

PASSION AND REASON IN THE CONSTITUTION MAKING PROCESS: THE ISSUE OF SLAVERY AND THE AMERICAN CONSTITUTION

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ABSTRACT

The constitution making process is one in which a designated group of individuals make a new or improved constitution for a nation. Often times, passions and preferences play a major role in the political bargaining between what the authors will include in a constitution. But the fact still remains that constitutions are essentially neutral, where the state does not have a particular stance on major social issues. In this research, the notion of passion and preference is argued by showcasing the extensive amount of constraints on the constitution making process. By illustrating this puzzle through the American 1787 constitution making process, where the colonists were at ends with one major issue: slavery, the research is able to show how passions can be put aside in order for actors to research a compromise that results in a neutral constitution.

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CHAPTER 1: FRAMING A CONSTITUTION

When the Framers of the American Constitution were issued the task to anew the Articles of Confederation into a better, more secure institutional arrangement for the Federal Government, the delegates to the Federal Convention of 1787 knew it would be a long, hard, fiercely-debated event. Since the setup of the Confederation of America prior to the Federal Convention was of thirteen distinct, individual colonies, it would be difficult to unite these differing interests into something that could be substantially agreed upon. Ideas, interests, and ideology were three perspectives the Founders had to begin to agree upon, or, at the very least, concede on their notions of what the proper role of government should be. What would come in the constitution-making process of the United States would be five months of continuous debate and political bargaining. While some may believe that the delegates compromised in order to appeal to make a more defined or “perfect Union,” the fact of the matter is that each delegate was, to an important extent, motivated by self-interest and bargained for the best deal that would maximize their interest. Although the American case of constitution making has been applauded as one of the most successful ones in global history, it had its fair share of faults as well; similar to many other examples of constitution making that took place around the world.

Apparently, selfish individual constitution makers were quite constrained – previous research topics point to these constraints, but the question embarked upon here is how to identify and understand such constraints that were not previously shown in other research topics. It is especially pertinent to this research to explain the interplay between self-interest and constraints as well. There exists a noteworthy gap in the literature of the American constitution making process showing the interplay between passion and reason for particular, controversial issues that

were debated at the Federal Convention. In order to show how constraints played a pivotal role in trumping the impassioned, self-interested delegates, different theoretical perspectives will be introduced through one specific controversial issue: slavery. Delegates at the Federal Convention had powerful viewpoints on this issue and it could be seen during the debating process, but it is interesting to see that the end product of the American constitution seems to be ideologically neutral¹ in terms of criticizing or agreeing with the practice. The debate on this issue resembles one of the major problems that are associated with the constitution making process:

compromising. When a group of constitution makers come together to form a new constitution, they bring with them a wide variety of interest, passions and preferences (as well as principled views) to be included in the constitutional framework of the country. Interestingly, this was most shown through the self-interest of twelve distinct American colonies. What the Framers brought with them to the constitution making process was an adherence to higher-order principles, such as liberty and equality, but even the definitions of these principles were left to the individual's conception. Yet the fact remains that the American constitution is essentially neutral in social issues. Ultimately, the constitution does not necessarily reflect passions, narrow preferences, and partial interests of their designers. Although 25 out of 55 delegates to the Federal Convention were slave owners, the document produced at the end of the convention is

¹ For the purpose of my research, I hold that neutrality in the constitution making process is identified primarily in the constitution as its outcome: in spite of plurality of preferences, world-views and principles expressed during the debates, the constitution does not give advantage to any of them. This becomes especially important in the case of the most controversial social issues. In the case of slavery, this means that the Framers refused to constitutionalize any of the competing ideological stances on the issue. The basic structure of society prior to the constitution making process, with slaves being seen as property of men, would be upheld in the constitution but not advocated for or argued against. The state remains neutral on the morality of the issue.

essentially neutral on the issue – the state did not advocate a position for or against slavery.² This goes to show that rather than passions shaping the constitution making process, reason and constraint seems to play much more of a pivotal role. On a broader level, the illustration of the American case shows that constitutions do not necessarily reflect passions and narrow preferences. But the major question that will be addressed with this issue is why these preferences are kept out of the end product of the constitution.

In order to answer this question, I will begin by highlighting the difference between theoretical approaches to constitution making in chapter two. While I acknowledge the wealth of the scholarly literature on the subject, for the purpose of my analysis, I will focus on two approaches that I find especially enlightening on the issue of slavery. Starting with Jon Elster's rational choice approach that explores the role of passions, and their relationship to rational preferences, I will summarize his major arguments and respond with some criticism. Emphasizing the competing theory of Stephen Holmes, which focuses on "gag rules" as constraints in the constitution making process, will lead to a broader discussion on the role of constraints. In chapter three, I will dive more deeply into the issue of constraints, focusing on both upstream and downstream constraints, as well as the role of the institution - Constitutional Convention - plays in the process and the mechanisms it puts forth for delegates in compromising. After summarizing these theories and showing the role of constraints in the process, I will apply it to the compromising process taken place during the Constitutional Convention of 1787 in chapter four. Specifically, I will focus on the issue of slavery and show how the delegates were able to compromise from self-interested, unwavering stances on the issue to mutual agreement that left slavery untouched and forever a part of American history. Not only

² Vile, John. The Constitutional Convention of 1787: A Comprehensive Encyclopedia of America's Founding. Santa Barbara: ABC-CLIO, 2005. p. 4.

did slavery play a major role in the debating process for the Founders, but this “speck” on the American constitution continued to affect the history of the United States in a major negatively way.

CHAPTER 2: A THEORETICAL DISCUSSION OF CONSTITUTION MAKING

2.1 Rational Choice and Self-Interested Actors

A frequent antonym of passion is reason – a basic definition of what passion is shows the negative effects it plays on certain processes, especially when it comes to constitution making. There are many different areas of passion: emotions - anger, fear, love and shame, and states – drunkenness, cravings, and other visceral feelings.³ Whether passions are connoted with either the states or emotion aspect, the fact remains that passions do cause a discrepancy between plans and behavior: they distort cognition, and induce weakness of will.⁴ So just how passionate were the delegates at the Constitutional Convention and how did this play negatively into the process?

To begin with, states and famous countrymen boycotted the very idea. Both Rhode Island, and other well-known patriots such as Patrick Henry, refused to attend the Constitutional Convention and were wary of changing the existing framework under the Articles of Confederation fearing that it would create a much more powerful government.⁵ Additionally, slave-holding states, which continued to prosper under the framework of the Articles of Confederation, did not want many changes to the existing arrangement. The delegates were instilled with fear, economic interest, and, in turn, individual security of their rights to practice this economic freedom – it was of no shock that they had quite the degree of passion (irrational) and self-interest (rational) when they traveled to Philadelphia. For this reason, Jon Elster's theory is quite compelling. Elster's rational choice approach does much to show how men can easily fall

³ Elster, Jon. Ulysses Unbound. Cambridge: Cambridge University Press, 2000. p. 7.

⁴ Ibid., p. 8.

⁵ Storing, Herbert. The Anti-Federalist. Chicago: University of Chicago Press, 1985. p. 72.

victim to passions, and, eventually, instill these passions into a constitution that binds generations to come. But before Elster approached the idea of constitution making, he began to develop his sound rational choice theory, and this is a good starting point with which to understand how it pertains to the constitution making process. To begin with, he believes that it is in the best interest of the researcher to choose a theory that holds out the greatest promise of a successful explanation. One way to explain phenomenon is by studying the behavior of the individual. Elster's methodological approach is consistent with that of microeconomic assumptions, or more broadly, methodological individualism. According to Elster, this approach is pivotal in the social sciences: "A satisfactory explanation must ultimately be anchored in hypotheses about individual behavior."⁶ The way that Elster believes that this methodological approach is fundamentally important in explaining social phenomenon is through the biology and psychology of individuals.⁷ Furthermore, in order to explain behavior at the aggregate level, it is necessary to explain the behavior of individuals. When Elster tries to understand a "relevant explanandum" or an appropriate explanation, he believes that the social science should refer to only individuals and their actions.⁸ Rather than referring to supra individual entities, as social scientists often do, such as families, firms or nations, the individual should be focused upon. What Elster sees troubling in this instance is the fact that such collectives are just a "harmless shorthand" or a "second-best approach" that is forced upon researchers when there is a lack of data or unsound theories.⁹

⁶ Elster, Jon. Explaining Social Behavior: More Nuts and Bolts for the Social Science. New York: Cambridge University Press, 2007. p. 36.

⁷ Ibid., p. 36.

⁸ Ibid., p. 13.

⁹ Ibid., p. 13.

In addition, Elster claims that social mechanisms are the best explanation for individual behavior. Social mechanisms, understood, as “frequently occurring and easily recognizable casual patters that are trigged under generally unknown conditions or with indeterminate consequences” are a way for social scientists to explain but not predict phenomenon.¹⁰ When this understanding of Elster’s epistemology is applied to the constitution-making process, one can see how he uses the mechanism-argument as the basis of his theory. Elster begins his theoretical approach to the constitution-making process by collecting different cases and asking if there is a causal pattern identifiable in all of those cases. If such a patters is found in the individual behavior of constitution-makers, then it is safe to assume that there is a social mechanism in place. He argues that the character and reach of actors’ rationality depends to an important extent on the institutional framework and context. More specifically, Elster refers to a mechanism of path dependency, stating “[a] constitution that is finally adopted may depend in accidental or irrelevant ways on decisions made by the framers when wearing their legislative hats.”¹¹

The vast majority of constitution making occurs in time of crisis. While some authors insist that the constitution-making stage presents a unique opportunity for overcoming passions and acting in accordance with higher-order principles, Elster disagrees. He argues that during impassioned times such as these, it is difficult to combat these forces from affecting the material that is instituted into constitutions. What Elster highlights in his theoretical argument is the fact that cognitive assumptions of constitution makers, with their beliefs and preferences, will shape

¹⁰ Ibid., p. 36.

