

We the People

DARK BARGAIN

SLAVERY,
PROFITS,
AND THE
STRUGGLE
FOR THE
CONSTITUTION

LAWRENCE GOLDSTONE



“Mr. Goldstone shows the specter of slavery lurking behind so many of the delegates’ disputes.”

—*Wall Street Journal*

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We the People

of the United States,
do hereby constitute ourselves, provide for our common defence, promote the general
welfare, secure the Blessings of Liberty, and establish this Constitution for the United States of

Article 1

Section 1. All legislative Power herein granted, shall be vested in a Congress of the
United States.

Section 2. The House of Representatives shall be composed of Members chosen every
second Year, who shall have the Qualifications requisite for Electors of the most numerous Branch of the
State.

No Person shall be a Representative who shall not have attained to the age of thirty Years,
and seven Years, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may
partake thereof, according to the whole Number of free Persons, including those bound to
service for a Year or more, and all other Persons.

The actual Enumeration shall be made within three Years after the first Meeting of the
Congress, and in every subsequent Term of ten Years, in such Manner as they shall by Law direct.

But each State shall have at least one Representative, and until such Enumeration shall be made,
each State shall have one Representative, and each State shall have no more Representatives than
any one State.

When vacancies happen in the Representation from any Cause, the Electors in that State
shall choose another in the stead of the Person so vacated.

Section 3. The Senate of the United States shall be composed of two Senators from each State,
who shall have the Qualifications requisite for Electors of the most numerous Branch of the
State.

Immediately after they shall be assembled in Consequence of the first Election, they shall
choose one of their Number to be President of the Senate, who shall hold Office until the
Expiration of the next Year, and in such Manner as they shall by Law direct.

They shall also choose one of their Number to be Vice President, who shall hold Office until the
Expiration of the next Year, and in such Manner as they shall by Law direct.

They shall also choose one of their Number to be President of the Senate, who shall hold Office until the
Expiration of the next Year, and in such Manner as they shall by Law direct.

Section 4. The Senate shall have the sole Power to try all Impeachments. When sitting for that
Purpose, they shall be on Oath or Affirmation. And no Person shall be convicted without the
Concurrence of two thirds of the Members present.

Impeachment shall not extend further than to the Person impeached, and shall not affect his
Inheritance, Natural Birthright, or any other Privilege or Immunity which by the Laws of the
United States he shall be entitled to.

Section 5. The Senate shall have the sole Power to try all Impeachments. When sitting for that
Purpose, they shall be on Oath or Affirmation. And no Person shall be convicted without the
Concurrence of two thirds of the Members present.

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WALKER & COMPANY
NEW YORK

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Published by Walker Publishing Company, Inc., New York
Distributed to the trade by Holtzbrmck Publishers

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The Library of Congress has cataloged the hardcover edition of this book as follows:

Goldstone, Lawrence, 1947-
Dark bargain : slavery, profits, and the struggle for the Constitution / Lawrence Goldstone.

p. cm.

Includes bibliographical references and index.

1. United States. Constitutional Convention (1787)—History. 2. Constitutional history—United States. 3. Slavery—Law and legislation—United States—History. 4- United States—Politics and governmental783-1789. I. Title.

KF4510.G65 2005
342.73202'9—dc22
2005042315

First published in the United States in 2005 by Walker & Company
This paperback edition published in 2006

eISBN: 978-0-802-71836-5

Visit Walker & Company's Web site at www.walkerbooks.com

1 3 5 7 9 10 8 6 4 2

Book design by Maura Fadden Rosenthal/Mspace
Typeset by Westchester Book Group
Printed in the United States of America by Quebecor World Fairfield

For Nancy and Emily

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Dark Bargain

PROLOGUE

Fulcrum

On the morning of Thursday, January 17, 1788, General Charles Cotesworth Pinckney rose to address his colleagues in the South Carolina General Assembly. One of the state's most distinguished and respected citizens, famed for his exploits in both peace and war, the general was a fourth-generation Carolinian who could trace his lineage to a vassal of William the Conqueror.

