

PAPERS

Nationalizing “the Curse of Heaven”: Gouverneur Morris on the Constitution and the Slave Power

J. JACKSON BARLOW*

“Time, my dear sir, seems about to disclose the awful secret that commerce and domestic slavery are mortal foes; and, bound together, one must destroy the other.”
—Morris to Harrison Gray Otis, April 29, 1813¹

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Gouverneur Morris was the dazzling but “inconstant” Framer—the womanizing, peg-legged, irresponsible, and irrepressible one, “better known for his bluntness than for originality.”² Recent biographers have improved our knowledge of Morris’s life, but his political orientation and outlook remain elusive: he never wrote a political treatise, his forays into elective office were few, and his arguments often speak to the moment without touching on larger principles. He was a conservative but not an ideologue, an aristocrat who criticized aristocrats. He was also a keen and prescient student and observer of political life, and he was consistent in his belief that the institution of slavery would poison American politics. At the Constitutional Convention, Morris gave the most powerful denunciation of slavery and the clearest prophecy of disaster from its power to occupy Americans’ minds.³ The Convention took an obsolescent labor practice, and from

* Charles A. Dana Professor of Politics, Juniata College. © 2023, J. Jackson Barlow.

1. Letter from Gouverneur Morris to Harrison Gray Otis (Apr. 29, 1813), in 2 *THE DIARY AND LETTERS OF GOUVERNEUR MORRIS* 552 (Anne Cary Morris ed., 1888) [hereinafter *DIARY AND LETTERS*].

2. WILLIAM HOWARD ADAMS, *GOUVERNEUR MORRIS: AN INDEPENDENT LIFE* 162 (2014).

3. See DENNIS C. RASMUSSEN, *THE CONSTITUTION’S PENMAN: GOUVERNEUR MORRIS AND THE CREATION OF AMERICA’S BASIC CHARTER*, chapter 9 (forthcoming 2023). See also LEONARD L. RICHARDS, *THE SLAVE POWER* 28–51 (2000); PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 1–33 (1996).

it, created the most powerful single force in American politics, later to be called the Slave Power. Once George Washington was out of politics, that Power asserted itself as a force, using its constitutional status and advantages to elect Thomas Jefferson in 1800. Jefferson's party, as the agent of the Slave Power, proceeded to capture the Constitution's mechanisms and, in Morris's judgment, to turn them against the commercial states.

Morris's arguments on slavery at the 1787 Convention took place within the larger context of his thought and action with respect to constitutions and constitutionalism. Writing a good constitution, of course, was one objective. Ridding America of slavery was another. Preserving a polity in which trade and commerce were free to flourish was yet another. These objectives were often, but not always, congruent. In the New York constitutional convention of 1777, Morris advocated a provision that would provide for gradual emancipation, on the ground that, while a commitment to natural rights required emancipation, the reality of New York politics was not favorable to immediate freedom. At the Constitutional Convention, Morris saw, and said, that both natural rights and commerce depended on paring back state autonomy and preventing the rise of an agrarian aristocracy. In the Jefferson-Madison years, Morris watched with growing sadness as his predictions of 1787 were realized. State autonomy and agrarian aristocracy combined with slavery to crush commerce and cement the Slave Power as the most potent force in American politics until the Civil War.

The first and most obvious ground of Morris's opposition to slavery was his dedication to securing natural rights. By definition, these rights belonged to everyone, and Morris knew that in practice the only way to secure them was to create a legal system that would guarantee civil rights to all. The distinctions needed to preserve slavery would create and entrench an aristocracy, he thought, and so his second reason for opposing slavery was a care to preserve a dynamic society in which status was earned, not inherited. Finally, creating a superior class would be facilitated, he thought, if the states were left to themselves to define social hierarchies or pursue separate economic strategies. To prevent this, it was necessary to strengthen the federal government and weaken the autonomy of the states. All three of these objectives were related to his basic constitutional premises of balance among the institutions of society and preferring the whole to the parts. These arguments converged powerfully in his comments at the Constitutional Convention, and they would re-emerge after 1800 with his opposition to the Jefferson-Madison policies leading to the War of 1812. We can begin by looking to his natural-rights reasons for opposing slavery.

I. SLAVERY AND NATURAL RIGHTS

The 1776 "Political Enquiries" is as close to a standard treatise on political theory as we have from Morris.⁴ In this document, probably notes for the coming task of setting up government in New York, he sets a skeptical, practical direction

4. The "Enquiries" are carefully analyzed in Arthur P. Kaufman, *The Constitutional Views of Gouverneur Morris* 39–79 (1992) (Ph.D. dissertation, Georgetown University).

for understanding government and its responsibilities. Morris was committed to human freedom, but he was not convinced that natural rights theory was the only, or even the best, way to advance that cause. The British, for example, had secured freedom without any such commitment. Natural rights theory might be true, but it was unable to explain or predict human behavior. This made it of limited use in designing institutions. Morris preferred to spend his time on institutions and leave to others the task of perfecting theories. He further took the practical position that a country had to have the constitution that best suited it, even if that was not the very best constitution generally. Thus, he could design a monarchical constitution for France and a republican one for the United States.⁵

In the “Enquiries,” Morris is particularly interested in the tensions present in the abstract concept “liberty.” He considers natural liberty, political liberty, and civil liberty in turn. He begins with a look at the Lockean trinity of Life, Liberty, and Property. “Of these three things Life Liberty Property the first can be enjoyed as well without the aid of Society as with it. The second better. We must therefore seek in the third for the Cause of Society.”⁶ Natural liberty must be restricted in order for property to be recognized, and for society to thrive. Awareness of this need is central to Morris’s thinking. Protecting property promotes commerce, whose effect is to produce advances in society—commerce is “from its own nature progressive.” But commerce “requires not only the perfect Security of Property but perfect good faith. Hence its Effects are to encrease civil and diminish political Liberty.”⁷ Morris concludes that both property and political Liberty can be secured only by restricting them in the name of civil liberty. A commitment to the abstract principle of natural rights is not sufficient. Experience tells us that it must be supplemented by institutions that increase civil liberty by putting limits on natural liberty. In his 1780 “Letters on Public Finance,” Morris discounted the effectiveness of any scheme that relied on changes in human nature through such emotions as patriotism:

I beg therefore, it may be understood, that I have an utter contempt for every scheme which supposes the least degree of patriotism in the people. . . . On these plain requisitions shall I build, taking man as he is, without pretending to be wiser than his Maker, or supposing my countrymen to be better than those of other people.⁸

5. See *GOVERNEUR MORRIS, MEMOIR WRITTEN FOR THE KING OF FRANCE, RESPECTING THE NEW CONSTITUTION*, reprinted in *TO SECURE THE BLESSINGS OF LIBERTY: SELECTED WRITINGS OF GOVERNEUR MORRIS* 239 (J. Jackson Barlow, ed. 2012) [hereinafter *WRITINGS*]; *GOVERNEUR MORRIS, OBSERVATIONS ON THE NEW CONSTITUTION OF FRANCE*, reprinted in *WRITINGS*, *supra* note 5, at 251.

6. *GOVERNEUR MORRIS, POLITICAL ENQUIRES*, reprinted in *WRITINGS*, *supra* note 5, at 8; *cf.*, JOHN LOCKE, *SECOND TREATISE* § 124.

7. *GOVERNEUR MORRIS, POLITICAL ENQUIRES*, reprinted in *WRITINGS*, *supra* note 5, at 10.

8. *GOVERNEUR MORRIS, “AN AMERICAN” LETTERS ON PUBLIC FINANCE*, reprinted in *WRITINGS*, *supra* note 5, at 146.

