

# Constitutional Agreement during the Drafting of the Constitution: A New Interpretation

Ben Baack, Robert A. McGuire, and T. Norman Van Cott

## ABSTRACT

We provide a new interpretation of one of the “great” but in our view “failed” North-South agreements during the U.S. Constitution’s drafting. In 1787, lower South delegates to the Constitutional Convention reputedly settled for a simple-majority congressional vote for commercial regulations in exchange for northern delegates reputedly agreeing to limitations on national slave import restrictions and an export tariff prohibition. We document that the overall South gained little from the agreement because (1) import taxes are de facto export taxes, (2) the simple-majority rule was costly to southern interests, and (3) the slave import provision was limited. The agreement represents serious economic and political miscalculation by southern framers. Because the agreement was at a constitutional level, it endowed the nation with decades of unforeseen and unintended constitutional and sectional conflict that played a critical role in American public finance and southern secession and has important implications for contemporary constitution making.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises. (U.S. Constitution, art. I, sec. 8, cl. 1)

To regulate Commerce with foreign Nations, and among the several States . . . (U.S. Constitution, art. I, sec. 8, cl. 3)

BEN BAACK is Associate Professor of Economics, Ohio State University. ROBERT A. MCGUIRE is Professor of Economics, University of Akron. T. NORMAN VAN COTT is Professor of Economics, Ball State University. The authors thank Farley Grubb, Douglas Irwin, Naomi Lamoreaux, and Jean-Laurent Rosenthal for their helpful comments and suggestions. We also thank the participants at the Von Grep Workshop in Economic and Entrepreneurial History, University of California, Los Angeles; the Economic History Seminar, University of British Columbia; and the 2006 Southern Economic Association meeting, where earlier versions of the paper were presented.

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No Tax or Duty shall be laid on Articles exported from any State. (U.S. Constitution, art. I, sec. 9, cl. 5)

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight. (U.S. Constitution, art. I, sec. 9, cl. 1)

The design of the Constitution, the result of various agreements and compromises among delegates with differing interests, is important to understanding our nation's economic, legal, and political development. Among the most important agreements during the Constitution's drafting were those between northern and southern delegates. One of the most important North-South agreements was to count slaves as three-fifths of other persons for purposes of representation and direct taxation. Another important North-South accord reputedly involved lower South delegates settling for a simple-majority congressional vote (rather than a two-thirds rule) to enact commercial regulations in exchange for northern delegates agreeing to a 20-year prohibition on national interference in the slave trade and a prohibition on export tariffs.

The latter agreement is considered by many scholars to be among the more important agreements that brought the Constitutional Convention to a conclusion. Indeed, economic historians Walton and Rockoff (2002, p. 271) contend that the slave trade clause was "part of one of the great constitutional compromises" to which our "nation's forefathers agreed in 1787." Lynch (1999, p. 24) considers the agreement to be "the second great compromise of the convention." Finkelman (1987) maintains that the agreement was critical for constitutional settlement and labels it the convention's "dirty compromise" because of its presumed benefits to slave interests.<sup>1</sup>

This agreement lies behind the above constitutional clauses. The first two grant the national government the power to tax and to regulate commerce; although their scope obviously extended beyond the agreement, the issue for the accord was whether a super- or simple-majority voting rule would apply to these powers. A simple-majority rule was adopted. The other two clauses are clear. Explicit export tariffs were

1. For studies of the overall making of the Constitution, see Curtis (1854–58), Beard (1913), Warren (1928), McDonald (1958), Rakove (1996), and McGuire (2003). For explicit discussion of the agreement being considered here, see Curtis (1854–58), Farrand (1904, 1911), Warren (1928), Jensen (1964), and Finkelman (1987).

prohibited, as was congressional interference in international slave importation for the first 20 years of the Constitution's operation (beyond levying an import duty not to exceed \$10). The agreement essentially eased the process whereby the national government could tax and regulate commerce in exchange for putative restrictions on the scope of its taxation and regulatory powers.

We offer a new interpretation of this constitutional accord, which we shall refer to as the Slave Trade Agreement, arguing that previous scholarship misstates the economic advantages it conferred on the South. In particular, scholars overlook the fact that economic principles would dash southern aspirations for the export tax prohibition. Moreover, the simple-majority voting rule for commercial regulations would make it easier for these hopes to be dashed. Southern interests ended up with an emasculated prohibition on export taxes and a 20-year moratorium on a national prohibition on slave importation. The former haunted the nation's constitutional and fiscal affairs throughout the antebellum period. The prohibition on national interference in the slave trade lasted no longer than its period of constitutional immunity.

