law, the bill discouraged manumissions by providing that masters who manumitted slaves older than twenty-one years had to pay a fee or post a bond to protect taxpayers against poor-relief costs. The bill also "severely limited" the rights of freed blacks; even though they were required to pay taxes and perform duties of citizens, they were denied the right to vote. They could serve as witnesses only against other blacks, and could not intermarry with whites.<sup>105</sup> New Jersey legislators had addressed manumission's consequences by minimizing its perceived socioeconomic costs to white citizens. Even with these onerous conditions on manumission, petitions urged the New Jersey Assembly to reject the bill, abolitionists agreed to delay it, and the bill failed by inaction.<sup>106</sup>

The years just before the Revolution also added another political dimension to slave-import laws when they became tools for attacks on British policy toward the colonies. This shift in the political rationale for colonial efforts to limit slave imports was evident from the 1774 Rhode Island import-ban law.<sup>107</sup> The statute departed markedly from past import limitations because it was not based on heavy import taxation but instead provided that any slave imported illegally would "immediately become free." Addressing both domestic and foreign audiences, its preamble proclaimed an abolitionist motive—linking political freedom for the colonies to freedom for slaves—as one of its primary purposes.

Rhode Island's ban statute was "largely symbolic"; it was riddled with exceptions to protect the interests of its citizens, its slaveowners, and its traders.<sup>108</sup> The statute excepted "Servants of Persons travelling through this Colony," a provision helpful to Rhode Island business. To avoid discouraging immigration, it then excepted "Negro or Mulatto" slaves, belonging to any British colonial "who shall come into this Colony, with an intention to settle or reside . . . therein." As to a new settler's slaves, remarkably, the statute provided that the law of slave discipline in Rhode Island would be the same law that had applied to the slave in its colony of

origin.<sup>109</sup> The statute also excepted many slaves temporarily held in Rhode Island for slave-trade reexport, which protected nearly all of the large Rhode Island slave trade.

As Paul Finkelman concludes, the ban statute's "sojourner" exception had the effect of negating *Somerset's* specific substantive holding as applied to them.<sup>110</sup> The statute's broader goal was to adapt *Somerset's* principles to Rhode Island's purposes. The legislation was premised on the fundamental conflict-of-laws principle of *Somerset*—the principle that local law (here, Rhode Island law) wholly controlled the fate of slaves once in Rhode Island, without regard to their status as property in other British colonies or foreign jurisdictions. Even before the Revolution, Rhode Island was declaring its law of slavery to be independent from that of any other colony and rejecting the imperial policy of slavery uniformity, following *Somerset's* logic.<sup>111</sup>

The Rhode Island ban foreshadowed the profound legal problem— independent state legal sovereignty—that would face the institution of slavery immediately after Independence.<sup>112</sup> In *Somerset*, the colonies had been told in unmistakable terms by the leading English judge of the day that English common law and morality did not sanction slavery, and that exercising their independent legal rights on slavery was not only legitimate but even desirable under long-standing English-law principles that protected freedom. After Independence, slaveholders would face a diverse legal regime that was far less stable than the reasonably uniform legal regime they had experienced under the empire before *Somerset*. Until a new revolutionary government was in place, they no longer had any assurance that their slave property would be protected by other states.

#### SLAVERY AND THE REVOLUTIONARY WAR PERIOD

The Revolution posed a series of important additional threats to slavery. These included the loss of imperial military and legal protection, the problem posed by slave revolts for military defense, sharply increased numbers of fugitive slaves, and the growth of antislavery ideology and state abolition movements. But the Revolution nevertheless strengthened slavery for several reasons. It fundamentally changed the balance of political power between slave states and states that were moving toward abolition in the new republic. Antislavery ideology, even reinforced by Revolution

principles, had limited effects in the face of the political and economic realities of slavery. Antislavery efforts also encountered countervailing political principles that were shared throughout America, including conflicting concepts of natural rights. Although the Revolution also caused some physical disruption to slavery, the effects of Revolutionary War slave flight and military limitations have been overstated. By far the largest part of the institution of slavery survived the Revolution's disruptions. Slavery emerged from the Revolution stronger than it had been within the framework of the empire, especially after *Somerset*.

The principal reason for the Revolutionary transformation of the sectional balance of power between slave states and Northern states was that the slave states represented a far larger share of the wealth and population of the total American confederation that resulted from the Revolution than they did of the British Empire. In their status as British colonies, the major American slave states had represented approximately 10 percent of the total population and 14 percent of the total wealth of the British Empire in 1774.<sup>113</sup> By comparison, those states contained more than 50 percent of both the total population and the total wealth of the United States when the Revolution began. One immediate political effect of Independence was to make the American slave states far larger stakeholders in a much smaller country. As debates in the new government quickly showed, the slave states also had strong common interests in various government policies. As a political matter, given their large resources and political cohesion, slave states were much more strongly positioned to resist Confederation control of slavery than they would have been to resist increased British imperial control of it.<sup>114</sup> Whether rebellious Americans anticipated that American independence would confer added political influence on the slave states or not, it quickly became apparent from the Continental Congress debates discussed below that where slavery was concerned, the slave states held a political veto over Confederation policy. Revolutionary politicians adjusted their policies accordingly.