Like Machiavelli, who recommends fear over love as a motivating force, Morris suggests that the low but solid urgings of self-interest are the most reliable. He was impatient with theorists like Jefferson, who could talk the natural rights talk eloquently but do nothing to improve human freedom in reality.⁹ Morris preferred that “all plans . . . should be founded in the nature of man, not on ideal notions of excellence.”¹⁰ As he understood human nature, then, slavery was simply too great a temptation for the self-interest that was the most reliable guide to human behavior. In denying civil rights it took master and slave back to a state of nature:

[t]he Limitation [of political liberty] is essential to its existence. Like natural Liberty it is a Theory. A has the natural Right to do as he pleases. So has B. A in consequence of his natural Right binds B to an oak. If it be said that Each is to use his right so as not to injure that of another we come at once within the Pale of civil or social Right.¹¹

Civil liberty was needed to preserve property, but to allow people to become property was to institutionalize injury. Slavery was a proclamation that a society would not protect “civil or social Right.”¹²

Slavery also violates the principle of balance by providing all the power to the slaveholder and denying any power, or even personhood, to the slaves. It was an example of A, in this case the slaveholder, binding B, the slave, to an oak. It allowed full play to the slaveholder’s liberty by denying liberty to the slave. It arbitrarily transferred the slaves’ right to self-ownership to create a property right for the slave holder. This is inconsistent with Morris’s recognition that the Golden Rule is the most equitable moral principle: “there would be less [avoidable Evil] in Society if each Individual did to others what he would wish from them.”¹³ Slavery, by contrast, encourages the characteristic American confusion between natural and civil liberty, which holds that liberty means the natural right to do as one pleases without regard for others.

The year after he wrote the “Political Enquiries,” Morris had the chance to put these theories into operation as one of the drafters of the New York Constitution of 1777. On April 17, he introduced the following resolution:

And whereas a regard to the rights of human nature and the principles of our holy religion, loudly call upon us to dispense the blessings of freedom to all mankind: and inasmuch as it would at present be productive of great dangers to liberate the slaves within this State: It is, therefore most earnestly

9. See THE DIARIES OF GOUVERNEUR MORRIS, NEW YORK: 1799–1816, at 224 (Melanie Randolph Miller ed., 2018) (describing Jefferson after a dinner in 1802: “He is Utopia quite”).

10. GOUVERNEUR MORRIS, “AN AMERICAN” LETTERS ON PUBLIC FINANCE, *reprinted in* WRITINGS, *supra* note 5, at 147.

11. GOUVERNEUR MORRIS, POLITICAL ENQUIRES, *reprinted in* WRITINGS, *supra* note 5, at 9–10.

12. Morris would repeat some of this reasoning at the Convention on July 5. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533 (Max Farrand ed., 1966) [hereinafter 1 FARRAND’S].

13. GOUVERNEUR MORRIS, POLITICAL ENQUIRES, *reprinted in* WRITINGS, *supra* note 5, at 6.

recommended to the future Legislatures of the State of New-York, to take the most effectual measures consistent with the public safety, and the private property of individuals, for abolishing domestic slavery within the same, so that in future ages, every human being who breathes the air of this State, shall enjoy the privileges of a freeman.¹⁴

The resolution went farther than any state had yet gone, but it would not have banned slavery.¹⁵ Nor would its language constitute an outright condemnation. Morris went only as far as balance; "consistent with the public safety, and the private property of individuals" gives legislatures a lot of room. The principle, however, was clear: New York would commit to securing the blessings of freedom. However distant, such a commitment was too much for the delegates: the provision was defeated 31–5.¹⁶

Principles aside, Morris was never one to resist a rhetorical jab that supported his point. His 1778 Open Letter to Sir Henry Clinton comments on the offer to slaves by Lord Dunmore, the last royal governor of Virginia, that Dunmore would free any slaves who leave their masters and fight for England.¹⁷ In his response, Morris allows himself to drop the rumor that Dunmore had "a natural propensity for females of that complexion."¹⁸ This brief expression of prejudice, however, remains an anomaly.

In early 1785, Morris, with John Jay and others, apparently participated in organizing the New York Society for Promoting the Manumission of Slaves.¹⁹ It was the nation's second abolition society, after the similar Pennsylvania Society which had been organized in 1775. Morris did not attend the organizational meeting of the New York Society on January 28, 1785 at Simmons Tavern, because from January until July of that year he was in Virginia looking after Robert Morris's business interests.²⁰ This visit gave him his first extended view of slave society, and even though he later characterized it as "among the most agreeable periods of his life," he retained a view of slave society and slave economy that was sharply negative.²¹ While in those days the lines between slavery and

14. MAX M. MINTZ, *GOVERNEUR MORRIS AND THE AMERICAN REVOLUTION* 76 (1970) (quoting 1 JOURNALS OF THE [NEW YORK] PROVINCIAL CONGRESS 887 (1775)).

15. Though not yet a state, Vermont voted to abolish slavery on July 2, 1777. Pennsylvania was the first state to adopt gradual abolition, in 1780. See DWIGHT LOWELL DUMOND, *ANTISLAVERY: THE CRUSADE FOR FREEDOM IN AMERICA* 29–33 (1961).

16. See MINTZ, *supra* note 14, at 76.

17. Letter from Gouverneur Morris to Sir Henry Clinton (Oct. 20, 1778), in *WRITINGS*, *supra* note 5, at 45–46.

18. *Id.* at 46.

19. See HOWARD SWIGGETT, *THE EXTRAORDINARY MR. MORRIS* 109 (1952); MARY-JO KLINE, *GOVERNEUR MORRIS AND THE NEW NATION*, 301–02 (1978); PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS*, *supra* note 3, at 100.

20. See KLINE, *supra* note 19, at 298–300.

21. 1 JARED SPARKS, *THE LIFE OF GOVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE* 272 (1832); cf. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 221 (Max Farrand ed., 1911) [hereinafter 2 FARRAND'S].

freedom were not always sharply drawn, Morris came to see a meaningful contrast between slavery in the North, where it was the exception, and slavery in the South, where it was the rule. Many members of the New York society had owned slaves themselves—Morris had received a slave in his father’s will—but in the North, slavery did not set the social status of all labor, while it did in the South. Morris was consistent in his desire to see the end of the institution. In later life, we have records of Morris buying slaves only to convert them quickly to indentured servitude for a specified term.²²

Before his performance at the Constitutional Convention, then, Morris was clear on his commitments to religious and personal freedom, not as a theory but as an actual, practical objective of government. This was coupled with a clear recognition that it was the people—sometimes with the best of intentions—that were the chief threat to finding and maintaining a balance that guaranteed the secure enjoyment of rights by all. As he had said in the “Enquiries,” “In the sincere Desire to promote [the public good] just Men may be proscribed, unjust Wars declared, Property be invaded & violence patronized. Alas! How often has public Good been made the Pretext to Atrocity!”²³ It is sometimes argued that because Morris was skeptical of the people, he favored a political order that was controlled by an “aristocracy.” But again, Morris was less concerned with forms or theories than with outcomes, as we see in the “Political Enquiries.” There, he (like Locke), acknowledges property as “the Cause of Society,” for example, but he stops short of saying that preserving property is the sole purpose of government, and stays away from endorsing the position that aristocracy and property were tied together. No single choice could be absolute. While political liberty demands that property rights be recognized, for example, property rights had to be qualified so that rights more generally could be assured. One could not be completely free to use his property any more than one could be completely free to use his liberty—restrictions on either liberty or property rights stand on the same foundation. In Morris’s words, “[Liberty’s] Excess becomes its Destruction.” Nowhere was that more true than in a claim that one person could hold another as property.