We argue that the lower South framers involved in the agreement made, *ex post*, a strategic economic and political miscalculation. What is more, we contend that the constitutional nature of the agreement endowed descendants of the southern framers and the nation with decades of unforeseen and unintended North-South constitutional and fiscal conflict that played an important role in the historical path of American public finance, southern secession, and the Civil War. The critical role of this agreement in the nation's constitutional and fiscal history and the decades-long sectional and political conflicts is the larger purpose of our paper.

Because the nature of our interpretation precludes formal testing, we offer an analytical historical narrative supported by a broad mixture of economic reasoning and historical evidence. First, we explain how a tax on imports acts economically as an implicit tax on exports, demonstrating that a prohibition on explicit export taxes loses significance for the South. Second, we examine the constitutional debates on the Slave Trade Agreement, documenting the issues involved. Third, we analyze the agreement and discuss its consequences for the South, indicating the agreement was unlikely to have benefited the overall South. Fourth, we examine antebellum congressional tariff votes and sectional representation, documenting more fully the costs to the South of abandoning a two-thirds voting rule. Fifth, we look at how southerners amended the

clauses of the U.S. Constitution, which contained the components of the Slave Trade Agreement, when drafting the Confederate constitution in 1861, indicating what they considered went wrong in 1787. Finally, we conclude with a discussion of the implications of the agreement for U.S. constitutional and fiscal history and the decades-long North-South conflicts during the nineteenth century, noting the lessons for contemporary constitution making.

#### OUR CHALLENGE

A driving force for the 1787 Constitutional Convention was that the Articles of Confederation did not give the Continental Congress the power to tax. Congress had to rely on requisitions and voluntary contributions from the states. This institutionalized the free-rider problem because individual states had little incentive to make contributions. Unable to authorize imposts (tariffs) during the Revolutionary War, Congress circumvented the free-rider problem by printing currency and authorizing the Continental Army to confiscate property.<sup>2</sup> With the realization that these policies were an unsatisfactory way of financing the government, a goal of many convention delegates was to resolve the free-rider problem by granting Congress the power of taxation, including the tariffs that it had unsuccessfully sought during the war.

An important issue at the Constitutional Convention was whether export tariffs would be allowed. Not surprisingly, most southern delegates opposed export tariffs. The South was agrarian and, compared to the North, more export based. Allowing taxes on exports was obviously contrary to southern interests in that it could foreshadow a national tax regime in which the southern states would be the government's cash cow.

Our challenge to the view that the agreement benefited the South is grounded in an often-ignored proposition in international economics. Namely, hiding behind any set of import tariffs is a regime of de facto export tariffs. The proposition is known as the Lerner symmetry theorem, after Abba Lerner, who first cast symmetry in the analytics of modern economics (Lerner 1936). Symmetry's intellectual history predates Lerner, however. In fact, Irwin (1996a, 1996b) notes that symmetry can be found in seventeenth-century mercantilist literature and figured

2. For an analysis of how the Revolutionary War was financed, see Baack (2001, 2008).

in the nineteenth-century English Corn Laws debates. Particularly important for what follows is that symmetry provided the basis for John C. Calhoun and South Carolina's opposition to the Tariff of Abominations in 1828. At the same time, there is no evidence that delegates to the Constitutional Convention understood tariff symmetry. Irwin (1996b, p. 5) flatly asserts they did not. This, of course, includes Alexander Hamilton, the reputed designer of the first U.S. tariff.

Symmetry follows from the fact that relative prices turn against exports and toward import-competing goods with either an import or export tariff. Import tariffs raise the relative price consumers pay for imports and thus increase the profitability of domestic production of import-competing goods relative to other goods, including goods for export. Export tariffs lower the relative price exporters net when they sell their goods and thus decrease the profitability of domestic production of export goods relative to other goods, including import-competing goods. However, changes in relative prices often are too subtle for individuals to recognize because they are embedded in the explicit changes in nominal prices. Either tariff, nonetheless, changes relative prices, increasing the relative profitability of import-competing goods.