The Revolutionary War did sharply exacerbate the fugitive slave problem for slave states. During the Revolution, the slave states lost substantial numbers of slaves through slave flight, but this loss had limited impact for several reasons. First, recent estimates suggest that slave flight was much lower than has often been thought. Some earlier estimates placed the total number of slaves who fled as high as 80,000–100,000, or approximately 20 percent of the total Southern slave population. A careful recent analysis by historian Cassandra Pybus shows that the number of slave runaways was

very probably dramatically lower—about 20,000, or 5–6 percent of the Southern slave population.<sup>115</sup>

Slave flight had varied effects in different parts of the country. Slaves fled to the British, into backwoods areas, and into the Northern states. The British command in New York became a magnet for runaways. During British occupation, slave flight from New Jersey and New York increased sharply.<sup>116</sup> In Virginia, Richard Henry Lee reported that his brother had lost sixty-five slaves to Cornwallis (roughly one-fourth of his holdings), and that other neighbors “lost every slave they had in the world.”<sup>117</sup> In the Lower South, Pybus estimates that slaveowners lost six thousand slaves to the British, or 8 percent of their total slave populations. But overall, the economic loss to slaveowners was relatively small. And as discussed below, they obtained protection against future slave flight from the new American revolutionary government.

The Revolutionary War also exposed some degree of military vulnerability of the slave states due to possible slave insurrections. Slaveholders were privately aware of this vulnerability even before the Revolution. As James Madison had written his close friend William Bradford, Jr., just before the war began, such insurrections were “the only part in which this Colony is vulnerable; & if we should be subdued, we shall fall like Achilles by the hand of one that knows that secret.”<sup>118</sup> At points during the war, some colonies were occasionally hampered in their military operations against the British because they needed troops instead to maintain slave discipline, but these disruptions do not appear to have been chronic or crippling.<sup>119</sup>

After Independence, slaveowners also faced the reality that antislavery thought had become more prominent in the years before the Revolution both in England and in the United States. Antislavery thought gained additional support—in some quarters—from the Revolution. Anyone familiar with Samuel Johnson’s famous gibe—“How is it that we hear the loudest *yelps* for liberty from the drivers of negroes?”—will appreciate that many Englishmen and contemporary Americans (Northern and Southern) thought that there was tension between American revolutionary principles and the institution of slavery.<sup>120</sup> Wartime efforts to employ blacks in the military undoubtedly increased this tension.<sup>121</sup> But for several reasons it would be a mistake to infer that the Revolution greatly strengthened the movement toward abolition throughout the country.

The conflict between slavery and Revolution principles was far more strongly felt by white citizens in the Northern states than in the South,

and perhaps only by a minority even in the North. As David Brion Davis points out, only the Vermont Constitution moved directly from an endorsement of natural rights to a constitutional abolition of slavery.<sup>122</sup> Davis doubts that the inconsistency of revolutionary ideals with slavery was a “pressing concern to the majority of Americans, even in New England. . . .”<sup>123</sup> And there were also sharply conflicting interpretations of Revolution principles where slavery was concerned. This conflict was not limited to differences founded on clashing views about black equality, but implicated larger issues of federalism and political sovereignty as well.

Historian Jack Greene argues persuasively that freedom to own slaves was one of the liberties claimed by South Carolinians, who saw no inconsistency between enslavement of African Americans and the ideas of the Declaration of Independence.<sup>124</sup> Many South Carolinians were fighting the Revolution to protect their slave property, not to free slaves, and they were not alone in failing to see any inconsistency between slavery and revolutionary ideals. Although there were notable exceptions, many Virginians felt precisely the same way about slavery; they fought at least in part to protect their freedom as Virginians to determine for themselves what they wanted to do with their slave property. Virginians’ determination to protect local control of slavery was evident in the deliberate modification of the 1776 Virginia Declaration of Rights during its drafting to exclude slaves from its protection, and in Richard Henry Lee’s key role in the drafting of the Articles of Confederation to protect slavery (discussed below).<sup>125</sup>