Slavery distorts civil liberty, by implying that some, rightly and properly, by nature, have less of it than others. It was not only morally wrong,

the distribution of power slavery produced would be destructive to the republic. Slavery not only set up the gross inequality between master and slave; it maintained a stark inequality between those who had the wealth and power derived from the forced labor of others and those who commanded only their own labor. Slavery made this gap difficult to overcome; it fixed the power of the slaveholding class and reduced the power and numbers of small landholders.²⁴

22. RASMUSSEN, *supra* note 3, at 195.

23. GOUVERNEUR MORRIS, *POLITICAL ENQUIRES*, reprinted in *WRITINGS*, *supra* note 5, at 6.

24. JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 90 (1990).

A sensible theory of natural rights, for Morris, would stand on “the common level of humanity” and “adopt those things which experience hath shewn to be useful among men.”²⁵ Practically, it would check political liberty to secure property rights and enhance civil liberty, the key to creating a commercial society. Such a commercial society would in turn encourage people to see the connection between self-restraint and prosperity. But there could be no room for slavery in such a scheme—either from the standpoint of rights or from the standpoint of commercial success.

II. SLAVERY, ARISTOCRACY, AND AGRARIANISM

At the Constitutional Convention, Morris brought these views on natural rights and the utility of theory. He also brought several years of experience in the Continental Congress and the Office of Finance, as well as personal experience of southern society. This experience fueled his second concern: to limit the consequences of caste or status in the American republic. In these discussions, the name for the elite caste varied—sometimes it was an “aristocracy,” and other times simply “the rich”—but by either name he was concerned to keep it contained. Above all, he wanted to prevent it from becoming hereditary, which would freeze social lines. Morris was by no means hostile to elites as such—he really preferred a society where deference was paid to status—but he also saw in them an enormous potential to create social harm. Nothing he experienced in his years in Congress or as Robert Morris’s assistant in the Office of Finance caused him to qualify this position. His overall goal was to create a polity that would be friendly to a dynamic market economy.²⁶ Above all, such a polity had to recognize and protect a civil right in property. Morris was and remained dissatisfied with the final Constitution partly because it tolerated state creation of property rights in human beings. But the Constitution committed a much worse blunder. It attempted to straddle the fundamental divide between a free government and a feudal government, and then gave additional advantages to the feudal elements. In Morris’s mind, the Slave Power was born at the Constitutional Convention.

As far as history showed, the human desire to increase one’s own status at the expense of others’ had been a constant theme in human society. The many and the few were always in opposition, and so it would always be: “there never was, nor ever will be a civilized society without an Aristocracy.”²⁷ If the few did not oppress the many, then the many would oppress the few.²⁸ He did not trust the few more than the many—Morris’s trust was simply that humans would behave

25. GOUVERNEUR MORRIS, “AN AMERICAN” LETTERS ON PUBLIC FINANCE, *reprinted in* WRITINGS, *supra* note 5, at 147.

26. NEDELSKY, *supra* note 24, at 91.

27. 1 FARRAND’S, *supra* note 12, at 545.

28. See NEDELSKY, *supra* note 24, at 78. See also NICCOLO MACHIAVELLI, THE PRINCE, Chapter IX (2019); Patrick Coby, *America’s Machiavellian*, 79 REVIEW OF POLITICS 621, 628 (2017). Whether Morris read Machiavelli is an interesting but so far unanswerable question. We know, however, that he often quoted both ancient and modern comic poets. See ANGUS FLETCHER, COMIC DEMOCRACIES: FROM

in entirely human ways. Both aristocrats and commoners needed checks on their behavior to guard society against potentially oppressive behavior. Above all that meant not trusting the aristocrats: “[h]is endeavor was to keep [Aristocracy] as much as possible from doing mischief.”²⁹ To him this meant a Senate that would be a suitable repository of the aristocratic faction, but also a place where the rest of the people could keep them under careful observation.

Aristocracy and slavery reinforced one another in Morris’s thinking, and both were hostile to republican institutions. Because humans are prone to error and self-deception, one person’s power over another will sooner or later be abused. Make that power absolute, as with slavery, and not only will the abuse come sooner, but it will also be more lasting. Morris brought his thoughts together in his speech on August 8:

Mr. Govr. Morris moved to insert “free” before the word “inhabitants.” Much he said would depend on this point. He never would concur in upholding domestic slavery. It was a nefarious institution—It was the curse of heaven on the States where it prevailed. . . . The admission of slaves into the Representation when fairly explained comes to this: that the inhabitant of Georgia and S. C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & damns them to the most cruel bondages, shall have more votes in a Govt. instituted for the protection of the rights of mankind, than the Citizen of Pa or N. Jersey who views with a laudable horror, so nefarious a practice. He would add that Domestic slavery is the most prominent feature in the aristocratic countenance of the proposed Constitution.³⁰

The Convention not only preserved slavery. In spite of Morris’s efforts, the Convention entrenched slavery’s power by counting slaves for representation purposes, at the urging of Southern states. He predicted that the result would be the over-representation of landed, feudal, or agrarian interests and the under-representation of commercial interests.

A distinction had been set up & urged, between the Nn. & Southn. States. He had hitherto considered this doctrine as heretical. . . . He sees . . . that the Southn. Gentleman [sic] will not be satisfied unless they see the way open to their gaining a majority in the public Councils. The consequence of such a transfer of power from the maritime to the interior & landed interest will he foresees be such an oppression of commerce, that he shall be obliged to vote for ye. vicious principle of equality in the 2d. branch in order to provide some

ANCIENT ATHENS TO THE AMERICAN REPUBLIC (2016). In chapters 2 and 3 Fletcher describes how Machiavelli followed in the path of ancient comedy.

29. 1 FARRAND’S, *supra* note 12, at 545.

30. 2 FARRAND’S, *supra* note 21, at 221–22.

defence for the N. States agst. it. . . . There can be no end of demands for security if every particular interest is to be entitled to it.³¹

What concerned Morris especially about agrarian interests? Part of the answer may be a distinction between agrarian interests as practiced in a slave society and those same interests in a free society:

Compare the free regions of the Middle States, where a rich & noble cultivation marks the prosperity & happiness of the people, with the misery & poverty which overspread the barren wastes of Va. Maryd. & the other States having slaves. Travel thro’ ye whole Continent & you behold the prospect continually varying with the appearance & disappearance of slavery.³²

In any society, landed interests would be powerful: “land is the ultimate object of human avarice.”³³ But monopolizing land would make it less productive: “A monopoly of the soil is pernicious or even destructive to society, let taxes, therefore, compel the owner, either to cultivate it himself, or sell to those who will cultivate it.”³⁴ A dynamic economy meant easily moving things from less to more valuable uses. An aristocracy locked them away. A slave aristocracy would present an even worse picture: “He would add that Domestic slavery is the most prominent feature in the aristocratic countenance of the proposed Constitution.”³⁵

As Morris uses the word “aristocracy” in describing the South, he seems to mean a sort of feudal agrarian variant on aristocracy, with a few planters at the top of the social pyramid, slaves at the bottom, and very little in the middle.³⁶ This was a formula for a static society. While the commercial states would be in a constant state of turmoil and re-invention, the agrarian states would remain deliberately stagnant. People would try to preserve old privileges, old fortunes, and old ways. Morris thought this would be detrimental to social stability, bottling up pressures for change until they became explosive. At a deeper level, he thought it would simply be unnatural. America had been created to be a vibrant commercial society where the vestiges of feudal society had vanished and thus change could happen naturally. Although Morris himself did not expect to understand or foresee all the changes that would take place, he remained resolved to help them come about. The southern aristocracy would be conservative in the destructive sense that it would try to prevent change of any sort.

So long as the slave trade continued—that is, for the next twenty years—some American states would increase their influence and wealth by saving and

31. 1 FARRAND’S, *supra* note 12, at 604.

32. 2 FARRAND’S, *supra* note 21, at 221.