¹¹ Elster, Jon. “Legislatures as Constituent Assemblies.: In Constitutionalism Nordic Perspectives, edited by Joakim Nergelius. Vol. 31 of The Raoul Wallenberg Institute Human Rights Library. Boston: Martinus Nijhoff Publishers, 2008. p. 62.

the institutional arrangements implemented within constitutions.¹² When the cognitive assumptions of the Framers are limited to impassioned times during the constitution-making process, such as social economic crisis, revolution, or creation of a new state, then it is difficult to constrain these desires and interests from affecting the neutrality of a constitution. Elster explains these desires through the notion of rationality, insisting “acting rationally means acting consistently on beliefs and desires that are not only consistent, but also rational.”¹³

By understanding Elster’s approach, it will help to show what is in the background when he constructs a framework for understanding the events that lead up to the adoption of the constitution. When applying this type of theoretical approach to the Federal Convention of 1787, Elster tries to understand how the constituent assembly, “suspended between the past and future, unbound by earlier generations” does bind the later ones.¹⁴ Elster would explain that the Framers were in a “state of crisis, with several scenarios of internal breakdown and external conflict being seriously entertained.”¹⁵ But what Elster tries to do when looking at the case of the Federal Convention empirically, is to construct a framework for understanding the events that lead up to the adoption of a constitution. What were some of these internal breakdowns, or conflicts, that the delegates disagreed upon? Ultimately, it could be in the struggle between the smaller and larger states. This seemed to come into affect during the debates in terms of representation. Others dealt with economic issues, specifically economic restrictions on suffrage that would

¹² Elster, Jon. “Forces and Mechanisms in the Constitution-Making Process.” *Duke Law Journal* 45 (1995): pp. 364-396.

¹³ Elster, Jon. Sour Grapes: Studies in the Subversion of Rationality. Cambridge: Cambridge University Press, 1983. p. 15.

¹⁴ Elster, Jon. “Constitutional Bootstrapping in Philadelphia and Paris,” in Michel Rosenfeld’s Constitutionalism, Identity Difference and Legitimacy. Durham: Duke University Press, 1994. p. 82.

¹⁵ *Ibid.*, p. 49.

prevent the poor from using a vote to deter the wealth of the economic elites. For this reason, only white, male, landowners were allowed to vote. Interestingly, slavery seems to be at the backdrop of most of the internal conflicts. Slavery became one of the most debated issues not only because it was morally irreprehensible to the majority of delegates, but also because the act extended into so many others debated subjects at the convention (economics, representation, etc.) Although the constituent assembly was made up of 55 distinct individuals with their own preferences and passions, Elster believes that it is still possible to explain actions through the political notion of collective rationality (this, in and of itself, amounts to a compromise). This notion states that individuals can overcome a large set of contradictions through concerted action.¹⁶ This can be related to methodological individualism in an interesting way. In order to explain the aggregate, it is necessary to explain individual action. So, in this case, the delegates still debate in order to have their self-interest served. But at a point, they realize that concerted action will be the only way that an actual compromise can take place.¹⁷ This notion implies that through concerted action, the Framers at the Constitutional Convention were able to overcome contradictions and reach a compromise on certain issues in order to come up with a constitution. In this sense, there was a particular interplay between personal and group interest that served as one of the most important factors for the Federal Convention. The personal interest served more in economic interests of the Founders and it could be seen in the voting process of the Federal Convention while the group interest (smaller states vs. bigger states, slave states vs. non-slave

¹⁶ Ibid., p. 29.

¹⁷ Such was the case when arguing for the slave trade. The delegates began to understand, after days of heated debate, that there would not be a proper agreement made with the entire delegation present. So, they delegated their powers to a Committee within the Convention that would deal specifically with the provisions on slavery and then bring it back to the entirety of the Convention to vote upon.

states) focused more on the combined interests of the states (For more details on this distinction between personal and group interest, see p. 33). Yet there exists a major flaw in this aspect of Elster's theory when it is combined with an empirical analysis of the compromise that took place during the Federal Convention. According to Elster, individual actors come together to have a combined interest.¹⁸

Essentially, this would place individuals who do not own slaves in the non-slave state coalition. But this does not seem to be the case at the convention, and it could be seen when the delegates were discussing the morality aspect of slavery. Even a delegate who was opposed to slavery could still be a citizen of a slave state, and, even more surprisingly, own slaves themselves. When George Mason, a delegate from Virginia and an influential critic of slavery, gave his impassioned speeches against slavery, he not only had racist assumptions of the superiority of white settlers over blacks, but he was a complete hypocrite in the practice of slavery.¹⁹ Mason joined the most righteous sounding of the Northern state representatives, yet amassed a plantation of over 5,000 acres and over 300 slaves.²⁰ Hypocritically, he went as far as to saying that someone who owned slaves "is born a petty tyrant [and] they bring the judgment of heaven on a Country."²¹ When Mason vehemently criticized slave owners, Oliver Ellsworth, a delegate from Connecticut, spoke out on the hypocrisy coming from Mason. He proclaimed that since "he had never owned a slave," he "could not judge of the effects of slavery on character."²² Essentially, both of these individuals were in the same coalition, albeit for differing purposes, yet

¹⁸ Ibid., p. 29.

¹⁹ Vile, John. The Constitutional Convention of 1787: A Comprehensive Encyclopedia of America's Founding. Santa Barbara: ABC CLIO, 2005. p. 460.

²⁰ Ibid., p. 460.

²¹ Ibid., p. 460.

²² Ibid., p. 575.

they still could not agree on these collective assumptions of why they were against slavery.

These collective assumptions were not born out of principled considerations – it was a common interest born out of a compromise. Rather than give arguments against the slave trade, some delegates invoked the moral reasons for not having slavery. On the surface, this could be seen as a principled consideration held by most delegates opposed to slavery. Yet going deeper into the specific reasons of why the delegates were opposed to slavery will show that it was far more of self-interest involved. Mason was much more self-interested in making his colony richer by stopping the importation of more slaves in Georgia and South Carolina, while Ellsworth vehemently opposed the practice of slavery altogether on the basis of morality.

This is just one criticism of Elster’s approach – it lacks a complete empirical understanding of how the Framers compromised on the issue of slavery during the Constitutional Convention. While his work does give empirical evidence of the Founders compromising on the issue, he tends to focus much more on the individual aspect while downplaying the role of other types of constraints, such as legal constraints or societal constraints on the constitution making process. More specifically, Elster does not point out where the higher norms that each delegate agreed upon originate. These higher norms eventually made its way to the constitution making process.

2.2 The Collective Goal: an Overlapping Interest

Before discussing Holmes “gag rules” based approach to the constitution making process, it is necessary to step back and understand what, if any, common objectives the Founders had in common prior to embarking on the mission of changing the Articles of Confederation. The Framers at the Constitutional Convention had a wide variety of interests they wanted to induce

into the constitution. As representatives of distinct states, preferences did not always match on major issues, but there was still a common objective from these members, and that was to ratify a new and improved constitution. They agreed on the fact of the crisis, even if they failed to agree on the character of that crisis and the best ways of overcoming it. This implies that there was significant interests overlap prior to Philadelphia and, in and of it, was translated into constraints. What were some of these interests? According to the Preamble to the Constitution, the states were able to join together in order to secure their liberties (religious freedom, sovereignty, free trade), establish justice (assumes that justice did not exist beforehand, or at least, that it was seriously threatened under present arrangement), and, most importantly, provide a common defense and ensure domestic tranquility.²³ The Articles of Confederation had failed, in the delegates' eyes, in several ways (security, functionality, trade within the colonies – each state had its own currency). For this reason, a basic goal each delegate had in mind was the dire need of making a new and improved constitution. One way that the Articles of Confederation failed was in terms of security, be it for domestic issues within the Confederation or the threat of an outside attack. A weak point in the internal structure during the Articles of Confederation was the lack of institutional mechanisms of conflict management. One such conflict was the Shay's Rebellion that took place on August 29, 1786. This caused a further fervor to initiate talks at the Philadelphia Convention – each delegate lived through this uprising and understood that it was, in fact, a threat to national security.²⁴ The threat posed by external actors - other states (most

²³ U.S. Constitution. Preamble.