More generally, informed contemporaries understood that within the tradition of English thought stemming from the political convulsions of the Civil War and Restoration, it was possible to take more than one view of the origin and character of natural rights. Natural rights could either be seen as unalterable “natural” or divine restraints on the sovereignty of any government, as in John Locke’s thought, or as rights existing in a state of nature that could be limited by legitimate governments exercising their sovereignty through positive law, as in the work of writers such as Hugo Grotius and Thomas Hobbes.<sup>126</sup> Colonists were divided on which concept of natural rights they supported in the 1770s, as the carefully articulated views in a 1774 South Carolina pamphlet written by “A Back Settler” show. That author responded to an attack on parliamentary supremacy over the colonies by beginning with the argument that natural law could not control the decisions of a sovereign government: “The unequal Dictates of natural Law being wisely restrained for the general Benefit of the

Community, and reduced to a subordinate Limitation, no Arguments, on the supposed Impropriety of such Measures as were adopted by the acknowledged Legislative Power could be admitted, being in their Nature opposed to the constitutional principles on which the State or Society was founded.”<sup>127</sup> Notwithstanding the ringing phrases of the Declaration of Independence, later events, including the drafting and ratification of the Constitution on the basis of popular sovereignty, would show that the struggle between these warring conceptions of natural rights and liberty had not been decisively ended by the Revolution.<sup>128</sup> That irresolution had important implications for the evolution of slavery. And there were significant sectional differences in attitudes toward slavery as well.

Sectional differences over the implications of revolutionary ideals for slavery were attributable to several factors. Many of the Northern states had a distinctive religious heritage, and their leading denominations were more likely to condemn slavery as irredeemably evil than those in slave states.<sup>129</sup> David Brion Davis’s classic studies conclude that the Revolution created a new intellectual climate regarding slavery, founded on a confluence of Enlightenment, religious, and political thought. He and other historians suggest that this new climate of thought catalyzed the Northern abolition of slavery, and might have led to much wider abolition than actually occurred, absent countervailing forces such as a desire to maintain economic class discipline or sectional interest.<sup>130</sup> But other historians have responded that Enlightenment thought and capitalist market development themselves had equivocal implications for slavery, and that there was a limited connection between antislavery thought and political support for antislavery action.<sup>131</sup> Perhaps most importantly, Enlightenment moral and political thought (particularly that stemming from the Scottish Enlightenment) was entirely compatible with theories of history, appealing to many prominent citizens in slave states, that permitted and even sanctioned a “modern,” “progressive” variant of slavery.<sup>132</sup>

Economic and social differences between the Northern states and the slave states had an impact on the Revolution’s effects on slavery as well. Northern states had far less to lose from abolition either in economic terms or through social-structure disruption than the slave states did (discussed further in chapter 2). And informed contemporaries believed that white racism, which existed throughout America, was more strongly reinforced by existing socioeconomic conditions and practices in the South.<sup>133</sup>

As the creation of the Confederation showed, during the Revolution, arguments for government action against slavery also encountered

strongly countervailing political principles shared by many Americans that had profound implications for its future. Individual colonies were often seen as sovereigns whose political legitimacy necessarily derived from local public consent. Adherents of the strongest version of this doctrine of state sovereignty (or “strong” federalism) believed that no central government could legitimately control domestic slavery because it was precisely the kind of political issue reserved to governments founded on such consent. It was also often thought that governments existed first and foremost to protect property. These views were reflected in the Articles of Confederation where slavery was concerned.

The clash of these powerfully conflicting ideological and socioeconomic forces affecting slavery, combined with sectional divisions of opinion about slavery itself, meant that there was—and could be—no uniform understanding across Revolutionary-era America of the relation between slavery and “Revolution principles.” Widespread Revolutionary-era clamor against political enslavement may have created the appearance of a universalizing impulse toward equality or protection of natural rights during the Revolution with irresistible implications for American slavery itself, but the political reality was far more modest. Americans were divided over slavery, as is clear even if only the differing sectional responses to *Somerset* and the politics of slave-import limitations are considered. The groundwork had nevertheless been laid by prerevolutionary developments for a strenuous contest among Americans over slavery. But significantly, it occurred in the pressing context of how the Confederation would finance and conduct the Revolutionary War. The debate revolved around conflicting sectional interests, and slave states gained important protections for slavery as a result of it.

#### SLAVERY AND CONFEDERATION

Slavery severely complicated many aspects of Revolutionary leaders’ efforts to form a permanent continental government under the Articles of Confederation.<sup>134</sup> The debate over the Articles occasioned the first confrontation on slavery between American political leaders at the continental level. Slaveholders “won” that confrontation because they were able to threaten convincingly that they would abandon the Confederation over slavery. Slave states insisted that the Confederation should have no power to control slavery or slave property, even to support the war effort. The

political strength of the slave states was not the only cause of the Confederation's pronounced decentralization, but slave state representatives ardently supported the most extreme version of federalism during its formation. Slave state political strength did lead directly to stalemates on core structural issues of taxation and representation that protected slavery directly from Confederation authority and also guaranteed ineffectual Confederation government no matter what formal powers over slavery the Confederation was given. Slave states were also able to dictate outcomes on a series of related issues that affected slavery: black military service, fugitive slaves, and the slave trade.