33. GOUVERNEUR MORRIS, “AN AMERICAN” LETTERS ON PUBLIC FINANCE, *reprinted in* WRITINGS, *supra* note 5, at 160.

34. *Id.*

35. 2 FARRAND’S, *supra* note 21, at 222.

36. See NEDELSKY, *supra* note 24, at 90.

investing, while some would do so by stealing African lives to transform them into human chattel.³⁷ Morris knew which path Americans, north and south, would choose. Southern society would form an aristocracy of “petty tyrants.” George Mason put Morris’s fears into words:

Slavery discourages arts & manufactures. The poor despise labor when performed by slaves. They prevent the immigration of Whites, who really enrich & strengthen a Country. They produce the most pernicious effect on manners. Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a Country. As nations can not be rewarded or punished in the next world they must be in this. . . . providence punishes national sins, by national calamities.³⁸

Northern states wanted to prevent such things as requiring supermajorities for navigation acts, and to get them they conceded constitutional protections for slavery, the slave trade, and fugitive slaves. Then they gave the South enhanced representation. Once the new government went into operation, the southern states used those protections to extend their influence to the detriment of the commercial states. While the northern states neglected political activity for the sake of fostering a lively commercial society, the South remained focused on politics. The Convention had given them a solid hand, and they played it effectively. In the nation’s first nine decades, the commercial states walked into every trap the Agrarian/Slave states set for them, until they finally called the South’s bluff in 1861.³⁹ In Morris’s lifetime, he saw first the addition of the 11th Amendment, then the repeal of the Judiciary Act of 1801, and later the slow strangling of Northern commerce through the Non-Importation Act, the Embargo, and finally the War of 1812. This sequence, he thought, showed that the slave states were being systematic in their squeezing of the commercial states, and in his view strangling the Constitution as they did so. Theodore Roosevelt, in his biography of Morris, summarizes it this way:

From the time the House of Virginia came into power, until the beginning of Monroe’s administration, there was a distinctly anti-New England feeling at Washington, and much of the legislation bore especially heavily on the Northeast. . . . The fiery young Democrats of the South and West, and their brothers of the Middle states, were the authors of the war [of 1812]. . . .⁴⁰

37. See 2 FARRAND’S, *supra* note 21, at 222.

38. *Id.* at 370.

39. See RASMUSSEN, *supra* note 3, at 205.

40. Theodore Roosevelt, *Gouverneur Morris*, in *AMERICAN STATESMEN* 302–03 (John T. Morse ed., 1899).

As Jennifer Nedelsky makes clear, Morris wanted a United States that was prosperous and productive.⁴¹ By increasing national power, we would stand to be not only a richer but a better member of the family of nations. National strength would make our friendship more desirable and make our agreements more lasting. The determination of the southern states to prioritize the liberty of slaveholders to hold others in bondage was simply out of step with modern government and the modern economy. It conceived of wealth as a static rather than a dynamic principle, lying in actual things rather than the capacity to harness power. The southern/agrarian formula was one that might have worked in the Middle Ages, but it was unsuited to a nation wishing to become a power in the eighteenth century.

In 1812, Morris looked back on the bargains that created the Constitution in an “Address to the People of the State of New York.” He begins by taking aim at the Three-Fifths Clause as the key concession of the northern states, in which “the violation of natural right was rewarded by political prerogative, and [southern states] became masters of their brethren, by making the negroes their slaves.”⁴² Granting additional voting power to the South led the nation into a series of policy choices that were increasingly hostile to the commercial states. Even the levy of direct taxes, which should have somewhat equalized things, had not done so: southern states simply refused to pay—shades of the old Confederation. The North, however, did pay, and thus these taxes:

became, in effect, an alleviation of the south and an additional burden on the north. That they were used moreover, as the engine to subvert an administration favorable to commerce and establish, in its stead, an administration of slave holders, who, envying the prosperity of the northern states, endeavoured to dry up it’s source by ruinous commercial restrictions and have now, actuated by the same spirit, exposed them to the desolation of a war alike unnecessary and unjust.⁴³

The concessions to the slaveholding states created the conditions for the United States to enter what Morris saw as a downward spiral, and toward the end of his life he became increasingly pessimistic. Although the mechanism was not quite what he had envisioned, his Convention prediction, that the South’s ruling class would come to control the people’s House, had come to pass:

... one of his [Mr. Govr. Morris] principal objections to the Constitution as it is now before us, is that it threatens this Country with an Aristocracy. The aristocracy will grow out of the House of Representatives. Give the votes to people who have no property, and they will sell them to the rich who will be able

41. NEDELSKY, *supra* note 24, at 67–95.

42. GOUVERNEUR MORRIS, ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (Aug. 29, 1812), reprinted in WRITINGS *supra* note 5, at 540.

43. *Id.* at 541.

to buy them. . . . The ignorant & the dependent can be as little trusted [as children] with the public interest.⁴⁴

The South prioritized two classes: owners and slaves. It was a structure designed to keep one class ignorant and dependent, and the other confident that its interest and the public interest were identical. Allowing states to forge this kind of retrograde individual path would in Morris's mind compromise the dynamic brand of capitalism that would include creative destruction and limitations to permanent fortune accumulation. If successful, it would be an economic and social system frozen in time. Donald Robinson describes the effects that Morris feared:

Southerners failed to move with the currents of the Industrial Revolution because the men who controlled the main resources of Southern society did not want to move in that direction. They . . . enjoyed their status and life as planters, and . . . they believed that their labor force might escape from its separate and subordinate status if it were released from the disciplines of agricultural slavery.⁴⁵

III. THE NATIONAL INTEREST VS. STATE INTERESTS

John Roche once reminded us that the Constitutional Convention was a “*nationalist* reform caucus,” and Morris was one of the leading nationalists in the body.⁴⁶ State autonomy, or reducing the Constitution to a mere “treaty,” as Morris said on July 7, would make the United States as feeble as Germany by privileging the interests of the parts over those of the whole. It would make the new federal government equivalent to the Articles of Confederation—an equally imperfect union. He was especially concerned that state equality in the Senate would give each state too much voice in national councils, and that state interests would continue to prevail. The effect would be the same as the Polish *Liberum Veto*—a government that was hostage to the particular interest of each of the parts of the country. He wondered

in what quality was it [the government] to protect the aggregate interest of the whole. Among the many provisions which had been urged, he had seen none for supporting the dignity and splendor of the American Empire. It had been one of our greatest misfortunes that the great objects of the nation had been sacrificed constantly to local views; in like manner as the general interests of States had been sacrificed to those of the Counties.⁴⁷

44. 2 FARRAND'S, *supra* note 21, at 202–03.

45. DONALD ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765–1820*, at 46 (1979).

46. John Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799 (1961).

47. 1 FARRAND'S, *supra* note 12, at 552.

Morris urged the Convention to take a more national view:

He came here as a Representative of America; he flattered himself he came here in some degree as a Representative of the whole human race; for the whole human race will be affected by the proceedings of this Convention. He wished gentlemen to extend their views beyond the present moment of time; beyond the narrow limits of place from which they derive their political origin. If he were to believe some things which he had heard, he should suppose that we were assembled to truck and bargain for our particular States. . . . We must look forward to the effects of what we do. These alone ought to guide us. . . . State attachments, and State importance have been the bane of this Country. We cannot annihilate; but we may perhaps take out the teeth of the serpents. He wished our ideas to be enlarged to the true interest of man, instead of being circumscribed within the narrow compass of a particular Spot.⁴⁸

Morris clearly anticipated the centrifugal force of the Slave Power in his Constitutional Convention speeches. So long as states remained free to choose slavery or freedom, they remained free to choose feudalism, or any other economic structure, over capitalism, frustrating national efforts to create a dynamic economy. The states that protected slave holders as a *rentier* class would by that protection prevent the commercial and entrepreneurial energies that were needed to move the country forward. This would also give the wealthy a decided advantage over the rest. In Yates's notes, Morris's warning sounds sharper than in Madison's telling:

I avow myself the advocate of a strong government, still I admit that the influence of the rich must be guarded; and a pure democracy is equally oppressive to the lower orders of the community. This remark is founded on the experience of history. We are a commercial people, and as such will be obliged to engage in European politics. Local government cannot apply to the general government.⁴⁹

The priority of local over national interests allowed the static principle equal or greater power than the dynamic principle in national life. Worse, it gave the parts priority over the whole, inviting separation, war, and failure. It mistook who the American people were, Morris thought, and raised the prospect of misdirecting their energy away from growth and toward a defense of privilege. By centering the energies of half the states on the defense of slavery (and committing the other half to support the institution), the Constitution committed the nation to stagnation, if not decay.