There is a parallel between tariff symmetry and the economic principle that the incidence of tax burdens between buyers and sellers is independent of who bears the statutory obligation for a tax. Thus, sellers of, say, tobacco being legally liable for remitting a tobacco tax does not mean tobacco buyers escape paying the tax in the form of higher tobacco prices. The parallel in international trade is that countries sell internationally (export) in order to buy internationally (import), so whether selling or buying is legally taxed is irrelevant. Unfortunately, McGuire and Van Cott (2003) show that the parallel is not an easy one to sketch out even in supply and demand terms; it is considerably more subtle than the economics of tax incidence.<sup>3</sup>

Perhaps the more obvious parallel is the one the public finance literature draws between broad-based income and broad-based expenditure taxes, where equal tax rates on income or spending are shown to have identical consequences (see Browning and Browning 1994, pp. 309–13). In this case, exports represent international earnings and imports international expenditures. It makes no difference whether inter-

3. Although Irwin (1996b) describes symmetry as one of the three most important propositions in international economics, McGuire and Van Cott (2003) note that most international economics textbooks do not include it in their discussion, perhaps because the idea is too subtle.

national earnings or international expenditures are taxed: the effect on relative prices is the same.

Symmetry's implications for a constitutional prohibition on export tariffs are clear. To wit, a constitution that permits import tariffs does not prevent implicit export tariffs. And a simple-majority voting rule, instead of a supermajority rule, makes it easier to enact implicit export tariffs. While a ban on explicit export tariffs precludes singling out particular exports for tariffs, whether the ban prevents import tariffs from having regionally disparate effects depends on the regional composition of exports.

Economists explain tariff symmetry in terms of a uniform tariff rate across aggregates labeled "imports" and "exports." However, countries do not buy and sell aggregates internationally, nor do governments typically levy uniform rates.<sup>4</sup> This means that the structure of de facto export tariffs is not immune to the structure of import tariffs. Import duties on European products, for instance, are likely to lead to a different structure of de facto export taxes than would import duties on Asian products. Yet symmetry still holds. Likewise, while demand and supply elasticities in import and export markets affect the distribution of the burden of tariffs between consumers and producers, implicit or explicit, variation in these elasticities does not undermine symmetry's existence. This is the essence of tariff symmetry (Lerner 1936; Meade 1952; McGuire and Van Cott 2003).

Is a straightforward application of the economist's aggregate perspective on symmetry sufficient to address issues surrounding the Slave Trade Agreement? That is, should the product-by-product implications of the U.S. tariff schedule be considered before contending that the southern framers' aspirations for the Constitution's export tariff prohibition were doomed for disappointment? Beyond the intractable nature of delineating such product specificity, we argue that the details of U.S. international trade, circa 1787 and until the Civil War, render the aggregate perspective on symmetry a good approximation of the impact of U.S. import tariffs on southern exports. This is because (1) southern exports were an important component of total U.S. exports, (2) the southern economy was export dependent, and (3) southern exports were concen-

4. U.S. tariff rates have never been uniform, except for 2 months in 1842. The Compromise Tariff of 1833 required that tariffs be reduced gradually until they reached a uniform 20 percent on dutiable items, effective July 1, 1842. But the Tariff of 1842 ushered in a new set of nonuniform tariff rates, effective September 1, 1842.

trated among a small number of products—tobacco, rice, indigo, and, later, cotton.<sup>5</sup>

The extent of the dependence of the southern colonies on exports was well established by the eve of the Revolutionary War. At that time, exports per capita in the South were nearly twice those in the middle colonies and over twofold greater than in New England. Exports per white person in the South were approximately 3 to  $3\frac{1}{2}$  times that generated by the white population in the middle colonies and New England. This dominance can be understood on the basis of the available trade data. During 1768–72, southern exports were 63 percent of total colonial commodity exports, while those from New England and the middle colonies were only 17 and 20 percent, respectively. The reason was simple. The destinations for colonial exports spanned Great Britain, Ireland, southern Europe, Africa, and the West Indies. However, over one-half of colonial commodity exports went to Great Britain, with most of those going to England. The South dominated American exports to England (see Figure 1).<sup>6</sup>