Historians have underestimated the protection that the Articles provided to slavery. They agree that disputes over confederal "quotas of contribution" (that is, taxation) that implicated slavery and over congressional representation were central to the debate over the articles.<sup>135</sup> They have also shown that slavery strongly influenced the shape of major features of the Confederation such as military-service obligations and its treaty powers. But far less attention has been given to implications of slave state advocacy of the Confederation's extreme federalism and to the Confederation's treatment of citizens' privileges and immunities.<sup>136</sup>

In particular, historians have generally concluded that it is uncertain whether the Articles of Confederation had any provisions related to fugitive slavery.<sup>137</sup> But the sources suggest that slave states responded to the existence of new postrevolutionary state authority to abolish slavery by obtaining "confederal" protections—that is, Confederation laws binding on all states—against fugitive slavery and protection for imported slave property in the Articles of Confederation. These provisions were intended to limit the effects of the *Somerset* decision even in states such as Massachusetts where its principles were being applied.<sup>138</sup> Thus the articles went beyond what historian William Wiecek described as the "federal consensus" on slavery, which included a consensus that state law governed slavery.<sup>139</sup>

The Articles had as a central principle the concept of federalism, which as Americans understood it entailed both a formal division of substantive policymaking authority between levels of government and political protection for state power within the national government structure. Federalism was undoubtedly a product of the strongly and widely held belief that maintaining the strength of local government would protect freedom against possible central government tyranny. But it was also a virtue born of political necessity. Federalism permitted constitutional drafters to avoid very divisive, indeed probably irresolvable, disputes between the



states over a variety of controversial social issues, such as the separation of church and state, the extent of suffrage, and slavery. No union would have been possible if the principle of federalism had not been applied to slavery, as shown by Confederation slavery debates analyzed below.

But the Confederation was not just a federalist government; it was an extremely decentralized form of federalism that gave the Confederation government exceptionally limited authority with respect to both law-making and law enforcement. While a number of Revolutionary leaders throughout the country favored extreme decentralization, some important leaders such as Benjamin Franklin clearly did not, and many of its most ardent advocates were to be found in the slave states. Article 2 of the Articles, proposed by slave state representative Thomas Burke of North Carolina, was intended to explicitly recognize and protect state sovereignty, preserving to states the large realm of powers not expressly delegated to the Confederation. Although no direct evidence is available, their political views then and later suggest that Virginia members of Congress at the time, such as Richard Henry Lee, would have supported Burke's position. Both because it excluded the national government from nearly all domestic policy matters and because changes in national powers were made virtually impossible without unanimous consent of the states, article 2 established at least as wartime national policy a conception of federal authority that was the polar opposite of parliamentary supremacy under the British constitution.

The Articles drafters accepted that the regulation of slavery within the states would remain primarily under state control.<sup>140</sup> In theory, this would permit abolition to move forward in Northern states but, since at the time nearly 90 percent of all slaves were located in states where slavery was central to the economy, this decision also made it quite unlikely that the status of most American slaves would change at least in the near to medium term (discussed further in chapter 2). Creating the Confederation also involved a series of other important disputes that fundamentally affected slavery's place in the new federal system.

As historian Robin Einhorn has shown in a careful and illuminating analysis, sectional divisions over slavery prevented the Confederation from creating even a workable taxation system.<sup>141</sup> In debating the Articles, leading Northern and mid-Atlantic delegates advanced a new conception of slave status for Confederation purposes. They asserted that slaves should be deemed members of "confederal" society for purposes of calculating Confederation state taxation and military-service quotas. Northern delegates

sought to distinguish between the state-law status of slaves as property and their status under confederal law. Slave state delegates strenuously contended that the state-law status of slaves as property should fully determine their character for Confederation purposes.

This fundamental dispute over the Confederation legal status of slaves was at the heart of a well-known debate that occurred on July 30, 1776, over how to fund the Confederation during the Revolutionary War. Delegate Samuel Chase of Maryland moved that tax quotas of contribution be fixed by counting only “white inhabitants.” Chase argued that including “negroes” effectively would tax the South more heavily on wealth than the North because the North’s cattle and horses would be excluded. Chase also contended “that Negroes in fact should not be considered as members of the state more than cattle & that they have no more interest in it.”<sup>142</sup> John Adams of Massachusetts responded to Chase that the “wealth of the state” was being taxed, and that in calculating that wealth, the free or slave status of workers was irrelevant; the issue was instead whether workers contributed “surplus” to the state’s wealth. Adams observed that “the condition of the labouring poor in most countries . . . is as [painfully] abject as that of slaves,” but for Confederation purposes, that status was irrelevant. Even if “one half of the labourers of a state could in the course of one night be transformed into slaves,” they would not make the state poorer or less able to pay taxes.