The presence of slavery put the United States on a path to weakness, irrelevance, and aristocracy, a concern Morris brought forward in his August 8 speech.

48. 1 FARRAND'S, *supra* note 12, at 529–31.

49. 1 FARRAND'S, *supra* note 12, at 518; *cf.* Coby, *supra* note 28, at 628.

Not only was slavery “the curse of Heaven,” but it was inconsistent with the profession of the “rights of mankind” at the base of our institutions. More, the proposed constitution created mechanisms to ensure that the advantages given to the South would continue to augment the Slave Power and weaken the power of the commercial states:

And What is the proposed compensation to the Northern States for a sacrifice of every principle of right, of every impulse of humanity. They are to bind themselves to march their militia for the defence of the S. States; for their defence against those very slaves of whom they complain. They must supply vessels & seamen, in case of foreign Attack. The Legislature will have indefinite power to tax them by excises, and duties on imports: both of which will fall heavier on them than on the Southern inhabitants; for the bohea tea used by a Northern freeman, will pay more tax than the whole consumption of the miserable slave. . . . Let it not be said that direct taxation is to be proportioned to representation. It is idle to suppose that the Genl Govt. can stretch its hand directly into the pockets of the people scattered over so vast a Country.⁵⁰

The Three-Fifths Clause gave the Slave Power a stranglehold on American government through the House of Representatives and the Electoral College; it created an aristocratic class whose interests and manners were opposed to those of the commercial classes. It allowed the rise of a society that harked back to something older than one could find even in England, and deprived the new country of any dynamic principle or even the means of finding one.⁵¹

The Constitutional Convention was structurally ill-equipped to resolve this problem, though, for the states still voted as states, and delegates thought of themselves as representatives of the states. The small-state faction especially clung to ideas of state equality, more than once relying on Delaware’s instructions to preserve state equality.⁵² Morris did not hesitate himself to represent the interests of his constituents when they coincided with his beliefs: at one point he announced that Pennsylvanians would never consent to being put on an equal footing with blacks.⁵³ As a result, in spite of the nationalist leanings of many delegates, the Constitution retained large areas of autonomy for the states. The composition of the Senate is the most obvious concession to state equality, and the authorization to states to create civic distinctions other than “titles of nobility” is a clear grant of state autonomy in social relations. Even before the Jeffersonians gained power and accelerated the rise of state authority, the Eleventh Amendment had altered the balance of power by rendering states immune from suit in federal court. By elevating state “pride” over any sense of “right,” the amendment was a step

50. 2 FARRAND’S, *supra* note 21, at 222–23.

51. Morris would not have wondered that Walter Scott became the favored novelist of the southern states.

52. See 1 FARRAND’S, *supra* note 12, at 37.

53. See 1 FARRAND’S, *supra* note 12, at 583.

toward anarchy.⁵⁴ While Morris provided many tweaks to the final draft of the Constitution, nudging it in a more nationalist direction, those tweaks proved to have little effect against the centrifugal force of the states.⁵⁵ As long as the South remained united, whether on slavery, commerce, taxes, or federalism, it could count on co-opting enough northern sympathizers to keep control of national policy.

For us today, it is easy to view events like the Constitutional Convention in light of their conclusion and to see a logical progression toward their final, inevitable result. Yet the framers’ tactical moves and principled or strategic moves can be hard to separate, and in advancing his objections to the trinity of slavery, state power, and agrarian aristocracy, Morris’s speeches are both.⁵⁶ He believed that to strengthen one was to strengthen the others, and so he had to work against them all simultaneously. Even as northern states conceded points, one after another, Morris knew that each concession weakened the institutions the Convention was creating. He resigned himself to the thought that the document that emerged was the best we could hope for. As he later said to John Dickinson: “In adopting a republican form of government, I not only took it as a man does his wife, for better, for worse, but, what few men do with their wives, I took it knowing all its bad qualities.”⁵⁷

Morris believed that the Constitution that emerged from the Convention was a frail compromise document whose success would depend on luck, cooperation, and strong leadership, even with his last-minute editing and nationalizing of the text.⁵⁸ Morris was delighted that the strong leadership came initially from George Washington.⁵⁹ The cooperation came partly from confidence in Washington’s leadership and partly from the muting of state competition in the economic prosperity of the 1790s. But the luck dissipated almost immediately. Hamilton’s plans for funding the debt, for creating a national bank, and for assuming state debts alarmed the small government advocates who began from the conviction that constricting federal power was a primary need. Hamilton, and Morris, had underestimated Americans’ desire to avoid all things—including beneficial things—that seemed “English” if that meant stronger central government. Thomas Jefferson became the leader of these forces, with the active collaboration of

54. GOUVERNEUR MORRIS, FIRST SPEECH ON THE JUDICIARY ESTABLISHMENT, *reprinted in* WRITINGS, *supra* note 5, at 311.

55. See William M. Treanor, *The Case of the Dishonest Scrivener*, 120 MICH. L. REV. 1 (2021).

56. See A NECESSARY EVIL? SLAVERY AND THE DEBATE OVER THE CONSTITUTION 41–65 (John Kaminski ed., 1995).

57. Letter from Gouverneur Morris to John Dickinson (Apr. 13, 1803), *in* 2 DIARY AND LETTERS, *supra* note 1, at 436.

58. See Treanor, *supra* note 55.

59. It is interesting to speculate whether Morris thought of Washington as a kind of third force in politics, keeping the commercial North and the slave South in balance and creating, for the moment, a classical mixed regime.

James Madison, who overcame or outgrew his earlier national leanings.⁶⁰ Without the unifying figure of Washington, the Federalist party collapsed completely after the 1790s and ushered in the unchecked rule of the democratic or popular elements in society. Morris watched as this progression destroyed the careful balance of the system. At the Convention, he had maintained that popular rule would actually strengthen the aristocratic faction if the interests of the aristocrats were not kept separate from the people. In arguing for an “aristocratic” Senate, he had said:

The Rich will strive to establish their dominion & enslave the rest. They always did. They always will. The proper security agst them is to form them into a separate interest. The two forces will then control each other. Let the rich mix with the poor and in a Commercial Country, they will establish an Oligarchy. Take away commerce, and the democracy will triumph. Thus it has been all the world over.⁶¹

The Jeffersonians and the South more generally were a threat to commerce. To Morris it was clear that their objective was to create a democracy dominated by a small vanguard of Virginian aristocrats. Once Washington was out of the way, the Jeffersonian strategy changed but the basic aims remained the same. The southern slave aristocracy mobilized the people and turned their constitutional advantages into an instrument for defending slaveholder dominance. They took care to ensure that the Constitution would be understood as more than incidentally in the service of slaveholding, that slavery was “nominated in the bond.”⁶² In pursuing this strategy, the Jeffersonians took full advantage of the Federalists’ unforced errors, especially the Alien and Sedition Acts and the “midnight judges.” Since the Federalists had “retired into the judiciary as a stronghold” in order to strike down “all the works of republicanism,” the place they began was dismantling the Judiciary Act of 1801.⁶³

The debate over repeal took place during Morris’s partial term in the Senate, and he published his speeches on repeal to make his position public. He was particularly concerned with the implicit Jeffersonian claim that the Constitution could be made or unmade by Congress. One of the most fundamental Federalist claims in 1787 had been that the Constitution was not ordinary legislation and thus could not be modified by the legislature. This was what made our Constitution distinct from Britain’s. When the Jeffersonians deprived good behavior-tenured judges of their jobs by legislative action, they were tacitly appealing to a British constitutional model to render the Constitution’s grant of tenure meaningless. In Morris’s mind, this was an assault by those who led the

60. See WRITINGS, *supra* note 5, at 428 (commenting on the British Treaty).

61. 1 FARRAND’S, *supra* note 12, at 512.