Born in 1746, son of a future chief justice of the South Carolina courts, Pinckney had been sent to Oxford to study law, where he read with the great legal theorist William Blackstone. He had returned to set up his own practice, but soon joined the struggle for independence as an aide-de-camp to General Washington. Pinckney won quick promotion and in 1780 was one of the officers charged with resisting the British siege at Charleston. Even in the face of overwhelming force, he had advocated fighting on, only agreeing to surrender after intense persuasion by his fellow officers. As a result, he spent the next year as a British prisoner of war. When his captors tried to persuade him to change sides, Pinckney said, "If I had a vein that did not beat with the love of my Country, I myself would open it. If I had a drop of blood that could flow dishonourable, I myself would let it out."¹

For all his lineage and fame, however, on that January morning in 1788, General Pinckney, described as "an indifferent Orator,"² faced possibly the greatest challenge of his life. The debate he was about to join, which had begun the previous day and would continue for two more, was crucial not only to the future of his state, but quite possibly would determine the very survival of the fledgling nation he had battled for and been imprisoned to secure. The subject was whether to call a convention to ratify the proposed new Constitution.

The Constitution had been drafted the previous summer in Philadelphia, fifty-five men from twelve states participating in often rancorous debate on how best to rescue the United States from the obviously inadequate Articles of Confederation.* General Pinckney, along with his younger cousin Charles,³ had been one of the four delegates chosen to represent South Carolina.

According to the plan that had emerged from the convention, nine states would have to ratify the new Constitution if the Articles were to be replaced. *Fulcrum* By the time the South Carolina legislature took up the question of whether to authorize a ratifying convention, five states had already approved the document and conventions to take up the question were scheduled in a number of others. Still, adoption was very much in doubt. Intense opposition existed in New York, and ratification was far from certain in Massachusetts. Virginia, perhaps the most important state in the Union in terms of wealth and strategic location, would not even meet to consider the new Constitution for months, and sentiment in the Old

Dominion was not encouraging. Virginia's governor, Patrick Henry, a rabid opponent of ratification, was already famous for his refusal to even attend the convention. "I smelt a rat," he had noted with typical understatement. If the South Carolina legislature declined to call a ratifying convention, it could well start a cascade of rejection.

Many South Carolinians were leery of ceding local prerogative to a central government, particularly one that might be dominated by the North. Under the Articles, each state voted as a unit, and at least nine votes were required to pass even the most basic legislation. As a result, the five southern states effectively maintained veto power over any measure that might be rammed through by the eight states to the north. Under the voting rules of the new Constitution, that blanket veto would be lost. Fear that tyranny and despotism were therefore just around the corner had to be overcome if South Carolina were to approve the new Constitution.

Heading the opposition was a figure of equal stature, Rawlms Lowndes, who had been South Carolina's second president.⁴ At the close of the Wednesday session, Lowndes had insisted that while "he believed the gentlemen that went from this state to represent us in Convention possessed as much integrity, and stood as high in point of character, as any gentlemen that could have been selected," the plan would be a disaster.⁵

"It has been said that this new government was to be considered as an experiment," Lowndes had said.* "He really was afraid it would prove a fatal one to our peace and happiness. An experiment! What, risk the loss of political existence on experiment! So far from having any expectation of success from such experiments, he sincerely believed that, when this new Constitution should be adopted, the sun of the Southern States would set, never to rise again."⁶

Lowndes's proclamation had ended a day of long and grueling debate. It had begun with Charles Pinckney, the general's cousin, giving a lengthy description of the plan that had emerged the previous September. The younger Pinckney, headstrong and brilliant—he had lied about his age so as to appear to be the youngest delegate in Philadelphia—had spoken for most of the morning. When he finally concluded his remarks, the delegates had eschewed a paragraph-by-paragraph reading of the new Constitution, but had instead launched immediately into a debate on the aspect of the plan that they found most frightening. Since, as one of the representatives put it, the president of the United States "was not likely ever to be chosen from South Carolina or Georgia" (a prediction that remained accurate for almost two centuries),⁷ executive power seemed to be of the most concern. Curiously, of all the powers of the presidency, it was the authority to negotiate treaties on which the delegates focused.

Almost the entire afternoon was spent discussing the treaty power, both in terms of its being binding on individual states and the need for a two-thirds vote in the Senate to ratify. Still, there was a surprising lack of specifics as to just what sort of treaties the South Carolinians found most objectionable. Instead, the debate was conducted on a philosophical plane, filled with comparisons to other governments—England and France, especially—and the theoretical dangers of

treaty making and the potential for despotism. Then, just before the delegates were to adjourn for the day, Lowndes rose to speak, and the meaning of the previous debates became clear.