²⁴ Interestingly, there is little talk about the two rebellions that took place during the first decade under the Constitution. The Constitution set up an institutional response for the central government to stop rebellions. Thus, both the Whiskey Rebellion (1794) and Fries's Rebellion (1799) were handled quite speedily without much bloodshed, unlike the institutional setup during the Articles of Confederation.

notably, Great Britain) - on attacking the Confederacy was real. The Founders understood this and made sure to set up institutions that could deal with this, such as a national military.²⁵

Liberty, justice, and defense were the significant overlapping interests prior to the Constitutional Convention. And thus, this translated into a constraint in a major way. What the language in the Preamble alludes to is the absence of these fundamental principles under the Articles of Confederation. The delegates had an awesome, momentous constraint lurking over their heads – the need to implement these principles that the country fought so hard to gain within a legal framework. To some Founders, such as Patrick Henry and other Anti-Federalists, the central government’s effectiveness was something that made it a problem. Others believed that not having a central government, which dictated rules and provided institutional mechanisms for the entirety of the Union, was a problem and needed to be addressed. As George Washington, the president of the Constitutional Convention, requested, “no temporizing expedient” should be the answer. “We must probe the defects of the Constitution to the bottom, and provide radical cures.”²⁶ By Constitution, Washington was referring to the Articles of Confederation. This declaration set forth by Washington was the opening remarks to the Constitutional Convention, and it set forth the overall goal that would be actively searched for throughout the following three-and-a-half months proceedings.

²⁵ Since the colonists at the time were weary of a standing army (due to the fact that they defeated the “best army in Europe” with just basic militia), limitations were put on it. Interestingly, no limitations were put on the Navy. This could be seen as a move put forth by the Founders that made sure external attack could be dealt with (Navy plays the first role in withstanding an attack on American soil).

²⁶ Meese, Edwin. The Heritage Guide to the Constitution. Washington, D.C.: The Heritage Foundation, 2005. p. 8.

2.2.1 The Politics of Omission: Constraining Passions

In essence, it could be argued that the major constraint on the constitution making process for the delegates was that failure was not an option, even though some delegates were not persuaded by this argument. But how did this constraint show itself within the process? Before providing empirical examples, it is necessary to outline another theoretical approach that discusses more specifically how the compromising process was able to happen in Philadelphia. In opposition to the rationality argument set forth by Elster, Stephen Holmes offers another theory as to how and why social issues were not addressed in American constitution. Holmes adds to the constitution-making process theories by inputting the notion of “gag rules”, or more simply, the politics of omission. A “gag rule” can be defined as a formal or informal rule that forbids or limits the discussion of a particular issue or topic by a decision-making body. For Holmes, the concept of a “gag rule” does much more than confine hot-topic debates and discussions on certain issues. In fact, “gag rules” can help to shift much of the attention away from areas of discord and toward areas of concord.²⁷ The role of “gag rules” plays a pivotal role in Holmes’ theory – it deters individuals from discord and utilizes the scarce resource of time more effectively. For the Framers at the Constitutional Convention, time was a necessity, and the need for compromise applied to nearly every issue on the political agenda. For a newly established liberal society, answers to major questions were necessary. Holmes believes that in order to have social order, “the basic normative framework must be able to command the loyalty of individuals and groups with widely differing self-understandings and conceptions of personal

²⁷ Holmes, Stephen. Passions and Constraint. Chicago: University of Chicago Press, 1995. p. 210.

fulfillment.”²⁸ To understand the social order that came from the American constitution, it is necessary to explain the phenomenon in another aspect than individual preferences. In essence, Holmes is offering a way to do just that by highlighting the informal “gag rules” present at the Federal Convention.

For the Constitutional Convention, the political future and moral status of slave ownership was too difficult a question to answer during the Federal Convention. It took decades and a Civil War for the nation to address the issue. Rather than face off between the Northern and Southern states at the Constitutional Convention, the Framers were able to apply informal “gag rules” to avoid the issue. Holmes mentions how “gag rules” are often designed for the specific purpose of postponing a discussion in order to avoid the difficult questions and to fulfill the political agenda of the time (creating a constitution).²⁹ This informal technique in the constitution-making process had other unintended but positive consequences. It helped to further the debate on other issues at the Federal Convention, since it would be impossible to have a passion-charged and divisive issue placed at the center of deliberation. Holmes gives many empirical examples of when and how “gag rules” can apply in politics and benefit the political agenda. One such example is the gag rule that was originated in mid-1830 in the U.S. Congress. The U.S. House of Representatives passed a bill that barred discussion or referral to any committee of antislavery petitions. In England, the gag rule can be seen as formally neutral –

²⁸ Ibid., p. 207.

²⁹ Ibid., p. 217.

individuals were forbidden to discuss or argue either for or against a particular policy.³⁰ Another formal gag order in the United States that helps the polity run more efficiently is as follows:

Judges seal records, telling lawyers not to inform the jury about a defendant's earlier mistrial for the same offense. More rarely, a judge may issue a gag order, prohibiting lawyers, police detectives and court employees from discussing a case with reporters while the trial is going on. The common law itself restricted courtroom communications, rejecting written testimony as valid evidence, for example, on the grounds that a lack of opportunity for visual observation and cross-examination of witnesses substantially diminished its reliability.³¹

In what way would a "gag rule" specifically fit into the U.S. case of constitution making? Simply put, it could be seen in many of the debates that took place on the issue of slavery in terms of federalism. Since each commonwealth was so distinctly different, delegates became extreme in supporting their states. What occurred from this fervent representation of their commonwealth was a discussion based on states. While delegates did debate on issues in terms of an individualistic nature (for example, on the morality of slavery), they were bound by their representation. By bound, I am referring to their states' interests, so the arguments set forth during the Convention, essentially came as a claim for what delegates believed their state should gain. What this means is that delegates were also bound by what was the current consensus within each commonwealth. When it comes to the issue of slavery, it seems natural for those Northern states to want slavery abolished, while Southern states want slavery to continue to exist and flourish. But how did this play out during the debates? According to a number of delegates, it would be easier not to change certain amendments in the Articles of Confederation, such as the

³⁰ Of course, this does go to show, as will be pointed out later, that applying these "neutral gag rules" means that the status quo is not necessarily questioned so vehemently. Essentially, the status quo can be entrenched.

³¹ Ibid., p. 205.

slave trade, because individual states were already setting in motion provisions for abolishing it.³² At that time, Massachusetts had already passed a provision that started the abolition of slavery in their state. Essentially, the delegates knew that in order to have the Southern states on board, they needed to compromise on allowing the slave trade to continue to exist.³³ Thus, they applied a type of “gag rule” without even realizing it. They decided to hold off on the issue and allowed for the slave trade to exist for another twenty years and implemented it within the legal framework of the U.S. Constitution - Article V (For a more detailed discussion of this ‘entrenchment strategy’, see p. 33). Ultimately, this led to more separation of the Country, rather than the practice dying off, as would assume it is the case.

Although it may seem as if the gag rule failed in this instance, it is not the case. Having a gag rule is not a way to solve problems - it is a constraint on unyielding individuals’ passion that allows some sort of compromise to be made. In this sense, this gag rule did allow the delegates to compromise on the issue, and, in turn, they were able to move on to other arguments that were necessary for completion of the constitution. But why did this gag rule lead to more separation of the Country, rather than slavery dying off? It could be argued that slaveholding states were granted more slaveholding “rights” and for this reason, it furthered their notion of the practice being “legal” and without fault. Such could be interpreted from the Fugitive Slave Clause. The previous Articles of Confederation stated that each state could, if it wished, free any putative slave found within its borders. In stark contrast, the new Constitution both “forbade states from

³² Elster, Jon. “Constitutional Bootstrapping in Philadelphia and Paris,” in Michel Rosenfeld’s Constitutionalism, Identity Difference and Legitimacy. Durham: Duke University Press, 1994. pp. 57-84.

³³ Ibid., p. 72.

declaring escaped slaves free, and guaranteed slave-owners the right to recover runaways.”³⁴

What came about was continuously heated arguments in the legal system about runaway slaves, but it was more linked to the rights of slave-owners. It is possible that this created much more of a gap within the identity of the Southern states and the Northern states because the basic idea of positive rights were invoked to slave-owners that others might have felt was not warranted.³⁵

Coming back to the notion of gag rules, it could be argued that it created more harm than good in the case of slavery. On the contrary, the gag rule was a rational move by the Founders – they held off on the issue and decided to come back to it at a later time due to the fact that they had many other issues that needed to be addressed in order to pass the constitution.

Holmes goes on to develop his theory of “gag rules” by emphasizing the need for constraints in the constitution-making process. Through these rules, there was a restriction of available options for the Framers. He proposes that these limited options helped to achieve more than their specific aims could have achieved if they were all left entirely unconstrained by stating, “Such is the democratic function of constitutional restraints.”³⁶ In Holmes approach, constitution makers begin to understand the need for constraints far before they begin the compromising process. Essentially, delegates understand that there will be vast differences and refuse to bring up such topics in order to make it seem as if the group does not have stark

³⁴ Maltz, Earl. “Slavery, Federalism, and the Constitution: Ableman v. Booth and the Struggle Over Fugitive Slaves,” *Cleveland State Law Review*, Vol. 56, Issue 1, 2008.

³⁵ In addition to a number of cases being seen in the U.S. court system on runaway slaves, it is pertinent to add that after considerable debate, Congress passed a statute designed to implement the constitutional guarantee of the Fugitive Slave Clause.