62. Frederick Douglass, Speech at the Anti-Slavery Society in Glasgow, Scotland (Mar. 26, 1860).

63. Letter from Thomas Jefferson to John Dickinson (December 17, 1801), in 10 WRITINGS OF THOMAS JEFFERSON 302 (Andrew Lipscomb & Albert Berg eds., 1907).

popular forces against the limitations placed on them by the Constitution, and the first step in creating arbitrary government. This explains why Morris saw the repeal of the Judiciary Act as the end of the Constitution of 1787. He had, of course, seen this phenomenon first-hand during the French Revolution, when governments changed frequently and the constitution and laws remained in constant flux. Unlike what he had seen in France, though, Morris thought the Jeffersonians were cleverer politicians than the French aristocrats had been. Breaking the Constitution left the country vulnerable to their manipulation. It was anti-constitutional, but it was traditional aristocratic behavior that appealed powerfully to Americans' worst instincts.

As these events unfolded, though, Morris remained unsure about how long the Jeffersonians' cleverness would prevail: were the Virginians leading or following? In an 1804 letter to Uriah Tracy, Morris laid out the basic democratic impulses that would be used to drive Americans. The repeal of the Judiciary Act had been a "mortal stab" that outlined "the beginning of a system." The conspiracy was dangerous "because it is not the result of a conspiracy among ambitious men, for that might be detected, exposed, and thereby frustrated." Instead, "the mischief lies deeper" because "the agents are actuated more by instinct than reflection." And he continued:

There is a moral tendency, and in some cases even a physical disposition, among the people of this country to overturn the Government. Such noxious humors can no more be cured by argument than the gout. With some, as in Virginia, they are hereditary; with others they are generated, as in Pennsylvania, by the intemperate use of ardent spirits, imprudently imported. In one case, aristocracy groans under that law of equality which forms the fairest feature in our Constitution; in another, bad subjects of a monarchy have broken loose and run mad. . . . The habits of monarchic government are not yet worn away among our native citizens, and therefore the opposition to lawful authority is frequently considered as a generous effort of patriotic virtue. . . . There is, therefore much reason to fear that all attempts to save the people from their most dangerous enemy will fail, and, in consequence, the wishes of those who long for a monarchy will be gratified.⁶⁴

The effect is to empower the majority, without any guidance:

The dangerous doctrine that the public will, expressed by a numerical majority, is in all cases to be obeyed, arises from a perverse confusion of ideas and leads to horrible results. That numerical majority not only may, but frequently does, *will* what is unwise and unjust. Those, therefore, who avow the determination strictly to comply with it, acknowledge themselves the willing instruments of folly and vice.⁶⁵

64. 2 DIARY AND LETTERS, *supra* note 1, at 369–70.

65. *Id.* at 370.

The Constitution, designed to protect the people from themselves, was being turned into a device for bringing the “most dangerous enemy” inside the gates.

Morris knew from experience that there would be ups as well as downs, however, and he was by disposition prepared to look on the bright side. So his disillusionment did not prevent him from appreciating a stroke of good statesmanship when it happened. In 1803, when Jefferson bought Louisiana, Morris supported it, unlike most of his fellow Federalists. Even before the purchase, in his Senate speech on the Ross Resolutions, Morris had argued that the commercial interests of New Orleans conveniently aligned with the interests of the commercial states:

In a short time all the West India Islands, fed from your granaries, must depend on your will. And in consequence, all the powers of Europe, who have colonies there, must court your friendship. Those rich sources of commercial importance will be, as it were, in your hands.⁶⁶

American commercial and strategic interests were complementary in this case. Morris seems to have forgotten his suspicions of agrarian westerners in his embrace of control over New Orleans; by 1803 he seems to be of the view that possession of New Orleans, if not the whole of the Louisiana Territory, will help to reduce, not increase, sectionalism in American politics.⁶⁷

This speech, however, gives a rare glimpse of Morris offering what seems friendly advice to slaveholders; and Brookhiser rightly characterizes it as “the worst argument of his public life.”⁶⁸ But let us look a bit closer. Morris goes on to say that for the slaves the “impulsion of fear must be strengthened by the hand of despair.”⁶⁹ It was indeed a “wicked argument,” made to and for wicked men. True, Morris frequently chose his arguments for their tendency to provoke. He knew that acquiring New Orleans was in America’s strategic interest, by giving the U.S. control over the mouth of the Mississippi. Yet even as he advocated the acquisition by appealing to southern self-interest, he took care to portray that self-interest in its ugliest light. He would also, implicitly, remind the southerners that a slave revolt remained a possibility (unless there was enough despair to deter it)—and in discussing the Caribbean, who could fail to think of Haiti, where a twelve-year slave rebellion would lead to independence in 1804?⁷⁰ It is wicked, but it also has a sharp point.

66. 3 JARED SPARKS, *THE LIFE OF GOUVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE* 414 (1832).

67. This aspect of the purchase is neglected in the two articles he wrote for the *New York Post*, where Morris spends more time discussing the politics behind the treaty. See WRITINGS, *supra* note 5, at 333-52. He was especially careful to give appropriate credit for the negotiations to his friend Robert Livingston, and equally careful to avoid any praise for James Monroe, “a person of mediocrity in every respect.” See 2 DIARY AND LETTERS, *supra* note 1, at 357.

68. RICHARD BROOKHISER, *GENTLEMAN REVOLUTIONARY* 170 (2003).

69. 3 SPARKS, *supra* note 66, at 414.

70. See BROOKHISER, *supra* note 68, at 170.

In spite of Morris’s hopes, sectional divisions, far from disappearing, worsened as the U.S. moved toward war with England. In an 1812 conversation with DeWitt Clinton, Morris discussed the general posture of public affairs. Although Clinton was a Democratic-Republican, he was in need of Federalist support in New York to further his political ambitions, and he and Morris were on the Erie Canal Commission together. Clinton comments that in New York most of the political class is “generally hostile to the Administration.” He adds that:

[h]is friends have returned from Congress disgusted. That every one begins to be weary of Virginia Domination—The present Plan of the Dominion is, he thinks, to provide for Munroe, Maddison standing, as is supposed, no Chance. They will readily run either Gerry or Tompkins or any other inefficient Northern Man for Vice President.⁷¹

Morris then reflects on the need of the Union and how its political fortunes might be repaired. He notes the problems created by the Three-Fifths rule and its distortion of American politics:

I then tell him that the only Measure I can devise which seems likely to rescue the Country from her present miserable and ridiculous Condition is to appoint a few Representatives of both Parties to meet other such Representatives from the States North of the Potowmac and consider the State of the Nation. That this Body when met will readily take the Ground no longer to allow a Representation of Slaves. That this geographical Division will terminate the political Divisions which now prevail and give a new object to Men’s Minds. That the Southern States must then either submit to what is just or break up the Union. . . .⁷²