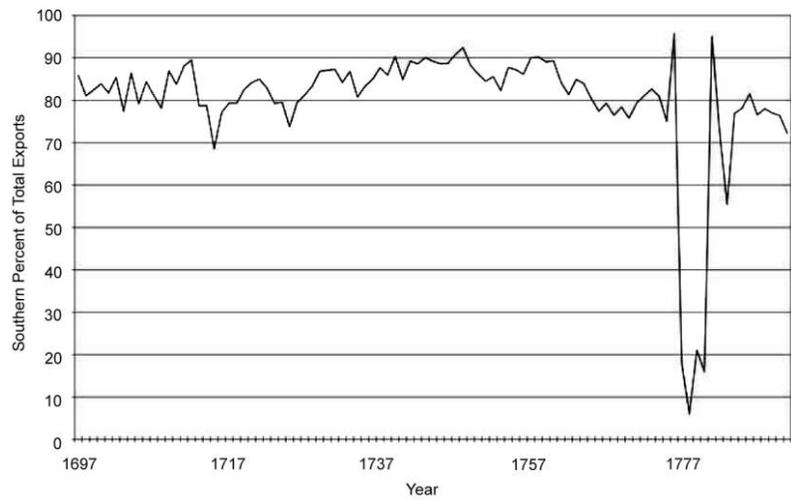
Southern export dominance also holds when one takes a comprehensive view of trade. While southern exports were made up primarily of commodities, those of the New England and middle colonies were a mix of commodities and services. The latter included such things as shipping services, insurance, and various other mercantile services. Even when the invisible earnings from the provision of these services are included, the South still dominated the aggregate colonial exports of the other two regions on the eve of the Revolution (see Figure 2).

Military historians contend that the southern economy suffered the greatest negative impact of the Revolutionary War (Higginbotham 1977, p. 375). Nevertheless, the South still accounted for nearly half of all American exports at the time of the Constitutional Convention. Southern exports were 60 percent greater than those of the middle colonies and over twice those of New England. In short, at the time of the Philadelphia convention, the South was dependent on exporting a very limited mix of products and was maintaining its leading export position among the three regions of the nation.<sup>7</sup>

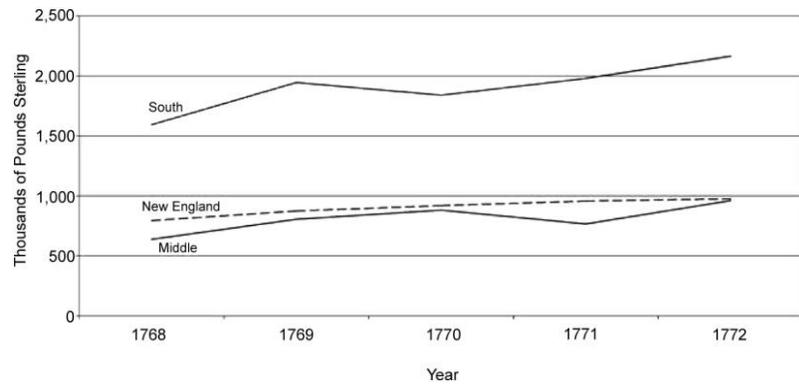
5. In the limit, had the United States exported only one product that came from the South, any structure of import tariffs would lead to the same de facto export tax.

6. The discussion in this paragraph is based on the data in Shepherd and Walton (1972, p. 47, table 3.2) and U.S. Department of Commerce (1975, 2:1176–77).

7. The discussion of exports in this paragraph is drawn from the data presented in Shepherd and Walton (1976, p. 413, table 5).



**Figure 1.** Southern share of total American exports to England (U.S. Department of Commerce 1975, 2:1176-77).



**Figure 2.** Commodity exports and invisible earnings by region, 1768-72 (U.S. Department of Commerce 1975, 2:1182-83).

**THE SLAVE TRADE AGREEMENT**

Curtis (1854–58) appears to have told the initial story of the Slave Trade Agreement. Later, Farrand (1904, 1911) documented the story, arguing that John Rutledge (South Carolina) and a few other lower South delegates agreed to vote against a two-thirds requirement to enact commercial regulations in exchange for support from Roger Sherman (Connecticut) and a few other New England delegates for a 20-year extension of the limitation on congressional interference in the slave trade and an export tariff prohibition.<sup>8</sup> While others have repeated the story of the agreement (see, for example, Warren 1928; Jensen 1964; Kelly and Harbison 1970), not all tell the same story. Finkelman (1987, p. 221), for instance, contends that the limitation on national interference in the slave trade was not much of a lure to the South. The key ingredients of the deal, according to Finkelman (1987, pp. 213–23), were passage of the export tariff prohibition to lure lower South delegates to vote against the two-thirds vote for commercial regulations, the payoff to New England delegates. In contrast, in a study of rent seeking and the slave trade clause, Anderson, Rowley, and Tollison (1988, pp. 86–89) argue that including the slave trade clause in the Constitution is consistent with rent seeking on the part of upper South delegates. At the same time, they acknowledge that others (Jillson and Anderson 1977; Robinson 1971) contend that the slave trade clause (not the export tariff prohibition) and the two-thirds vote for navigation acts were the key ingredients of the deal between New England and southern delegates.