³⁶ *Ibid.*, p. 173.

disagreements.³⁷ This approach differs from Elster in the sense that it focuses on intended consequences rather than actual consequences. Holmes would provide an argument based upon the action or inaction of Madison as an intention that existed prior to his choice – Elster would refuse this altogether. With Holmes’ approach, it is possible to see that limiting options for delegates allows for more progress for each individual. In the case of slavery, delegates from the South want slavery to be completely allowed. Delegates from the North want abolition of slavery. Clearly, there could be many other smaller “factions” that had their own ideas within these two broader goals. Some Southern delegates might want restrictions on the slave trade; yet still want the overall goal of most slave states. By allowing for more options, it would be much more difficult for delegates to agree to some compromise. Implementing gag rules would deter those options in a way that allows a specific discussion to occur that is in line with committing to a compromise in order to achieve the overall goal of settling on the issue.

The inner-dynamics of the constitution-making process has seen many arguments in favor of constraints but not necessarily in the form of “gag rules.” Other constraints tend to focus more on institutions or the mechanisms that diminish the possibility for passions to be implemented in a constitution. A possible objection to the gag rules approach could argue that the validity of constraining what the delegates should have talked about. At the time, the issue of slavery had been discussed from a moral standpoint, with some delegates from the slave-holding states depicting that morally, it is quite all right to endorse slavery, while other delegates

³⁷ Such was the case when James Madison refused to bring up his plan on how representation should be divided – slaves counted in one house, and slaves not counted in the other house. He believed this would show the stark differences between the Southern states and the Northern states and believed it better to not address the issue from the very beginning but to let compromises yield in a different respect.

believed that it was immoral, but still remained a staple in colonial society at the time. It also contributed to the continuously growing American economy. Yet individuals who would disagree with the notion of Holmes' "gag rule" theory state that it is undemocratic and it only avoid the questionability of the issue for the present time being. Holmes answers his critics by stating that "self-gagging is a form of self-control, not of self-strangulation."³⁸ If the Framers did hold onto the liberal principle of non-entanglement, there is a possibility that it would help to serve as a model for the public that it serves to see that they are appealing to higher norms. For Holmes, this type of "self-control" would help make the public more susceptible to "democratic methods of conflict resolution."³⁹ Although issue suppression might sound tyrannical for individuals in a society, it is a way to constrain the personal passions of a few in order to reach a consensus about a just society. According to Holmes, democracy becomes possible only when certain emotionally charged solidarities and commitments are displaced from the political realm.⁴⁰ If the Framers agreed to privatize some issue, such as religion, they could then enable it to resolve other differences in a more rational manner – through public debate and ultimately compromise.

Elster's theory lacks a good empirical understanding of what took place and how it took place at the Federal Convention of 1787. Elster fails to understand the informal rules that constrained the Framers during the Constitutional Convention. At the same time, his theory is applicable to a certain degree – the idea of rationality explains how the Framers wanted to maximize their expected utility, and this could be seen explicitly in some of the debates for

³⁸ Ibid., p. 207.

³⁹ Ibid., p. 207.

⁴⁰ Holmes, Stephen. Passions and Constraint. Chicago: University of Chicago Press, 1995. p. 215.

slavery. This could be seen when Virginia delegate George Mason argues fervently against slavery because it is morally wrong, yet does so in order to restrict the notion of a slave trade so that Virginia continues to prosper with the amount of slaves they have.⁴¹ Yet a fundamental proponent of an individual making rational decisions is information. When the Framers have informal “gag rules”, this implies that information is lost in the process. Therefore, it seems plausible to show that rational decisions cannot be properly made when “gag rules” are implied. For this reason, Holmes’ theory of the politics of omission much more applicable to understanding how the compromise of the issue came into play during the Federal Convention.

⁴¹ At the time of the Constitutional Convention, the vast majority of slaves worked in Virginia plantations. Restricting the slave trade would be beneficial to the Virginia, because the majority of the work force would be kept in one state. Thus, Virginia could gain more economically by producing more due to the amount of slaves working in the field. This seemed apparent at the debates and was brought up concerning why Mason would reject slavery (because he owned nearly 300 of them).

CHAPTER 3: THE ROLE OF CONSTRAINTS DURING THE FEDERAL CONVENTION OF 1787

Applying the theory of “gag rules” set forth by Holmes must include a stronger emphasis on the role of constraints in the constitution making process. Differing from Elster, Holmes believes that it is possible to suppress passions, and a discussion of the role of constraints will be the best way to show this suppression. The presence of constraints and ability to recognize and acknowledge them increases constitution makers’ propensity to compromise on controversial issues that are debated for entry into the final product of the constitution, more specifically, slavery. It is pertinent to show some of the constraints in the constitution making process at the Federal Convention and depict how both Elster and Holmes view these constraints. By analyzing different constraints, it will show that they are the key factor in the bargaining and compromise of what becomes included at the end of a constitution. In essence, these constraints will allow passions to be put to the side in order to reconcile on the final product, which is essentially neutral on the issue of slavery.

3.1 American Constitutionalism and Higher Norms

Understanding the basics to constitutionalism is a good starting point in analyzing the compromising process in constitution making. The essence of American constitutionalism would be a complex of ideas, attitudes and patterns of behavior elaborating the principle that the authority of government derives from the people, and is limited by a body of fundamental law,

the core of which is the principle of primacy of human liberty.⁴² Yet what remains is its primary goal: implementing a constitution that includes a set of ideas and principles that form the basis of a polity's identity. By applying these principles to individuals in a society, constitution makers are prescribing them to the status of active members and not "passive objects of the rulers' willpower."⁴³ The fact that constitution makers must agree upon these ideas and keep them into account while prescribing a new institutional structure for an entire polity requires a significant amount of constraint and compromise. Michel Rosenfeld saw this challenge as nearly impossible when he stated, "It is difficult to imagine how one could justify the imposition of a constitutional order."⁴⁴ Not only is there a predominant identity, but also it simultaneously creates and stresses the importance of one identity and minimizes the other. In this instance, there is incongruence between pre-political and constitutional identities. When Rosenfeld analyzes the phrase "all men created equal" in the American constitution, he begins to illuminate this perspective from the "predominant constitutional identity promoted by American constitutionalism."⁴⁵ Rosenfeld prescribes to Holmes' notion of gag rules that essentially shift the focus to rallying points for the preservation of a common identity rather than focus on areas of discord that will create more divisions in the process.⁴⁶ Rather than debate the controversial issues at hand, a new common identity is formulated through the process in which constitution makers concur on certain ideas and norms that should be implemented in constitutions.

⁴² Preuss, Ulrich. "The Political Meaning of Constitutionalism," in: R. Bellamy (ed.). Democracy and Sovereignty: American and European Perspectives. Aldershot: Avebury, 1996.

⁴³ Ibid., p. 17.

⁴⁴ Rosenfeld, Michel. "Modern Constitutionalism as Interplay Between Identity and Diversity," in: Michel Rosenfeld (ed.) Constitutionalism, Identity, Difference, and Legitimacy. Durham: Duke University Press, 1994.

⁴⁵ Ibid., p. 7.

⁴⁶ Ibid., p. 10.

For the Framers at the Constitutional Convention of 1787, this was formulated after the American Revolution. All the delegates had been strong revolutionaries in the fight against the British for independence. After the failed Articles of Confederation, these delegates were democratically and legitimately given the task of amending institutions that did not work well under the previous legal system. Bearing in mind this new common identity with a demand for justice, the Framers began to formulate a liberal constitution that would include new truths and practices. One of the first mechanisms set forth by the Framers was establishing a convention itself. Bruce Ackerman states that, “By establishing a convention apart from ordinary organs of the government, the revolutionaries did more than isolate the problem of constitutional order from the many short-term issues that bulked the political agenda.”⁴⁷ In creating a separate body with the explicit task of creating a constitution, the Framers self-consciously constrained themselves by having to act within this institution. But who granted the authority and legitimacy for this constitutional body? The answer is key in understanding one of the major constraints put on the delegates: constituents democratically elected delegates from their state. Acting as representatives for their constituency, the delegates had to protect their own region’s interest while compromising to make a constitution. As Ackerman points out, “[The delegates] could not afford the luxury of ideological purism – they would have to bargain with one another and reach a sound political compromise of principles and interests through this complex process.”⁴⁸ How this constraint played out in the convention is revealing in the compromising process. While the delegates knew that slavery was a controversial social issue, the fact remained that there was not unanimity on the economic aspect of the issue. Although 17 delegates at the convention owned slaves, many of them were sharp critics of the practice. How could this be so? The basic answer

⁴⁷ Ackerman, Bruce. The Future of Liberal Revolution. New Haven: Yale University Press, 1992.

⁴⁸ Ibid., p. 51.

is such: the institution of slavery had been entrenched in the economic system of the country.

The Framers realized that they could not come to a consensus about the future of the economic state if slavery had been abolished. Even when Southern delegates, such as George Mason, stated that slavery was not morally justifiable, he still argued that they were entrenched in the societal landscape of an economy based upon slave labor.⁴⁹ Rather, they came together on the agreement of the moral hazard that slavery posed upon the nation.