Several months later, Morris provides his most fully articulated reflection on the cost of slavery to the country in his “Address to the People of the State of New York.” As he works up to his support of the Hartford Convention, he reviews the Jeffersonian moves to remake the country along southern lines, ensconcing slavery and crippling northern commerce. He begins with the claim from some that the Union is in danger of fracturing. He professes himself alarmed at the possibility but reassures his readers that with timely action the danger is not too great. He denies that the Union was adopted to secure the interests of the whole by giving priority to the interests of each separate part—what will later become the Calhoun thesis. The theory of advocates of separation is that “when concessions were made by the States for the sake of union, it was not because union was the end of their association but because they considered [union] as one

71. THE DIARIES OF GOUVERNEUR MORRIS, NEW YORK, 1799–1816, *supra* note 9, at 741–42.

72. *Id.* at 742.

of the rational means to preserve their liberty and promote their prosperity.”⁷³ Morris maintains that the northern states were driven by necessity to acknowledge state interests by such things as equal representation in the Senate and counting slaves for representation:

They proceed to relate that, for the sake of union, one important concession was made by the northern States with extreme reluctance because they deemed it unjust; and the haughtiness with which the southern States insisted on it was offensive. Nothing, therefore, but a pressure of necessity would have induced them to submit to a regulation whose object and effect were to increase the representation of those States, in proportion to the number of men whom they should hold in bondage: So that the violation of natural right was rewarded by political prerogative, and they became masters of their brethren, by making the negroes their slaves.⁷⁴

He goes on to complain that “as to the price stipulated for the additional representation,” i.e., the direct taxes the Three-Fifths Clause permits, “it has never been paid.” Direct taxes had simply not been collected in the South, and so became “an additional burden on the [N]orth.”⁷⁵ The outcome of the struggle between slavery and commerce thus had been a decline of commerce and a rise of slaveholders:

That [direct taxes] were used moreover, as the engine to subvert an administration favorable to commerce and establish, in its stead, an administration of slave holders, who, envying the prosperity of the northern states, endeavoured to dry up it’s source by ruinous commercial restrictions and have now, actuated by the same spirit, exposed them to the desolation of a war alike unnecessary and unjust.⁷⁶

Further along in the Address, he mentions specifically “an opinion which has got abroad,” which is “that one object of the War was to check the growth of this State.” And while he says this is unfounded, he proceeds to explain why the War of 1812 was especially bad for New York:

Yet I must acknowledge that if a desire to arrest the rapid progress of our prosperity had existed, no better mode of gratifying it could have been devised than a war with England. It exposes . . . on the south, the greatest commercial City of the Union [New York City] to bombardment. Moreover, a War ruinous to Commerce must be most injurious to the most commercial State.⁷⁷

73. GOUVERNEUR MORRIS, ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (Aug. 29, 1812), reprinted in WRITINGS, *supra* note 5, at 539.

74. *Id.* at 540.

75. *Id.* at 541.

76. *Id.*

77. *Id.* at 545.

IV. MORRIS'S ANTI-SLAVERY CONSTITUTIONALISM

Hostility to slavery runs through the various features of Morris's constitutionalism, but more as a conclusion than a premise. He does not begin with a theoretical opposition to slavery, or theoretical support for some other institution and reason from that to political forms. Instead, he approached constitutional design with the spirit of a problem-solver oriented toward results. Morris was conservative, not in the sense of embracing a conservative ideology but in the sense of respecting what history taught and using its lessons to identify *avoidable* mistakes. The key principle was to provide *balance* among the various elements, so that none would be able to rule unchecked. Tolerating the presence of slavery, and with it a slave society, in the United States was one of the biggest mistakes we could make. History showed no examples of a successful country divided by such radically incompatible forms of social organization.⁷⁸ The Constitutional Convention had been offered a choice of commitments, and it hedged—creating a system that would be unstable at best, and dangerous at worst, especially if foreign powers became involved. Morris was not surprised that it came apart in his lifetime. Nor, one suspects, was he surprised that it was the backward-facing faction that created the crisis.

The idea that one could ask or tell history to stop was to Morris as gauzily utopian as anything dreamed of by Thomas Jefferson, yet Morris foresaw that this was what the South was determined to do.⁷⁹ He would counter this idealism by saying that constitutionalism needs to take a sober view of human nature, and history shows us very well how human nature behaves. Slavery is one way in which humans have tried to control history's movement. A slave society is a static society, where status is hereditary and so the categories of master and slave are immutable. No social motion is allowed to take place. Morris's conservative constitutionalism, then, is not an attempt to fix certain social institutions or practices irrevocably. Rather, it is designed to create a balance that will support a fluid and dynamic society—protect the "blessings of liberty" rather than secure a fixed notion of freedom—because the question is not *whether* society will change, but how. Institutions and manners come and go, grow and change. People come and go as well. The issue for a free people is how to manage their freedom within a constantly advancing society. This was the society Morris wished to create, and indeed thought had been created in the non-slave states.

What stands out in Morris's conservatism is his pessimistic but foresighted recognition that every solution creates new problems. Nothing settled in 1787 will solve the problems that 1815 brings; indeed, the solutions of 1787 will help to *create* the problems of 1815. Likewise, the compromises of 1787, or the agreements to disagree, will remain sources of conflict. Slavery would be a retrograde

78. In that sense, the comparison with Machiavelli is not fully apt: the Roman Republic had conflicts over which class had power, rather than social and economic forms. See Coby, *supra* note 28, at 622, 628.

79. See William F. Buckley, Jr., *Publisher's Statement*, 1 NAT'L REV. 5 (1955).

force in society and would become a perpetual irritant as well as a constant trumpet of American hypocrisy. In the end, even force could not guarantee the success of a compromise that demanded complicity in another's evil. Whether as aristocracy, as sectionalism, or as a denial of natural right, slavery demanded a sacrifice of everyone's principles. The American Constitution was a compromise that created a divided system—a dynamic, ever-changing capitalist North that could be run by men of business, and a static, feudal South run by a slaveocracy. It effectively prevented Madison's utopian scheme for allowing multifarious interests to clash civilly with one another—which might have been possible in a commercial society—and merely recycled the older scheme by which rich and poor or slave and free were opposing forces.⁸⁰ The gifts of the Three-Fifths Clause and equality in the Senate gave the Slave Power a decided advantage that made recovery improbable. As he said to Harrison Gray Otis, binding slavery and commerce together would be fatal to one or the other—and very likely, in his opinion, fatal to the nation.

Liberty and equality are abstractions, and Morris devotes little of his writing to dealing with abstractions. When he does deal with liberty or equality as abstractions, he indulges the scholar's habit of problematizing them, as we have seen. In the very first paragraph of the "Political Enquiries," for example, he presents a variety of options for the purpose of government. While certain options—royal magnificence and so on—seem to be excluded a priori, he examines "the Public Good" more carefully. While it seems an easy choice, Morris reminds us that it, too, can be controversial. People will disagree about what "Good" is, for one thing. And in its pursuit, it can lead to proscription, confiscation of property, and violence. In the rest of the essay he shows why concepts like "liberty" can also be misleading, and how an exclusive focus on the abstract principle can lead to miserable conditions on the ground.

Morris shows his concern for liberty and equality in his actions, in working to oppose slavery in the New York Constitution, in the U.S. Constitution, and in American law. He does not waste his time calling out the hypocrisy of those who profess to love liberty yet force people into bondage. If the Convention wanted to be hypocritical, he would do his best to avoid calling attention to it. Humans, he might have said fatalistically, are hypocritical most of the time; it is not helpful to debate with people over such things. The "Enquiries" of 1776 show the youthful Morris at his most reflective and set the general pattern for his later efforts to secure constitutionalism in the new states. As the "scrivener" of the Constitution, he honored the wishes of the Convention by avoiding the words "slave" or "slavery," in spite of having threatened to embarrass Georgia and the Carolinas by using them.⁸¹ In this way, he opened a window, however small, for Lincoln and others later to argue that the Constitution was a document that guaranteed freedom.