The debate broadened to consideration of slavery’s differing effects on Confederation member states. James Wilson of Pennsylvania argued that Chase’s amendment meant that the North would bear all of the burdens of slavery, while the South received all of its benefits. The South would get to keep the profits of slavery, but could still exclude slaves from military-defense quota obligations, which would be particularly unfair if they were tax exempt. Wilson then expanded his attack based on antislavery considerations. He argued that the South could use free labor, but chose not to. Although “it is our duty to lay every discouragement on the importation of slaves, this amendment would give the *jus trium liberorum* to him who would import slaves.”<sup>143</sup> Wilson’s broadening of the argument was met with the acid response from slave state delegate Thomas Lynch of South Carolina, who had served in the first Continental Congress as well, that if it were to be debated whether slaves were slaveowners’ property, “there is an end of the confederation.”<sup>144</sup>

Lynch’s threat of Southern defection in the face of efforts by Massachusetts and Pennsylvania delegates to incorporate slaves into the tax and

military-service base of the Confederation laid bare the ultimate basis of slave state political power in the revolutionary government. It had long-lasting effects on one very influential member of the Continental Congress, John Adams, who understood that wholesale Southern defection would be a death sentence for the Revolution. Almost immediately after the tax debate, Adams opposed plans to include black troops in New Jersey forces because “S[outh] Carolina would run out of their Wits at the least Hint of such a Measure.”<sup>145</sup> Adams was so impressed by the vehemence of the Southern response to Northern arguments on slavery policy that when he was contacted in 1777 by Massachusetts legislators who were planning gradual abolition legislation in Massachusetts and sought Congress’s advice about it, he advised them not even to bring it up in their legislature for fear of the Southern reaction.<sup>146</sup>

Adams’s alarmed reaction to the prospect of Massachusetts abolition legislation was quite remarkable. His arguments during the taxation debate showed that he understood that there was ultimately no legal dispute in the Confederation itself about Massachusetts’s power to abolish slavery if it wanted to do so. Adams apparently believed that slave states thought that Northern moves toward abolition would threaten slavery in the slave states, and deferred to their fears. His short journey from aggressive efforts to include slave wealth and military capacity in the Confederation’s resources to efforts to keep slavery from becoming a divisive force in the revolutionary government provides strong evidence of his view of slave states’ bargaining strength in the revolutionary coalition.

Chase’s motion to exclude slaves from the tax base was defeated on August 1, 1776, on a sectional vote of 7–5. However, in late 1777 the draft Articles were revised to include only land and buildings as the basis for calculating tax quotas, so the slave states ultimately prevailed on the taxation issue. In mute but unmistakable testimony to slave state political strength, the Confederation was left with a completely unworkable tax system that was never used. (See chapter 3.) Slave and Northern states could not agree on a workable taxation system in significant part because of the conflicting effects that slavery had on sectional political calculations.<sup>147</sup>

The sectional stalemate over slavery also had significant implications for the structure of congressional representation under the Confederation. In the Articles, congressional representation was based on one vote per state, a system that the Southern states generally disliked, given their disproportionately large wealth and population. However, once they had insisted on federalism by incorporating state sovereignty as a governing principle,

and on a taxation system that bore little if any relationship to wealth or population, they had no plausible basis for insisting on a change in the representation system.

The Articles of Confederation therefore ended up as a set of unworkable, purely expedient *quid pro quo* agreements. In the Confederation, representation and taxation had no politically coherent relationship to each other, and neither appropriately reflected the postindependence distribution of either wealth or population in America. This inherently flawed governance process was, ironically, inconsistent with the Revolution's principle that in a just government, representation and taxation must bear some reasonable relationship to each other. It led to repeated Confederation stalemates on fundamental policy issues. But government by stalemate and ad hoc accommodation also left slavery free to develop as an institution under state control without bearing Confederation tax or military burdens (except those voluntarily imposed by states).

The Confederation's extreme federalism extended to enforcement of its own laws. Representative Thomas Burke of North Carolina was able to deny direct law-enforcement authority to the Confederation even on issues central to its ability to execute its agreed-upon powers. Ironically, Burke's rationale for his opposition to Confederation law-enforcement authority was based on his understanding of the implications of the law of slavery.