"The interest of the Northern States would so predominate, as to divest us of any pretensions to the title of a republic," he protested. "In the first place, what cause was there for jealousy of our importing negroes? Why confine us to twenty years* or rather why limit us at all? For his part, he thought this trade could be justified on the principles of religion, humanity, and justice; for certainly to translate a set of human beings from a bad country to a better, was fulfilling every part of these principles.⁸ But they don't like our slaves, because they have none themselves, and therefore want to exclude us from this great advantage. Why should the Southern States allow of this . . . ?"

Slavery, as Lowndes made clear, was at the very heart of the matter. "Without negroes, this state is one of the most contemptible in the Union . . . Negroes were our wealth, our only natural resource; yet behold how our kind friends in the north were determined soon to tie up our hands, and drain us of what we had!"

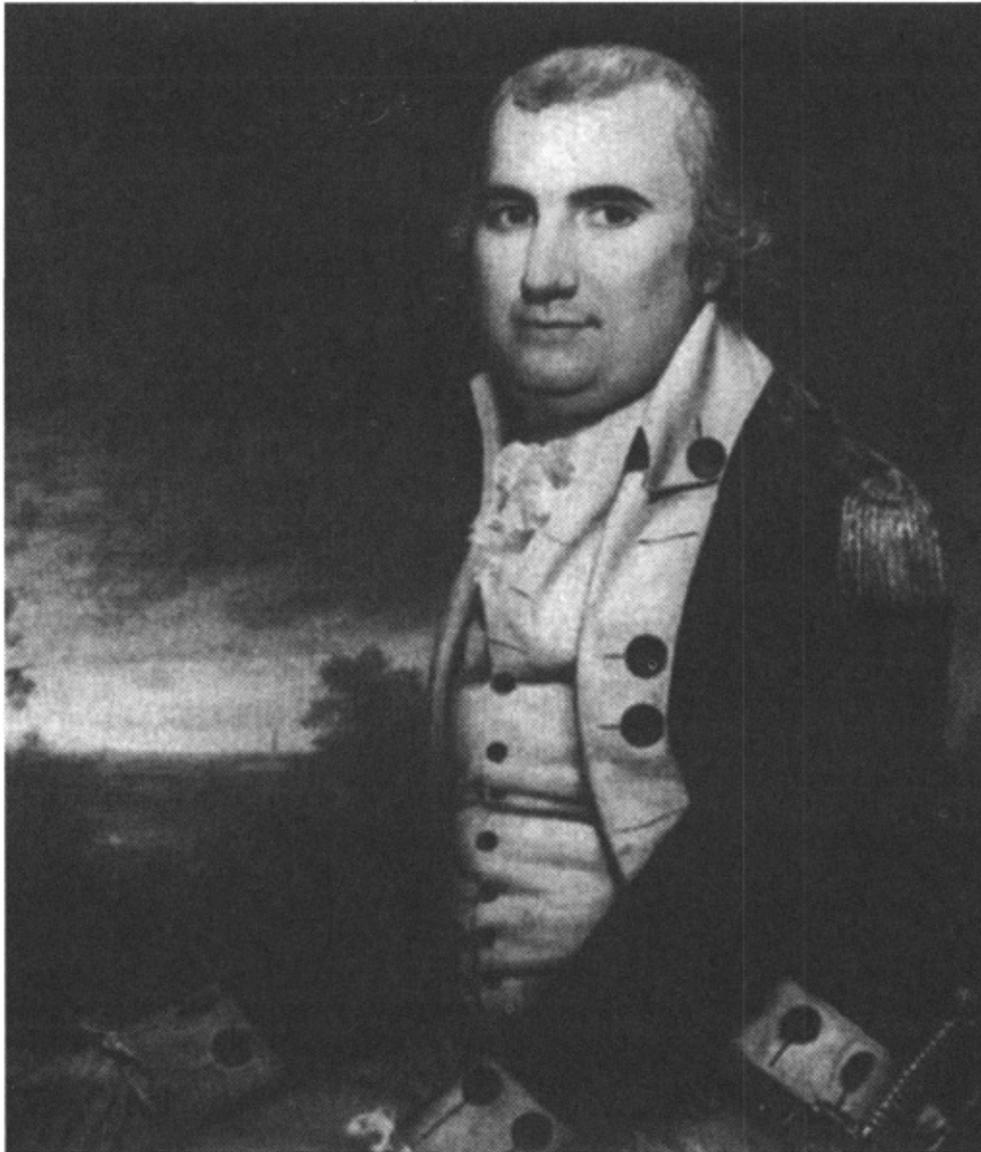
The session ended and the delegates were left to spend the night pondering a South Carolina in which, because of treaties with foreign powers or Congressional fiat, slavery had withered away or had been prohibited altogether. Thus, when General Pinckney rose to speak on Thursday morning, he likely felt that in order to save the United States, he had to persuade his fellow Carolinians of what he himself was already convinced and had struggled for four long months to achieve—that the new Constitution did, in fact, protect and even encourage the institution of slavery.