80. See Coby, *supra* note 28, at 628.

81. See 2 FARRAND'S *supra* note 21, at 415; Treanor, *supra* note 55, at 2.

Morris insists that government should obey the rules of justice: the Golden Rule, he argues, should be the measure of human conduct.

Of avoidable Evil, there would be less in the World if the Conduct of States towards each other was regulated by Justice; there would be less in Society if each Individual did to others what he would wish from them; and less would fall to every Man’s Lott if he were calm temperate and humane.⁸²

He implies that an enlightened attention to one’s “own Affairs” is the ground of virtue—that is, a care for one’s own good marked by a lively awareness that everyone else is entitled to care for their own good as well. People who neglect their own business for the public’s contribute to weakening the nation.⁸³ The implications for slavery are clear. Lincoln would later operationalize this principle, and argue, “As I would not be a *slave*, so I would not be a *master*.”⁸⁴ The nature of any political community, however, is to constrain people to observe rules that are formulated for the good of the whole, and this may conflict with the individual’s sense of their own interests; how, then, do we define the legitimate scope of liberty? Perfect liberty, Morris points out, is impossible in a society unless we insist on unanimous consent for any act of government. He goes so far as to observe that liberty can be enjoyed better outside society than in it. Because property is the basis of society (drawing again from Locke), the basic conflict in society is between liberty and property: “Where political Liberty is in excess Property must always be insecure and where Property is not secure Society cannot advance.”⁸⁵

At the end of the day, politics presents a series of balancing questions—liberty against property, political against civil liberty, public good against property rights. To think that any can be achieved completely is naïve. Any attempt to secure one exclusively will collapse of its own contradictions. Every attempt to solve one problem, whether to increase liberty, or increase property rights, or constrain voting, creates other problems. Poland is Morris’s example of “perfect” political liberty, yet it “must first be admitted that nine tenths of the Nation (the Serfs) are not Men.”⁸⁶ Moreover, on closer examination, the requirement of unanimous consent itself turns out to be a vicious form of minority rule: every noble is subject to the rule of every other. Morris concludes that “this then is not political Liberty.” In looking at abstract political claims, Morris was careful to examine what was being asked for and how the proposed solutions might lead to other problems. His conservatism, then, was not based on a general objection to motion, but on a desire to be sure that the motion being promoted was genuinely

82. GOUVERNEUR MORRIS, POLITICAL ENQUIRIES, *reprinted in* WRITINGS, *supra* note 5, at 6.

83. *Id.* at 7.

84. ABRAHAM LINCOLN, DEFINITION OF DEMOCRACY (Aug. 1, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 532 (Roy P. Basler ed., 1953).

85. GOUVERNEUR MORRIS, POLITICAL ENQUIRIES, *reprinted in* WRITINGS, *supra* note 5, at 10.

86. *Id.* at 9.

progress. Existing social and political arrangements may have their drawbacks, but let us in making a fresh start be sure that any proposed solution (a) solves the problem and (b) has side effects that are tolerable, or at least not worse than the existing arrangements.⁸⁷

To Morris, any principle, even liberty, becomes tyrannical the moment it becomes one's sole purpose, in a practice or in a country—he had seen this from a front seat in Paris. His reservations about Jefferson and Madison, like his reservations about John Adams and his friend Hamilton, all stem from their willingness to pursue a principle to the limits of its logic. Conversely, he admired Washington for his “prudence” and wisdom in never becoming the servant to an ideology. It was this “strength of judgment” that Morris himself worked to emulate.⁸⁸ Thus, Morris's constitutionalism reflected his sober judgment of human character and his belief that all human works are transient. The highest calling of constitutionalism was to protect humans from themselves, and to use institutions to prevent people from harming themselves. This is especially true of majorities. Morris had no special like or dislike for majorities; but he knew that, being human, they would make mistakes. So would minorities or aristocracies. Everyone needed a check.

Slavery was a continuing reminder of the Constitutional Convention's cardinal political blunder. It set up South and North as rivals, economically, culturally, and politically. But in trying to combine these two incompatible principles of society and economy, it left them unequal. The Convention gave a decided advantage to the archaic slave society and shortchanged the progressive, commercial principle through the Three-Fifths Clause and state equality in the Senate. By ignoring time-tested political wisdom, the Convention made their institutions unstable and the system's life span uncertain. The United States was not Rome, where Machiavelli tells us the struggle between two energetic classes contributed energy to the polity. The U.S. Constitution set up a struggle between dynamism and lethargy. Morris considered it a political mistake, and while others wanted to wish it away, he knew that eventually it would have to be resolved.

Slavery is simply a contradiction of constitutionalism. In the United States, the Constitution compounded the moral wrong by adding political favors for the Slave Power. A slave society is a poor nursery of the habits and virtues needed in a republic, but that was not what bothered Morris. He was concerned that slavery suppresses the economic energies of the country.⁸⁹ He thought it would keep the

87. Compare John Dickinson, in 2 FARRAND'S, *supra* note 21, at 278 (giving the famous “Reason must be our only guide,” speech but adding comments on English institutions that “accidents probably produced these discoveries, and experience has given a sanction to them”), with THOMAS PAINE, COMMON SENSE, *reprinted in* THE POLITICAL WORKS OF THOMAS PAINE 10 (1882) (contending that the English constitution is the result of two ancient tyrannies with some new republican elements).

88. GOUVERNEUR MORRIS, ORATION ON THE DEATH OF WASHINGTON, *reprinted in* WRITINGS, *supra* note 5, at 294.

89. See 1 FARRAND'S, *supra* note 12, at 545; WRITINGS, *supra* note 5, at 160.

parts of the country that practiced it poor, and he saw evidence that it would be so—this was before cotton, of course. Morris thought he had lived to see the death of the constitutional system through its slow but systematic strangulation by the Jeffersonians. The economic policies of the Jefferson and Madison administrations showed, he thought, a government bent on impoverishing the active and commercial parts of the country to level the terrain with the South. Morris was convinced that the Jeffersonians would not be satisfied until their leveling made the whole country a desert.

To Morris, humans were fragile and limited creatures, easily blinded by ignorance, self-interest, and superstition.⁹⁰ Yet they were also creatures capable of knowledge, selflessness, and true religion. The job of a constitution was to limit the influence of the unhelpful human traits and bring forward the good qualities. His opposition to slavery fits into this scheme because a slave society creates the maximum scope for such bad qualities as greed—in the masters—and ignorance—in the slaves. Slavery also minimized the good human qualities, which Morris believed were more strongly encouraged by a dynamic commercial society. To Morris, the slave masters were trying to stand across history yelling “Stop.” This was foolish and unrealistic. A society devoted to arresting history, as he foretold, was a society not merely doomed to failure, but doomed to undermine the best of the human qualities. It would not simply be stagnant and unproductive economically, but it would strangle the kinds of human innovation—moral as well as economic—that would lead society forward.

The Constitutional Convention found an essentially regional economic and social curse and transformed it into a national and constitutional one. They ensured a society composed of two opposing powers, and then deprived one power of the institutions it needed to assert itself. This committed the country, Morris feared, to faction and instability. Allowed to develop unencumbered, commerce would provide the principle of energy for American society. But the Slave Power checked that energy, and its power to check continued to grow in Morris’s lifetime. The conservatism that Morris practiced had no regard for particular institutions—institutions were simply means to an end. The end was freedom for the individual through a balance of forces that would allow society to move forward. Slavery upset that balance, and in protecting slavery the Constitution invited heaven’s curse.

90. See 1 SPARKS, *supra* note 21, at 290.