3.2 Mandates and Representation

Although the institutional setup of the convention had external constraints (ratification process), the inner-dynamics of the process is where the bulk of the constraints are put onto the impassioned colonists in order to achieve an objectively sound constitution.⁵⁰ In order to begin this discussion on the internal constraints, it is helpful to try and answer this question proposed by Jon Elster: should the process of constitution making be viewed as an act of constraining others or acts of self-constraint?⁵¹ In these terms, Elster is discussing the role of constituent assemblies but it is mostly about the procedures of constitution making: from where do these procedures gain their legitimacy? He tries to answer this question by analyzing upstream authorization of the constituent assembly. The upstream authorities in constituent assemblies follow the same logic of Ackerman. Both authors agree that the constituent bodies of the delegates play a pivotal role: “If X brings Y into being, then X has an authority superior to that of Y.”⁵² But he also points out that “If Y is brought into being to regulate, among other things,

⁴⁹ Ketcham, Ralph. The Anti-Federalist Papers and the Constitutional Convention Debates.

⁵⁰ Elster, Jon. “Forces and Mechanisms in the Constitution-Making Process,” *Duke Law Review*, Vol. 45, 1995-1996.

⁵¹ Elster, Jon. Ulysses Unbound. Cambridge: Cambridge University Press, 2000.

⁵² *Ibid.*, p. 106.

the activities of X, Y would seem to be the superior instance.” Thus, the slogan, “Let King beware of the kingmaker,” fits in this instance. Even though delegates do essentially owe their legitimacy to one group, they must have a degree of freedom to the process in order to compromise on issues. Essentially, this is the question of the nature of mandate and representation. It follows in line with Elster’s methodology of methodological individualism. For this reason, Elster tries to propose several types of bound mandates produced during the constitution making process that affects the role of compromise. The three types are as follows: instructions about how to vote on specific issues; instructions to refuse to debate specific issues; instructions to withdraw from the assembly in case certain decisions are made.⁵³ Of the three, Elster points to the third as a major factor in the affect of compromise, and uses the issue of slavery to point it out.

To back this third mandate affecting the role of compromise, Elster begins by pointing out that there were many times in which slaveholding states threatened to withdraw from the convention unless the issue of slavery was not addressed.⁵⁴ Delegates from South Carolina were adamant on withdrawing from the convention if the slave trade was prohibited. In an impassioned speech, South Carolina delegate Charles Pinckney was quoted as saying, “South Carolina can never receive such a plan that prohibits the slave trade.”⁵⁵ Just the fact that there was a credible threat that the slaveholding states would opt out of the convention meant that the hot-topic issue has to be set to the side. For the slave states, their self-interest was met – a union with strong restrictions on slaveholding would have been worse than an isolated existence

⁵³ Ibid., p. 109.

⁵⁴ Elster, Jon. “Arguing and Bargaining in Two Constituent Assemblies,” *Journal of Constitutional Law*, Vol. 2, Issue 2, 2000. pp. 345-421.

⁵⁵ Ibid., p. 364.

outside the union.⁵⁶ What Elster sees in this process is a type of mandate that bounded the process of compromise. Elster understood this process with his rationality theory – constitution makers are mere human beings who are slaves to passions – and showed this through these bound mandates. On the contrary, these mandates were a way to assume individuals would be passionate but rather than use them as a tool for intimidation, it was a tool that led individuals to compromise on these issues. Earlier in the essay, Michel Rosenfeld introduced the politics of omission, citing Stephen Holmes’ “gag rules.” For the issue of slavery, Holmes’ theory can be applied in a logical sense. Whether the gag rule was applied formally through the institutional process or informally through the initial bargaining process is not pertinent to the discussion. What is important is the reason why and how the delegates did come to the conclusion that they did. Holmes discusses the issue of slavery during the Constitutional Convention directly by stating that, “The moral status and political future of slave ownership was too hot to handle and touched nerves too deep to be subjected to majoritarian politics on the national level.”⁵⁷ But more importantly was the larger issue at hand: creating a new constitution. Rather than argue on the individual level, the delegates began to collectively utilize the scarce resource of time by eliminating the discussion completely, or applying informal gag rules.

3.3 Legal Constraints on the Process

Although Elster does try to show the process of constitution making and some constraints (mandates), a further discussion on the legal constraints in the process is necessary in order to understand how, and why, delegates were bound by the Articles of Confederation. One of the

⁵⁶ Ibid., p. 110.

⁵⁷ Holmes, Stephen. Passions and Constraint. Chicago: University of Chicago Press, 1995. p. 210.

major reasons that individuals in colonial society were weary about the idea of improving the Articles of Confederation was the fact that the Federalists were not initially following the law that was already in place. The final provision in the Articles of Confederation reads:

13. And the Articles of this confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the United States, and be afterwards confirmed by the legislature of every state⁵⁸

When this article is linked to the constitution's seventh article, which stipulates that during the Convention nine states will be sufficient for the establishment of the constitution, it shows that the Convention was not following the laws previously established.⁵⁹ Yet the claim that Federalists argued for was that they were legally constrained. In what ways did the Federalists argue this? One major way the Federalists were legally constrained was by trying to demonstrate that they were actually not breaking with the Articles of Confederation.

To begin with, the Federalists agreed that the Convention was given the authority to frame a constitution with the following goal in mind: creating a national government. It could do so by reducing the Articles of Confederation into such a form to accomplish this specific purpose.⁶⁰ Bearing this in mind, the construction of such a goal in a constitution would require following two rules that are based on legal axioms: one, "that every part of the expression ought, if possible, to be allowed some meaning, and to be made to conspire to some common end," and

⁵⁸ Articles of Confederation. Article XIII.

⁵⁹ Ackerman, Bruce. We The People. Cambridge: Harvard University Press, 1998.

⁶⁰ Federalist Papers No. 40.

two, “that where the several parts cannot be made to coincide, the less important should give way to the more important part.”⁶¹ By arguing this point, the Federalists are pointing out that although they might change the substance of the Articles of Confederation into a constitution, this constitution is just an expansion of the Articles’ principles – thus, it is justified by the process of appealing to these principles rather than the content. But Madison does relent by saying that the convention did “exceed its powers” – its actions were “informal,” its privileges were “assumed,” its propositions were “unauthorized.”⁶² In addition, Madison also points out that convention did not have “real and final powers for the establishment of the Constitution of the United States...[its] powers were merely advisory and recommendatory.”⁶³ What this legal constraint alludes to is the fact that the Founders needed to come to agreements that nine states had to agree upon. This is not simply an easy task when one sees the distinct interests each state brought to the convention. For that reason, Madison did try to lobby himself to the Confederation Congress (the institution that delegated power to the Convention to amend the Articles of Confederation) to adopt the provisions the Convention set forth for the newly improved constitution. This lobbying and effort by certain Federalists to persuade the Confederation Congress could be seen as revolutionary, since the convention did not have authorization for amending the Articles of Confederation. Yet other authors conclude that since the Federal Convention derived its authority from the people, then this revolutionary spirit was already “circumscribed by law, a law that represented the principle of continuity amidst of constitutional change.”⁶⁴ The Framers were

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

showing that there needs to be some sort of extra-legal measure that allows for constitutions to be changed, and for this reason, the sort of change that came about in the Articles of Confederation were not necessarily revolutionary.

3.3.1 Entrenchment Strategy as a Means of Compromise

Since human actors make constitutions, then it safe to assume that there will be faults in the design and content of these constitutions. The Founders understood this human fallibility and tried to set in place certain self-constraints for themselves and future generations. This was due largely to the idea that passions could overtake the reason of individuals. Madison commented on this in Federalist Paper No. 10 when he stated, “As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.”⁶⁵ In the eyes of the Founders, passion was seen as “unfriendly” and something that needed to be constrained: “The existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression.”⁶⁶ Since passions were unyielding, oppressive, and unfriendly, the Founders made sure to make a constitution based on the idea of limited government and a limit on the passion-influenced rule

⁶⁴ Arato, Andrew. Civil Society, Constitution, and Legitimacy. Lanham: Rowman and Littlefield Publishers. 2000. Notes, p. 330.

⁶⁵ *Federalist Papers. No. 10.*

⁶⁶ *Ibid.*

of the majority. The Founders not only created institutions within the constitution that helped to constrain these passions, but they also set about specific legal provisions that were, essentially, constraints on themselves and future generations. Two provisions in the constitution, both being seen in Article V, were specific ways that legally bound passion – these laws were “entrenched”, meaning they were exempt from being amended. It seems to be a paradox to have these two provisions be exempt from the amendment power when the Founders alluded to the fallibility of human nature and allowed all other provisions in the constitution to be amended. In Federalist Paper No. 37, Madison argued that perfection was unattainable, as a product of the defective nature of human judgment.⁶⁷ Yet Article V would, be barred from legal change whatsoever. Why did the Framers allow this paradox to exist? Essentially, the constitutional formulation of these two provisions were prompted by the larger political condition of making a constitution that nine states would agree upon. But one of the two provisions was put into the constitution for one major specific problem facing the constitution makers at the time – accommodating slavery so the Southern states would ratify the constitution.