He immediately went on the attack, refuting Lowndes point by point. Due to the rule of secrecy under which the debates in Philadelphia had been conducted, only the general and the other three members of the South Carolina delegation had any idea of what had actually been said, and all of them favored the plan. He was therefore able to both slant his description of the proceedings and assure his suspicious fellow planters that the Yankees were not the conniving ogres that Lowndes had made them out to be. The northerners, in fact, General Pinckney observed, had turned out to be a group of quite reasonable fellows, eager to find middle ground.

When, for example, he described the compromise over apportionment, the general noted, "As we have found it necessary to give very extensive powers to the federal government both over the persons and estates of the citizens, we thought it right to draw one branch of the legislature immediately from the people, and that both wealth and numbers should be considered in the representation. We were at a loss, for some time, for a rule to ascertain the proportionate wealth of the states. At last we thought that the productive labor of the inhabitants was the best rule for ascertaining their wealth."

Not having been present in Philadelphia, Lowndes and the other opponents of the plan could not have known that this statement was patently false, that wealth had been repeatedly rejected as a means of apportionment, and productive labor had never been seriously considered as a standard.

"In conformity to this rule, joined to a spirit of concession," General Pinckney went on, "we determined that representatives should be apportioned among the several states, by adding to the whole number of free persons three fifths of the slaves. We thus obtained a representation for our property; and I confess I did not expect that we had conceded too much to the Eastern States, when they allowed us a representation for a species of property which they have not among them."



Charles Cotesworth Pinckney

This was, once again, less than a fully accurate account. Northern acquiescence in allowing slaves to be counted in apportionment of legislators was a victory for southerners, to be sure, but Pinckney and the rest of the South Carolina delegation had continually urged that slaves be counted in full and been rebuffed not just by northerners, but even by their slaveholding brethren in Virginia and Maryland.

"The first House of Representatives will consist of sixty-five members," the general continued. "South Carolina will send five of them. Each state has the same representation in the Senate that she has at present; so that South Carolina will have, under the new Constitution, a thirteenth share in the government, which is the proportion she has under the old Confederation: and when it is considered that the Eastern States are full of men, and that we must necessarily increase rapidly to the southward and south-westward, I do not think that the Southern States will have an inadequate share in the representation. The honorable gentleman alleges that the Southern States are weak. I sincerely agree with him. We are so weak that by ourselves we could not form a union strong enough for the purpose of effectually protecting each other. Without union with the other states, South Carolina must soon fall."

When Pinckney moved on to the most volatile issue of all, that of the slave trade, he was on firmer ground. "By this settlement we have secured an unlimited importation of negroes for twenty years. Nor is it declared that the importation shall be then stopped; it may be continued."^{*}

"I am of the same opinion now as I was two years ago . . . that, while there remained one acre of swampland uncleared of South Carolina, I would raise my voice against restricting the importation of negroes. I am as thoroughly convinced as that gentleman is, that the nature of our climate, and the flat, swampy situation of our country, obliges us to cultivate our lands with negroes, and that without them South Carolina would soon be a desert waste."

General Pinckney then persuasively summed up the many advantages that the new Constitution offered to slaveholders. "We have a security that the general government can never emancipate them, for no such authority is granted; and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states. We have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before. In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but, on the whole, I do not think them bad."

Immediately after the general ended his remarks and took his seat, another legislator, Dr. David Ramsay, observed that he "thought our delegates had made a most excellent bargain for us, by transferring an immense sum of Continental debt, which we were pledged to pay, upon the Eastern States, some of whom (Connecticut, for instance) could not expect to receive any material advantage from us. He considered the old Confederation as dissolved."