In early 1777, Congress considered an important proposal to permit the Confederation directly to empower citizens to take up military deserters and bring them to a justice of the peace. In successfully opposing that proposal, Thomas Burke strenuously argued that this power could be exercised only by a state because it was an "act of high dominion" and could be authorized only by a local law that had the consent of the people, and "here he Illustr[at]ed by quoting the case of the Negro Somerset."<sup>148</sup> Burke's shorthand treatment of *Somerset* in this debate makes clear that he believed that most delegates were already familiar with that decision, which meant that he could simply apply its principles to the issue at hand. Burke interpreted *Somerset* as containing a "strong" federalism principle applicable to a range of issues such as military desertion. Its implication was that the confederal government could not directly enforce even some of its own major laws, but must act through states to enforce them.<sup>149</sup> Beyond successful efforts to minimize Confederation authority over their states, slave states' impact on the Articles extended to new confederal limits on the power of all states to interfere with slavery as well.

Where slaves were concerned, the Articles accepted the fundamental principle that state law determined slave status, but they also carefully either protected state authority over slaves, or imposed limits on state authority over them, in specific cases. In the privileges and immunities clause (hereafter, P&I clause), the slave states were able to obtain agreement extending the reach of this state-law legal regime governing slavery extraterritorially for the first time through confederal law (that is, Confederation law binding on all states). The clause raised exceptionally contentious issues, and its wording changed dramatically during the course of drafting. Several of its provisions added at the last minute dealt with slavery and the slave trade.

Why the clause was controversial is evident from its original form in the July 1776 proposal (the “Dickinson draft,” named after delegate John Dickinson, commonly thought to be its author) reported to Congress unanimously by a twelve-member committee:

ARTICLE VI. The Inhabitants of each Colony, shall henceforth always have the same Rights, Liberties, Privileges, Immunities and Advantages, in the other Colonies, which the said Inhabitants now have, in all Cases whatever, except in those provided for by the next following Article.

ARTICLE VII. The Inhabitants of each Colony shall enjoy all the Rights, Liberties, Privileges, Immunities, and Advantages, in Trade, Navigation, and Commerce, in any other Colony, and in going to and from the same from and to any Part of the World, which the Natives of such Colony enjoy.<sup>150</sup>

The Dickinson draft privileges proposal was breathtakingly expansive, indeed almost “imperial,” in scope. It would have created a broad “confederal” law regime that required preservation of the status quo (or “freezing” of the law) in fundamental areas of the English law of all of the colonies. Under this provision, if slavery were legal in colony A at enactment, so that an inhabitant from colony B could hold property rights in a slave in colony A, colony A could not deprive inhabitants of colony B of those rights in the future. Similarly, because it “froze” the law, the Dickinson draft meant that if states chose to ban slave imports, they could not stipulate that fugitive slaves or slaves whose masters were sojourning in the state would be freed as a result of such an import ban. For example, the Rhode Island 1774 import ban would have been consistent with these provisions,

but the state could not have liberalized its laws. John Dickinson, a conservative major slaveholder who was also a lawyer trained at the Middle Temple in London, would probably have thought it desirable to create such “imperial” property law, requiring continued protection of existing property rights throughout the country.

The Dickinson draft’s aggressive effort to maintain existing law throughout the colonies proved so controversial that the next draft of the Articles completely omitted any privileges and immunities articles whatsoever. Historian Merrill Jensen’s characterization of the omitted provisions was an apt description of their purpose: “the two articles which erased state lines with respect to legal and commercial privileges and rights were likewise omitted.”<sup>151</sup> From August 1776 until the final day in November 1777 on which the Articles of Confederation were adopted, there was no further public debate on the privileges and immunities issue. Yet immediately before adoption, Congress added a P&I clause to the Articles.

On October 26, 1777, Congress agreed that each state should be given total, independent authority to prohibit imports or exports of any particular species of “goods, wares, or merchandize,” and added a proviso to make clear that this authority would preempt the provisions of any treaty.<sup>152</sup> As William Wiecek concludes, this new authority was intended to permit states to ban slave imports, among other things.<sup>153</sup> Slaves had been regarded as a form of goods (a kind of property) under English law for international trade purposes for nearly one hundred years.<sup>154</sup> State power over slavery was thus being sharply expanded compared to the August 1776 Articles draft, which could have prohibited state bans on slave imports in the event certain treaties were entered into by the Confederation. But this expansion of state authority broadened the potential slavery issue facing the slave states, because state authority could also be used to free fugitives or imported slaves, to prevent slave transit through a state that banned imports, or to prevent slave sales out of state (as Rhode Island soon did).<sup>155</sup>

On November 10, 1777, after debate on all substantive articles was completed, a three-member committee chaired by Richard Henry Lee of Virginia, and including James Duane of New York and Richard Law of Connecticut, was appointed to recommend additional necessary articles. On November 13, the Lee committee proposed seven new provisions.<sup>156</sup> The Lee committee’s privileges and immunities proposal abandoned the comprehensive effort to use confederal law to “freeze” or limit state law proposed by the Dickinson draft, except in a very few specific instances

deemed important enough by the committee to create confederal law for them. During debate, Congress rejected one proposal that demonstrates the broad power over state law that delegates thought the Articles could confer. The rejected amendment was a strong creditor's rights amendment using confederal law to require all states to permit lawsuits in their state courts to enforce foreign state-court judgments against local debtors if the foreign plaintiff provided a suitable bond. It had been proposed to the Lee committee, but omitted from its report.