Before proceeding into explaining why these two entrenched provisions were given exemption from constitutional change, it is necessary to state what Article V of the constitution stipulates:

Article V. The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the

⁶⁷ *Federalist No. 37.*

Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.⁶⁸

Paradoxically, the Founders list the way in which amendments could be made, and then go on to say the following two provisions cannot be amended: the slave trade was to be protected for the next twenty years and the equal suffrage of states in the Senate. Some strong Federalist supporters understood that insisting on an end to slavery would have resulted in the collapse of the entire constitutional process.⁶⁹ Leading North Carolina Federalist James Iredell addressed this decision when he debated the ratification of the constitution in the North Carolina convention: “In twenty years, there will probably be a great alteration, and then subject may be reconsidered with less difficulty and greater coolness.”⁷⁰ The logic set forth behind this entrenchment strategy is, in a sense, a type of gag rule proposed earlier by Stephen Holmes. Regrettably, the constitution makers needed to legally constrain future options of amending the slave trade clause in the constitution, and decided that in twenty years the issue would be readdressed. This could, in fact, be seen as yet another compromise that took place during the Federal Convention. In order to relieve the worries and doubts of Southern and small states, these two provisions became legally entrenched, despite other provisions being allowed to be amended. Entrenchment, in this sense, could be seen more as a forward-looking constraint rather than a constraint on the process. During the time of the Federal Convention, this constraint helped in the bargaining process by putting the issue to the side and agreeing for the time being. Essentially, it helped more in the ways of a compromise rather than a way to restrict the debate on the issue. What came after 1808

⁶⁸ *U.S. Constitution, Article V, Section 1.*

⁶⁹ Schwartzberg, Melissa. *Democracy and Legal Change*. Cambridge: Cambridge University Press, 2007.

⁷⁰ *Ibid.*, p. 127.

was yet another lively debate due to the fact that the answer of the slave trade was still unanswered. The fact that this empirical evidence in the constitution shows yet another way the Framers were forward-looking in order to keep the bargaining process alive during the Federal Convention, goes well with Holmes theory of gag rules.

3.4 Forward-looking, Not Self-serving

After looking at the differing theoretical approaches of constraints on constitution making, it is clear that one side seems to be more forward looking, thus maintaining the true ideal of constitutionalism. It seems much more pertinent to look at Holmes' theory of gag rules and apply this theoretical perspective in the constitution making process. Rather than focus on the negative effects constraints held in the process, it is better to understand how compromise was reached through positive means of the constitution making process. What the politics of omission allowed the Framers to do was come up with logical ways to find a compromise to their goal, rather than restrict the process. Although it may seem that there was no compromise on the issue of slavery, there is an extensive amount of empirical evidence that proves the Framers did exactly this. By applying gag rules, the Framers insisted in compromising on the issue and applying a "forward-looking method," as described in Holmes' theory.⁷¹ By forward-looking, I refer to Holmes' idea that gag rules establish the framework for a further discussion of the issue at a later time. This was the case with the slave trade – a gag rule of allowing it to exist for another twenty years meant that the discussion had to be resumed afterwards. This approach complies with the essence of constitutionalism and the revolutionary spirit that the Framers used

⁷¹ Ibid., p. 211.

when initializing the constitution. Specifically, at stake was defense of the Framers institutionalist settlement of revolution, which states that, “constitutions are not the solution to problems, but rather institutional instruments of problem-solving; they are possibility-engendering, rather than devices used to consolidate a particular policy willed by the people, in a particular situation, under particular conditions.”⁷² The Framers omitted the discussion on this particular issue because it was more of a self-serving issue rather than forward-looking. Self-serving would have been the Northern delegates refusing to sign the constitution because they wanted slavery to be abolished. In the same way, the Southern delegates could have refused to accept a constitution that limited slavery in any way. Yet both sides agreed that compromising and establishing a constitution for the greater good of the people would help future generations much more than continuing to quarrel with one another about this particular issue. They understood the implications that would go along with instilled such policies within the institutionalist framework of the constitution. Rather, they decided to put the issue to the side and let the future generations within the American government settle on the issue over time. So where did the delegates go from here? What did the actual compromising process look like? In the fourth chapter, I will outline how the delegates were able to compromise on the issue of slavery through several provisions outlined in the constitution and their debate over these provisions.

⁷² Pruess, Ulrich. “Constitutional Power making for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution”, in: M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy*. Durham: Duke University Press, 1994.

CHAPTER 4: “THE GREAT COMPROMISE”: THE ISSUE OF SLAVERY

Scholars and historians point to one year in the founding of American history as the pivotal date marking a critical juncture for the nation: 1776 – the year that the colonists declared independence from Great Britain. Although the significance of this year and act should not be downplayed, there is still a more interesting moment that took place during the time of colonists that sparked a newfound interest and fervor in political thought in action: the Stamp Act Crisis of 1765. When the British Parliament imposed this act, which required that printed materials in the colonies be produced on stamped paper produced in London and carry an embossed revenue stamp, colonists began to respond with great resistance.⁷³ Self-interested colonists united together and formulated the Stamp Act Congress, assembling the first joint colonial response to any British measure, thus giving credence to the start of a collective identity. But this identity had been formulated prior to the Stamp Act Crisis. How exactly did this identity look like during the time of the American Revolution? And what were some of the specifics that made this identity come together? How did it turn into a conflict with the British Empire? By looking at two aspects of this identity, both the character of the colonies’ autonomy within the Empire and the nature of representation, it could be seen how the two began to grow farther apart. To begin with, a discussion on the autonomy of the colonies in the British Empire is essential.

⁷³ Ketcham, Ralph. From Colony to Country: The Revolution in American Thought: 1750 – 1820. New York: Macmillan Publishing Company. 1974.

4.1 *Autonomy of the Colonies and the Nature of Representation*

Although the colonists did have a degree of autonomy, it was quite dependent on events unfolding in the British Empire. During the decades of war with France, the British Empire had much more of a hands-off approach with the American colonies. During the reigns of George I (1714-1727) and George II (1727-1760), the British Empire authorities did not administer any new policy changes but left the colonies to themselves.⁷⁴ This policy lasted until war broke up again with France in 1740 and ended in 1763. Between 1755 and 1757, French invasion of Pennsylvania and New York spurred the British Empire to mount a massive counterattack. Nevertheless, after the war ended, the British Empire could not longer follow the hands-off approach the colonists had been living in for decades. George III (1760-1820) felt it necessary to have a military presence in North America and put many of the costs on the colonists.⁷⁵ It is interesting to highlight these two different foreign policy approaches taken by the British Empire on the American colonies during the 18th century because it first granted a large level of autonomy to the colonies, then immediately revoked it when the British were under economic troubles.

Essentially, American colonists did not label themselves as revolutionists when they signed the Declaration of Independence in 1776.⁷⁶ This is fundamental in understanding how

⁷⁴ James, Lawrence. The Rise and Fall of the British Empire. London: St. Martin's Griffin, 1997.

⁷⁵ British officials referred to the fact that they protected the colonists from French attack to legitimize putting most of the massive war debt they accumulated upon the colonists. Needless to say, this lead to several acts (Sugar Act, Stamp Act, Quartering Soldiers Act) that created anger and animosity toward the Crown.

⁷⁶ McLaughlin, Andrew. Foundations of American Constitutionalism. Greenwich: Fawcett Publications, 1961.

autonomy worked during British rule of the colonies. Colonists were satisfied with the institutions that were set up – they were based in British principles, yet still held a large degree of local autonomy. They refused to believe they were revolutionists because “they were not engaged in a crusade to improve the institutions of Britain.”⁷⁷ What they wanted was either local autonomy free from the economic pressures put upon them by the Crown, or a degree of representation in the British parliament. This was one aspect that the colonists and the British fundamentally disagreed upon: the nature of representation. In essence, it is possible to see how representation became the crusade for the Revolutionary spirit evident during the last decades of the 18th century in the American colonies. What were the philosophical viewpoints of representation for these two subjects?

When colonists were designing corporations in their cities, the practice of representation began to shape fundamentally. Trying to understand the source of authority, colonists began to locate the way that it could be expressed; yet no matter the mechanism to expressing power, it belonged to the freemen.⁷⁸ In essence, was the fundamental groundwork of the democratic idea of power lying in the individual, which translates to “people [being] the possessors of power and government [being] their agent.”⁷⁹⁸⁰ This idea of representation is in stark contrast with that of the British idea of representation within their Empire. When defending the Stamp Act, George

⁷⁷ Ibid., p. 63.

⁷⁸ Ibid., p. 58.

⁷⁹ Ibid., p. 58.

⁸⁰ This point could be further argued by showing many different ways that representation existed in the colonies: town meetings and its elections of officials, practices in the Puritan churches, etc.

Greenville made a clear understanding of what British representation looks like when he said the following:

The colonies are in exactly the same Situation: All British Subjects are really in the same; none are actually, all are virtually represented in Parliament; for ever Member of Parliament sits in the house, not a Representative of his own Constituents, but as one of that august Assembly by which all the Commons of Great Britain are represented. Their Rights and their Interests, however his own Borough may be affected by general Dispositions, ought to be the great Objects of his Attention, and the only Rules for his Conduct; and to sacrifice these to a partial Advantage in favour of the Place where he was chosen, would be a Departure from his Duty.⁸¹

What Greenville is attempting to convey here are that the general interests of the entire Empire should not be subjected to the specific needs of locality. For this reason, the British Empire could assume that they did, in fact, represent the interests of the colonists and thus render the slogan, “No taxation without representation” not applicable. Their logic assumes that what is the best interest of the Empire is in the interest of specific colonies. On the other hand, the American colonists, with their idea of representation, began to combat the British notion. Thus, the identity of the American colonists became even stronger because they were united against the tyrannical rule of King George III.