Lowndes continued to oppose the Constitution personally, but Pinckney's performance had been powerful and persuasive. When the vote to call a ratifying convention was held a day later, it passed unanimously. Even Lowndes himself was forced to grudgingly acknowledge that perhaps South Carolina should allow a ratifying convention to consider the plan. Charles Cotesworth Pinckney had convinced the planters of South Carolina. Acting in the interest of their social system, slaveholders had helped preserve the chance of union.

*Rhode Island—"Rogue's Island" to some—by this time dominated by what was popularly seen as a radical agrarian government, had refused to send a delegation.

*Both in the records of legislative meetings and the notes to the Constitutional Convention, speakers were often referred to in the third person by whoever was taking the notes. Although encountering a speaker referred to as "he" takes some getting used to, for accuracy and to give a flavor of the proceedings, these records will always be cited as written. In this case, for example, the "he" in the following sentence is Lowndes himself and the statement is a quote, not a paraphrase. This treatment will be adhered to with respect to convention delegates as well. Therefore, unless specifically noted to the contrary, quoted passages will always be those of the speaker indicated.

*Alluding to a prohibition on the slave trade that was to take effect in 1808.

*This interpretation of the twenty-year extension of the slave trade was exactly the opposite of the argument that James Madison was making to the citizens of New York as "Publius" in the *Federalist*.

PART I

Reluctant Nation

1. DEVIL IN THE MIST

Few milestones in the history of humanity's struggle for self-rule have been as significant as the United States Constitution. The four months in which the Constitution came into being—from May to September 1787—were as dramatic and compelling as the document itself, and the delegates as intriguing a group of characters as has ever sat down to create a country. Lawyers, farmers, shippers, plantation owners, scientists, a philosopher or two, and a lot of speculators—these men were a study in extremes, geographically, politically, and socially.

The youngest was not the thirty-year-old Charles Pinckney but rather a callow twenty-seven-year-old from New Jersey named Jonathan Dayton, who barely opened his mouth, but nonetheless later had a city in Ohio named for him. The oldest was the eighty-one-year-old, gout-ridden Benjamin Franklin, "a short, fat, trunched old man"¹—who was carried to the meetings on a chair borne by four convicts. From Massachusetts came the quixotic capitalist Elbridge Gerry; from North Carolina, the scientist and physician Hugh Williamson; and from Maryland, the besotted Luther Martin, about whom it was later said, "the times must be momentous indeed . . . for the whole week Luther Martin has resided in Washington, he has not once been seen intoxicated in the public streets!"² Sometimes extremes existed within delegations: John Langdon, the richest man in New Hampshire, was forced to pay the expenses of his fellow delegate Nicholas Gilman, who was virtually penniless. To add gravitas to the proceedings, a reluctant George Washington had been induced to once again leave his beloved Mount Vernon and join the Virginia delegation.

No Adams would be present, nor would a Lee. Patrick Henry stayed home and Thomas Jefferson was in Paris. But each delegate who did attend was a man of power and prestige in his home state—Jefferson called them "demi-Gods"—used to deference and respect, now thrown into a room with other men accustomed to the same treatment. Many were meeting for the first time after years of commitment to a similar cause. Others were meeting after years of contention. Vain, imperious George Mason of Virginia, one of the richest of the delegates, set eyes on Benjamin Franklin for the first time in May 1787, after more than two decades of furious competition with the crafty Pennsylvanian in the race to buy up and settle land in the West. Inevitably, the clash of personalities in Philadelphia would be as intense as the advocacy of ideas or ideals.

Although there was ample contrast in Philadelphia among individual delegates, the greatest disparity lay between the states themselves, and the deepest gulf was between South and North, slave states and free.

While only five of the thirteen states were primarily slaveholding,³ each of the five—particularly Virginia and South Carolina—was ruled by a genteel, landed aristocracy whose members had more in common with the British upper classes they had just kicked out than with their new countrymen in the North. They were Church of England, owned sprawling estates, ruled tenant farmers in

addition to slaves, wore powdered wigs, imported fine silks in the latest fashions, held fancy balls, and provided their children with a classical education, often in Europe. Although they loved wealth, they thought there was something unseemly about handling money, and as a result, many were in debt.

Northerners, on the other hand, were often flinty, parsimonious, hardheaded merchants or capitalists who dressed in dark wool, had few servants, no tenants, and only borrowed money to expand their businesses. Some were presbyters who didn't dance, carouse, or stay up late. They also loved wealth, but found nothing demeaning about counting their money, often repeatedly.