The final version of what became article 4, recommended by the committee and adopted on November 13, contained two sections with potential effects on slavery: (1) the provision that any fugitive charged with "felony or other high misdemeanor in any State" shall be delivered upon demand of the "[g]overnor or executive power" of the state from which he fled, and (2) the provision regarding privileges and immunities.<sup>157</sup>

The first of these provisions stated: "If any person guilty of or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence." This provision was broad enough to include fugitive slaves, for several reasons. Colonial statutes such as those in Virginia made slave rebellion a felony. In addition, a declaration of outlawry against a fugitive, a statutory remedy often used at the time of the Revolution to combat slave flight, would have been regarded as equivalent to a charge of felony or high misdemeanor. An outlawry declaration permitted the killing of the outlaw with impunity by anyone. In 1770 alone, the Virginia legislature compensated two slaveowners whose fugitive slaves had been outlawed and then killed.<sup>158</sup> Thus the fugitive delivery provisions of the Articles would often have applied to fugitive slaves. This provision might be thought of, then, as a "proto-fugitive slave clause."

The second of the relevant Lee committee provisions stated:

[T]he free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States . . . the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein the privileges of trade and commerce, subject to the same duties, impositions, and restrictions

as the inhabitants thereof respectively, *provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant.* . . .<sup>159</sup>

The P&I clause itself was premised on the existence of a fundamental legal distinction between free inhabitants and slaves, authorizing rights required to be accorded to all free inhabitants to be denied to slaves in every state. The following analysis provides evidence from the Articles' drafting history that supports the conclusion reached many years ago by noted legal historian Charles Warren that this clause also protected slaveowner property, and explores the implications of Warren's conclusion.<sup>160</sup>

One specific part of the P&I clause was intended to protect slave property: the proviso that prohibited use of state power to "prevent the removal of property imported into any State . . ." The proviso's reference to "property" would have been understood at the time to include slaves. A contemporaneous example of usage of the term "property" to include slaves was article 7 of the Treaty of Paris of 1783, which prohibited British forces from removing "Negroes or other property of the American inhabitants" from the United States. Article 7's language classified "Negroes" (slaves) as a form of property.<sup>161</sup>

Handwritten drafts of the Articles' P&I clause clarify the evolution of the Lee committee's views on the clause and its proviso.<sup>162</sup> These drafts show that language excluding "paupers, vagabonds and fugitives from justice" from the protection of the P&I clause was a late addition to the proposal. The committee therefore ultimately agreed to exclude two separate classes of persons from the clause's guarantee of equal treatment to all American inhabitants: (1) slaves and (2) persons who, though nominally free, had by their poverty or criminal behavior forfeited their right to nondiscriminatory treatment.<sup>163</sup> Under the redrafted provision, persons such as fugitive slaves and paupers could be denied various fundamentally important legal and social-welfare protections by a state to which they came, including the right to reside there and benefits available to other inhabitants such as poor relief.

The handwritten drafts of the Lee committee's work also show that the original version of the committee provision on state laws regarding the movement of property was redrafted by the committee to make it considerably clearer and more emphatic as a limitation on the power of every confederated state. The original draft of the P&I clause had provided that "the people of each state shall have free ingress and egress for their persons



and property,” but as to “Merchandise” imported for commercial purposes, had provided only that it would be protected against discriminatory taxation.<sup>164</sup> This draft contained no provision protecting the right to remove imported property. The later draft of the same provision, recommended by the Lee committee and included in the Articles, contains a proviso that makes the right to remove imported property an express limitation on state power regarding trade and commerce.<sup>165</sup> In this context, “imported” could mean either property brought into a state by its owner, whether while in transit through a state or during a sojourn there, or property separately imported into a state for the purpose of removal by the owner.

The new proviso appears to have been the direct result of incorporating into the original draft a proposed amendment written in a different hand, which proposed a separate restriction to prohibit any state from using its authority to restrain a property owner from “conveying” his property to any other state.<sup>166</sup> On its face, the separate amendment’s language was broad enough to include slaves. Even leaving aside its probable authorship by slave state congressman Thomas Burke, there are reasons to think its author intended to include them. Slaves were among the most valuable forms of movable property in the new nation. Slaves were also quite probably one of the few forms, if not the only form, of movable form of property whose export or reexport a state would have had a policy interest in preventing at the time.