The following years leading up to the Constitutional Convention of 1787 strengthened this identity. After independence was won, this collective identity seemed to remain in the background and colonial identity came to the forefront – the ex-colonies were constitutionally set up as separate entities within a confederation (Articles of Confederation). Almost immediately, problems did arise within this structure, specifically dealing with interstate and foreign commerce. With commerce problems and an outbreak of disarray in the nation – Shay’s

⁸¹ Ibid., p. 61.

Rebellion – Congress commissioned for delegated to be sent to the Federal Convention of 1787 to strengthen the Articles.⁸² Thus, the constitution-making process of the American Constitution began.

What the delegates from these twelve colonies (Rhode Island did not send delegates) brought to the convention were differing interests and preferences that unsurprisingly clashed with one another. Yet the goal of the commission was to strengthen the Articles of Confederation due to the insecurity of the landscape – failure was not an option. Ultimately, delegates relented on their viewpoints, bargaining not only interests but also fundamental ideals, in order to come to bring out “Great Compromises”.⁸³ One such compromise that took place during the Constitutional Convention of 1787 was on the issue of slavery. How did the Northern States, with their doctrine of abolishing slavery, coincide with the Southern States protection of the slave trade in order to compromise the two views and represent it in the American Constitution? By showing the political bargaining that took place during the debates in the Federal Convention, it will be possible to highlight how exactly this compromise was made. Through constraints made on the constitution-making process, it is possible to analyze the way in which delegates had the ability to compromise. Ultimately, understanding the compromises can be highlighted through specific provisions in the constitution, including the following: counting slaves as three-fifths of a person for the purpose of representation, the protection of the slave trade for twenty years and the fugitive slave clause. Showing the constraints brought upon the constitution-

⁸² Ketcham, Ralph. From Colony to Country: The Revolution in American Thought: 1750 – 1820. New York: Macmillan Publishing Company. 1974. p. 37

⁸³ McWilliams, Wilson Carey and Hale, Dennis. “The Constitutional Convention and the Founding Principles,” in Robert L. Hutley’s *Principles of the Constitutional Order: The Ratification Debates*, New York: University Press of America. 1989. pp. 11 - 32.

making process through this particular controversial issue is of importance due to the adverse interests and ideals of delegates at the convention.

4.2 Societal Landscape During the Federal Convention

If the delegates were all representatives of the original colonies, how different could they possibly have been on particular social issues, more specifically, on the issue of slavery? Answering this question will show just how much delegates had to compromise on the issue, in its interest-specific, moral, legal and institutional aspects. At the end of the convention, concessions were made on nearly every interest that was brought to the table by delegates. Even more surprising, as the weeks rolled on during the convention, the atmosphere turned from concession, or compromise, to an air of conciliation.⁸⁴ Competing coalition of interests - Federalists and Anti-federalists, big states and small states, Southern States and Northern States – could be seen mobilized on particular issues, such as representation, reapportionment, and such, yet the major issue at hand was that of slavery – what to do with the moral aspect of it, how to count the slaves, and what type of taxation will be given. Many of the speeches and vignettes revealed a mood of tension and passion during the convention on this issue. When discussing slaves, Georgia’s Abraham Baldwin went as far as stating that slaves “carried their ethics beyond the mere equality of men, extending their humanity to the claims of the whole animal creation.”⁸⁵ The fact that the Southern States (most specifically South Carolina and Georgia) had an unyielding position on slavery forced their opponents to accept defeat in the first seven weeks of the Convention. Thus, pragmatic accommodation began to reshape and characterize the

⁸⁴ Rakove, Jack. “The Great Compromise: Ideas, Interests, and the Politics of Constitution Making,” *The William and Mary Quarterly*, Vol. 44, No. 3, 1987. pp. 424 – 457.

⁸⁵ Vile, John. The Constitutional Convention of 1787: A Comprehensive Encyclopedia of America’s Founding. Santa Barbara: ABC CLIO. 2005. p. 10.

atmosphere of the remaining two months of deliberation.⁸⁶ Due to this idea of accommodation for the Southern States, many of the Northern States began to relent on their viewpoints and begin to give credence to such constitutional sanctions as the three-fifths clause and periodic reapportionment. But concessions were not done overnight. For the issue of slavery, it was a battle filled with passionate interests, with the Southern States fearing their economic interests being deteriorated by changing the structure of slavery that was implemented in the Articles of Confederation.

Within the Articles of Confederation, the nation's first constitution, slavery is not mentioned. And since there was no representation of the entire citizenry in a national Congress body (states elected its own representatives but were not seen as votes in "Congress" but just those representing the state), the size of the population did not matter. This changed when it came to having a representative government based on population, as was proposed during the Constitutional Convention. At that time, slavery was a major part of the societal and economic structure. Nearly every state had slaves counted in it for the census of 1790, with the exception of Massachusetts and the "districts" of Vermont and Maine. Slaves made up 17% of the country's population, numbered 700,000 of 3.8 million.⁸⁷ Specifically, the makeup of the South had a large population of slaves: South Carolina – 43%, Virginia – 39%, Maryland – 32%, and North Carolina – 26%. Interestingly, in Virginia, the slaves numbered 300,000.⁸⁸ With Virginia housing a large portion of the country's slaves, it became a major detail in the discussion of the slave trade, specifically the importation of more slaves. Delegate Charles Pinckney showed that

⁸⁶ Rakove, Jack. "The Great Compromise: Ideas, Interests, and the Politics of Constitution Making," *The William and Mary Quarterly*, Vol. 44, No. 3, 1987. pp. 424.

⁸⁷ Dollarhide, William. The Census Book: A Genealogists Guide to Federal Census Facts, Schedules and Indexes. North Salt Lake: Heritage Quest. p. 7.

⁸⁸ *Ibid.*, p. 7.

by not allowing more slaves to be imported, Virginia would gain economically. He linked the interests of some delegates from Virginia arguing against him, such as George Mason, for this sole reason. The makeup of the country's slave states shows how at the time of the Convention, slavery was an issue that needed to be addressed, yet interestingly, it essentially remains ideologically neutral in outcome of what is actually written within it. How did this occur in the compromising process?

4.3 The Compromises on Slavery: Moral Reading, Representation and the Slave Trade

In order to show where delegates stood on the slavery issue, many of them were compelled to bring up the moral aspect of the issue. Interestingly, even slave owners were morally opposed to slavery, since 25 out of the 55 delegates owned slaves. For this very issue, some famous revolutionists refused to attend the convention, most notably Patrick Henry, the patriot from Virginia. Even though he was a citizen of a slave state, he was quite outspoken on the issue and went as far as saying that he would not attend the convention because he “smelt a rat” – someone who would argue for a strong federal government and would compromise on certain issues in order to reach this goal. The “rat” Henry spoke of was none other than the Father of the U.S. Constitution, James Madison, a fellow Virginian who became one of the most influential delegates at the Convention. When Madison argued about slavery, he was clever enough to show his disdain toward the practice: “We have seen the mere distinction of color made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man.”⁸⁹ Morally speaking, he was opposed to the practice. As a realist and

⁸⁹ Vile, John. The Constitutional Convention of 1787: A Comprehensive Encyclopedia of America's Founding. Santa Barbara: ABC CLIO. 2005. pp. 430.

Federalist, he conceded on the notion because he wanted a strong Union to be formed and understood that the South would not ratify a constitution that limited slave importation. This seemed to be the hypocritical stance many of the delegates took toward slavery: they opposed it on the basis of morality, but conceded to the South to actually form a “more Perfect Union.”⁹⁰

Luther Martin believed that the institution of slavery was inconsistent with the principles of the revolution and it was a dishonorable to the American character to have such a feature in the Constitution.⁹¹ Yet the argument proposed in opposition to this by Ellsworth shows just how divided the country was on the issue – even when individuals from slave states argued against slavery, it was for their own selfish interest. Furthermore, there was not a consistent coalition against slavery that agreed to abolish it completely for the purpose of it being a moral issue, as Gouverneur Morris of Pennsylvania valiantly declared in an impassioned speech on August 8:

The admission of slaves into Representation when fairly explained comes to this: that the inhabitant of Georgia and South Carolina 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 and damns them to the most cruel bondages, shall have more votes in a Government instituted for the protection of the rights of mankind, than the Citizen of Pennsylvania or New Jersey who views with a laudable horror, so nefarious a practice. I would sooner submit myself to a tax paying for all the Negroes in the United States than saddle posterity with such a Constitution.⁹²

Regardless of the moral reasons to be against slavery, it was deemed a “necessary evil” by most and put aside as the basis for arguing against slave representation and the slave trade in general. Interestingly, what began to take place in the compromising process during this debate

⁹⁰ Ibid., p. 5-10.

⁹¹ Ibid., p. 449.

⁹² Ibid., p. 727.

did not happen through a moral lens. Rather, interests were compromised in order to reach some type of agreement that would allow the Framers to move forward on the position. But even slavery played a role in the debates pertaining to representation in the federal government.