To add to the challenge, these delegates had no model on which to base their efforts—no document of this kind had ever been drafted before. In the drive to find a workable formula, they drew from the Greeks, French *philosophes*, and English reformers, but mostly they relied on their own sense of practicality. They might not have known exactly what they wanted the new government to look like, but they certainly knew what they did *not* want it to look like, although even here different delegates held different opinions as to what they most wished to avoid.

Sometimes they sought resolution through debate on the floor of the convention; other times by assigning committees to draft compromise agreements in secret; and still others by meeting at night in small groups in the back rooms of Philadelphia's inns and taverns. The debates themselves played out with high tension—grand declarations interspersed with sarcasm, spite, and invective, the future of the embryonic democracy teetering on every petty squabble. Delegates regularly threatened to walk out if a favored proposal were voted down or a repugnant one agreed to. Some did leave, becoming fierce opponents of ratification in their home states.

Aware of what was at stake, the delegates knew they had to speak candidly, expressing sentiments they dared not voice in public. In order that none would be held accountable for anything said in the chamber, the proceedings remained strictly secret, conducted behind locked doors that were guarded at all times by armed sentries. To bar eavesdropping, the windows of the State House were kept bolted, intensifying the already oppressive heat and humidity of a Philadelphia summer where, at one point, the temperature reached ninety-six degrees.

The public was meant to be unaware of the proceedings not just as they occurred, but in perpetuity. The official minutes were kept intentionally sketchy, little more than a journal of motions and the ensuing votes, and even that cursory record was not released to the public for decades afterward.* The most copious notes were kept by James Madison and these would not be published until 1840. To Madison (and, in the early weeks, Robert Yates of New York) we owe almost all of our knowledge as to what went on behind those locked doors.

That a Constitution was actually wrought from such secrecy and disarray has been called "a miracle," and, given the tone of the proceedings, that description may not be far off.⁴ The delegates disagreed on almost everything. Should the legislature be one house or two? Should the president be elected by the people, by the congress, or by the state legislatures? Should new states be admitted as equals or subordinates? Should there be a standing army? What were to be the

powers of the court system? Were the states to be subordinate to the federal government or the other way around? Should the new government assume the massive debt from the Revolution? How should commerce be regulated? What constituted treason? Each of these questions had different advocates proposing different resolutions, all with equal ardor.

But of all the issues that would arise in Philadelphia, the one that evoked the most passion, the one that left the least possibility of compromise, the one that would most pit morality against pragmatism, was the question of slavery. To a significant and disquieting degree, America's most sacred document was molded and shaped by the most notorious institution in its history.

For the longest time, however, almost nobody thought so. Throughout the nineteenth and most of the twentieth centuries, one prominent historian after another examined the record and insisted that the economics of slavery was a minor factor in Philadelphia. The battle was fought between big states and small states, insisted some, while others saw the principal conflict as between those who owned real property and those whose wealth was largely on paper. For many, the debates were simply one of history's great intellectual exercises, a four-month colloquium on government and political philosophy conducted by a group of latter-day Athenians.

The United States Constitution is arguably the most analyzed document in the history of government, but it is not difficult to understand why slavery has so regularly been consigned to the shadows. "The peculiar institution"—an equally peculiar phrase—was an unpleasant and repugnant topic, a stain on America's honor, and, therefore, the less of a role it played in defining the nation's identity the better. Even in the debates, so repellent was slavery to northerners—and so embarrassing to southerners—that when the subject came up, the delegates often danced around it, employing euphemisms, such as "this unique species of property" or "this unhappy class," as stand-ins for the more disagreeable "slaves." Thus, the words "slave" and "slavery" never appeared in the original Constitution, nor would they until ninety-one years later when the thirteenth amendment abolished the practice forever.⁵

With all that, any fair reading of the record makes it difficult to deny that the sectional division, with slavery as its pivot, was the most crucial. Many of the delegates certainly saw things precisely that way. James Madison, for example, at one point observed that he "always conceived that the difference of interest in the U. States lay not between the large & small, but the N. & Southn States," and added that "it was pretty well understood that the institution of slavery & its consequences formed the line of discrimination."⁶

Almost from the day the convention adjourned on September 17, 1787, theorizing began as to what the delegates intended to say and the underlying meanings of the document they had produced. Theorizing was necessary since there were only fifty-five men in the entire nation who knew what had transpired inside the State House. Even among these fifty-five, only a handful could offer firsthand commentary on the full course of the proceedings.