The separate amendment thus appeared to be a direct effort to use confederal law to overcome the clear implication of the *Somerset* decision that states had power to limit slave removal by owners who were sojourners or slave importers. The final committee version, though slightly different in wording, had the same intent. This conclusion is reinforced by the fact that the handwritten draft of the committee version of the proviso struck through the word “Goods” and replaced it with the broader term “Property,” which then commonly included slaves.<sup>167</sup>

The Articles provisions on property removal limited interstate comity by denying states the full authority over slavery conferred by the principles of *Somerset*. Although it served as a limit on state authority to prevent slave transit or an owners’ removal of slaves after a sojourn in a state, the privileges and immunities proviso was broad enough that it also effectively denied state authority to prevent commercial-scale transshipments of imported slaves, which occurred frequently in certain states such as Rhode Island.<sup>168</sup> That the Articles were amended to contain specific provisions directed to the issue of fugitive slaves, slave transit, and slave reexport,

when virtually all other provisions proposed for inclusion in the Articles requiring state law to conform to confederal law were omitted by Congress, demonstrates the importance placed on the problem of interstate slave movement by the delegates in the context of defining interstate obligations.

The very significant effects that the Articles of Confederation's provisions had on fugitive slavery can be seen from historian Emily Blanck's analysis of a 1783 controversy between South Carolina and Massachusetts regarding nine South Carolina slaves. These slaves were ultimately captured by the Boston-based American privateers *Hazard* and *Tyrannicide* after first having been taken from South Carolina by British ships in 1779. The South Carolina owners then sought to regain the slaves four years after their capture. At the slaveowners' request, the captured slaves had been confined to jail in Massachusetts, awaiting shipment to their owner-claimants in South Carolina.

But the slaves were released by Massachusetts chief justice William Cushing in 1783 in *Affa Hall et al. v. Commonwealth*, on the ground that they had committed no crime in Massachusetts and therefore could not be confined.<sup>169</sup> The governor of South Carolina then wrote to the governor of Massachusetts, John Hancock, protesting vigorously that Cushing's ruling was a violation of the Articles of Confederation because it impaired the rights of South Carolina residents to regain their slave property. Justice Cushing was asked to respond to this contention.

Cushing agreed that the Articles protected slaveowner rights to recapture slaves. He stated that the South Carolina owners still had an unimpaired private right of recapture of the runaway slaves in Massachusetts and a right to their removal, which Massachusetts would recognize; but in his view, they were not entitled to have the slaves jailed as part of that recapture. As Blanck notes, it is quite remarkable that Cushing did not deem the slaves free even after they had spent four years in Massachusetts.<sup>170</sup> The South Carolina–Massachusetts controversy demonstrates that contemporaries with sharply conflicting views on slavery and abolition nevertheless agreed that the Articles of Confederation were intended to protect fugitive slaves as property throughout the Confederation. The article 4 provisions and the evidence from the South Carolina–Massachusetts controversy together suggest that contemporaries thought that the Articles maintained slaveowners' common-law rights of slave recapture both by protecting them against state legislation freeing or protecting fugitives and by permitting private recapture.

## CONCLUSION

The collapse of imperial slavery during the decade from 1770 to 1780 was followed by the emergence of a new legal and political foundation for American slavery. The decade's disruptions led to a series of alterations in the politics of slavery, with mixed results. Some American colonies were moving to set new boundaries for slavery even before the Revolution began, but in others, the Revolution was fought in part to protect slave property and to maintain local control over it.

As the Northern states began to take tentative steps toward gradual abolition, the public and legislative reaction to such proposals clearly foreshadowed the political difficulties facing such abolition efforts. Northern legislatures such as New Jersey's rejected efforts in the 1770s to liberalize even slave manumissions because of widespread fears of the social and political consequences of such liberalization. Vermont agreed to end slavery for persons of majority age. In a path-breaking decision, Rhode Island passed a law to prevent its slaveowners from selling their slaves outside of the state.

The confrontation between Northern and slave states over slavery's role in the Confederation provided dramatic evidence of the power of the slave states, as well as of the major political weight of the institution of slavery as an element in structuring the revolutionary government. Slavery benefited significantly from the Confederation's exceptionally decentralized federalism. Slave states' political influence also led to a permanent Confederation stalemate on issues of taxation and representation, which effectively exempted slave property from taxation and military-service obligations, even at the price of ineffectual government. Although the colonies were generally opposed to continuing slave imports, the Confederation government imposed no legally binding prohibitions on American participation in the slave trade, or on such imports. Slavery's political influence led to confederal restrictions on state power designed to protect slavery and the slave trade, including restrictions against state power to shield fugitives. The first steps toward creating a slaveholders' union had been taken as a politically necessary part of founding a new government to direct the Revolution.