The “Father” of the U.S. Constitution, James Madison, understood that all of the states under the confederation were divided into different interests not because of their size, but specifically for material reasons – particularly having or not having slaves. For this reason, the great division of interest between the Northern and Southern States was due to slavery, not geography. And the main concern with undergoing a new federal government was representation. One plan that was proposed before the convention began detailed proportioning the votes of the States in two branches – one that would count slaves, one that would not count slaves. Although it was Madison’s plan, he opted to not bring it up at the convention so that the diversity of interests would not be shown. Instead, Oliver Ellsworth, a delegate from Connecticut, proposed that the three-fifths formula should be used for representation in the lower House (House of Representatives) “until some other rule shall more accurately ascertain the wealth of several States.”⁹³ By this time, Southern delegates wanted full representation for slaves, strengthened by the enthusiastic rhetoric of South Carolina delegate Charles Pinckney.⁹⁴ Other external factors played a role in the process, such as the Anti-Federalist writer Brutus, who had this to say about slavery:

The smallest states are to send the same number of members to the senate as the largest, and, because the slaves, who afford either aid or

⁹³ Ibid., p. 246.

⁹⁴ Ibid., p. 578.

defense to the government, are to increase the proportion of members. To prove that it was not a just or adequate representation, it was urged, that so small a number could not resemble the people, or possess their sentiments and dispositions. That the choice of member would commonly fall upon the riche and great, while the middle class of the community would be excluded. That in so small a presentation there was no security against bribery and corruption.⁹⁵

Yet the three-fifths clause⁹⁶ was agreed upon because at that moment in time, the delegates knew that there was no other way to compromise and resolve the issue. To clarify, the three-fifths clause states that slaves would be “three fifths of all other Persons.”⁹⁷ Essentially, this means that rather than slaves granted full representation in numbers, the slave population would be represented only in 3/5. This was used in terms for apportionment of the members of the U.S. House of Representatives as well as the distribution of taxes. Both sides had to understand that slavery was a big part of the compromising process, and both sides seceded on their notions of what they believed should be instituted in the constitution. In essence, many of the delegates wanted to settle the issue of the three-fifths clause so that they could get to the central debate on the issue of slavery – slave trade.

Many of the delegates at the convention understood what exactly would happen if the slave trade would be extended, but it was said best by Madison when he strongly opposed the notion of extending the right of states to import slaves from 1800 to 1808 by stating, “Twenty years [from the adoption of the Constitution to 1808] will produce all the mischief that can be apprehended from the liberty to import slaves. So long a term will be more dishonorable to the national

⁹⁵ Ketcham, Ralph. The Anti-Federalist Papers and the Constitutional Convention Debates.

⁹⁷ U.S. Constituion, Article 1, Section 2, Paragraph 3.

character than to nothing about it in the constitution.”⁹⁸ Other delegates opposing the idea of a slave trade used more practical arguments than morality. Luther Martin, a delegate from Maryland, proposed allowing slavery for the following reasons: the three-fifths clause would encourage the Southern states to import more slaves and that slaves weakened one part of the Union which the other parts were bound to protect – the privilege of importing them was therefore unreasonable.⁹⁹ Interestingly, one delegate, Roger Sherman from Connecticut, even opposed a tax on slave importation because it implied that they were property. But the Southern delegates, specifically the ones from South Carolina and Georgia, were adamant on their stance – in no way would they waver, and this was showed in impassioned speeches, such as one given by John Rutledge of South Carolina: “If the Convention thinks that North Carolina, South Carolina and Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those states will never be such fools as to give up so important an interest.”¹⁰⁰ Rutledge went on to proclaim that both religion and humanity had nothing to do with this question because it was all a question of interest. He even stated that the Northern states should start to utilize their own interests as well, since slavery does increase the commodities of why they will become carriers.

The debate happening with Rutledge was sound evidence that many of the issues argued about at the debate were impassioned arguments because of the sovereignty of their constituents. Although the convention was closed off to the general public, each delegate knew that they had

⁹⁸ Vile, John. The Constitutional Convention of 1787: A Comprehensive Encyclopedia of America’s Founding. Santa Barbara: ABC CLIO. 2005. p. 246.

⁹⁹Ketcham, Ralph. From Colony to Country: The Revolution in American Thought: 1750 – 1820. New York: Macmillan Publishing Company. 1974. pp. 161–163.

¹⁰⁰ Ibid., p. 165.

to ratify it in their own states. Thus, having a provision against slavery in the constitution would just simply not be ratified by the Southern states. In a sense, it placed quite a constraint on the process, because the delegates were bound by their constituent power. Charles Pinckney, the other influential delegate from South Carolina, emphasized this constraint when he stated during a conventional debate that he “would be duty-bound to vote against the Constitution if it did not provide ‘some security to the Southern States against an emancipation of slaves’”.¹⁰¹ This speech he gave also points out that the delegates at the Convention, were, in fact, acting under constraints rather than being slaves to passion, at times when arguing about slavery. Essentially, Pinckney understood that slavery was immoral, but it was not enough for him to go against his entire constituency. This is highlighted when he said, “Even if I did sign the Constitution in my firm opinion, it would be of no avail towards obtaining the assent of my constituents.”¹⁰² The debate ranged from adamant to collegiate during this time. It seemed that they had locked themselves in a standstill, yet the Southern states had no room to budge on the issue. At this point, the delegates had understood that arguing on the basis of morality was a dead issue, and thus, it implied that a type of “gag rule” had applied on the issue (discussing the issue at a later date). What needed to be done in order to confront this issue would be a political bargaining of sorts.

A concurrent issue was debated along with the slave trade – the requirement of a two-thirds vote in Congress to pass laws regulating foreign commerce. For the slave trade, both South Carolina and Georgia were determined to leave it open. Similarly, the New England states (New Hampshire, Massachusetts, Rhode Island and Connecticut) wanted to remove the two-thirds

¹⁰¹ Ibid., 164.

¹⁰² Ibid., 164.

restriction on commercial regulation. What happened in order to come to an agreement with both issues would be a political bargaining of sorts: if Georgia and South Carolina would not insist on the two-thirds vote on commercial laws, then New England would not vote to prohibit the slave trade.¹⁰³ Passions were overcome by the fear of deadlock and failure that led to the strategy of bargaining. Constraints provided the mechanism by which reason could be applied: passions were thrown to the side in order for a compromise to be reached. This was the way that compromises were achieved. Both sides had their distinctive ideology in terms of slavery, yet neither was upheld. Allowing the slave trade was more than the Northern states wanted to give the Southern states, but there was a time limit on the issue – 20 years – that meant the issue was not yet resolved. It did, in fact, remain ideologically neutral, albeit that one side may have gotten more favor for their own interest.

¹⁰³ Ibid., 165.

CONCLUSION

In the blistering heat of the Philadelphia summer in 1787, 55 delegates from across the thirteen colonies convened in the Pennsylvania State House with one goal in mind: amending the Articles of Confederation. With a national government too weak and inadequate to regulate and respond to various conflicts that arose between the states, the Second Continental Congress ordered delegates to improve the existing law in order to restore peace, justice and tranquility in the region. Although there was an overlapping consensus of one goal (changing the Articles of Confederation), what each delegate brought to Philadelphia was their own preferences and mandates given to them by the commonwealths they represented on how to change (or not change) the preexisting law. For the next four months, the delegates debated these ideas of what they believed to be the best solution to amending the Articles of Confederation. What the American case seems to highlight in the constitution making process is how individuals, with such differing worldviews, social backgrounds, and ideas of the nature of government, can reconcile their passions and preferences in order to come to an agreement on the terms of the future life together.

In this research, my focus was on the following question: How do passions become reconciled with reason in the constitution making process? My general answer is: by identifying and acknowledging constraints. Stephen Holmes' concept of "gag rules", along with a criticism to Jon Elster's rational choice approach was applied to the U.S. constitution making case. With an analysis of the constraints that were implicit at the Federal Convention of 1787, the research was able to show how self-interested actors had to maximize their utility with the mechanism that constraints held on the process. By looking at the most debated issue during the convention,

slavery, the research was able to show the means by which compromise can be met during the debating process. The Founders were able to put aside their preferences and passions and amicably meet at the “center” of the issue, or, at the very least, agree to disagree and move on. In order to find a common denominator acceptable for the entirety of the delegates, there was a political bargaining process, as was noted with the slave trade and the foreign commerce issue. Yet the delegates all appeal to higher norms or justice, equality, and limited government – their conception of government was one that is seen through American constitutionalism. Although constitutionalism was one such constraint on the constitution making process, the research also depicts the legal constraints the American Founders were subject to. By emphasizing the entrenchment strategy, one could see how compromises could be made, specifically through the legal implementation of provisions. In addition, the idea of representation and mandates brought upon by each delegate from their commonwealth is yet another way of showing the stark contrasts in delegate preferences from one another. What could be seen in the content of the American constitution is essentially a neutral government that does not stand with or against certain controversial issues (i.e. slavery). Through the bargaining process showed in this research, one is able to see how the process matters for the content of the constitution. Reading the content of the constitution is not enough – one must go deeper into the process and understand just how the consensus was made.

This research sheds light on the constitution making process by emphasizing the role of constraints and reason as opposed to the perception of constitution makers falling victims to passions, as proposed by Elster. The U.S. case is just one instance in constitution making where this theoretical approach is analyzed. Further research on this area would do good to apply this

type of reasoning and theoretical framework to other constitution making events in times of social and political crises.

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