An examination of the debates at the convention resolves the issue of what components were part of the agreement. The debates also make clear that the southern delegates either did not understand or were unaware of tariff symmetry. The debates make it equally clear that the southern delegates took positions throughout the convention that they perceived as advancing their sectional economic interests.

Following attainment of the Great Compromise in mid-July, which settled the issue of representation between large and small states by adopting a bicameral legislature, the delegates agreed on July 24 to a motion forming a Committee of Detail (Farrand 1911, 2:106). Being charged with writing a draft of a constitution, the committee began a process that ultimately led to the Slave Trade Agreement. As the com-

8. Farrand's (1911) *Records of the Federal Convention* contains reputedly the best single source of information concerning what took place at the Constitutional Convention; it includes, among other sources, the notes of several delegates reporting what was said.

mittee prepared to meet, it was clear what interests had to be reconciled before the delegates would agree on a constitution. As James Madison (Virginia) put it 10 days earlier during debate on the Great Compromise: “It seemed now to be pretty well understood that the real difference of interests lay, not between the large & small but between the N. & Southn. States” (Farrand 1911, 2:9–10).<sup>9</sup>

Scholars trace the export tax prohibition in the Constitution to the influence of southern slaveholding delegates. The argument is straightforward: Southern delegates knew that the nation’s exports came primarily from their states. Export taxes would reduce southern exports. Therefore, preventing such taxes would protect their states’ economies. Accordingly, southern delegates insisted on an export tax prohibition.<sup>10</sup>

Charles Cotesworth (C. C.) Pinckney (South Carolina) first brought up the issue of taxation of exports on July 12, saying “[h]e hoped a clause would be inserted in the system restraining the Legislature from taxing Exports” (1:592).<sup>11</sup> On July 23, in response to the motion to form the Committee of Detail, C. C. Pinckney indicated that absent “some security to the Southern States agst. . . . taxes on exports, he shd. be bound by duty to his State to vote agst. their Report” (2:95). The committee issued its draft constitution on August 6 (2:183). Among other things, the draft gave Congress the power to levy taxes and duties and to regulate commerce. It also included a prohibition on export taxes, no prohibition on slave imports, and no passage of a navigation act without the assent of two-thirds of both houses.<sup>12</sup>

The subject of export taxes was not mentioned again until mid-August, when George Mason (Virginia) “urged the necessity of connecting with the power of levying taxes duties &c, <the prohibition in

9. All quotations of speeches at the Constitutional Convention, unless otherwise noted, are from James Madison’s “Notes” contained in Farrand (1911). All abbreviations, punctuation, spelling, and emphasis in the quotes are in the original. Hereafter, only the volume and page numbers in Farrand (1911) are listed in parentheses following each quote or reference to Farrand (1911).

10. For discussion of the details of southern involvement in the export tariff prohibition, see Curtis (1854–58), Farrand (1904, 1911), Warren (1928), Jensen (1964), Kelly and Harbison (1970), Finkelman (1987), and McMillin (2004). We are unable to find any discussion in the constitutional and historical literatures that disputes the view that southern slaveholding interests were the driving force behind the export tariff clause.

11. Charles Cotesworth Pinckney (C. C. Pinckney) was the older cousin of Charles Pinckney (C. Pinckney), who also was a South Carolina delegate at the convention.

12. These provisions have led some constitutional scholars to conclude that the Committee of Detail gave the South everything it sought (Collier and Collier 1986, p. 169; Finkelman 1987, p. 211; Robinson 1971, p. 218).

Sect 4 of art VI> that no tax should be laid on exports” (2:305). Then, before the final vote on the export tax prohibition on August 21, Madison argued that, “[i]n order to require  $\frac{2}{3}$  of each House to tax exports—as a lesser evil than a total prohibition moved <to insert the words ‘unless by consent of two thirds of the Legislature>,” which failed, 5–6, with all five southern states voting no (2:363). When the convention voted on the prohibition, it passed in the affirmative, 7–4, with all five southern states voting yes (2:363–64).<sup>13</sup>

The constitutional restriction on national interference in the slave trade, a 20-year (rather than a shorter or no) restriction, would appear to be an obvious benefit to the South.<sup>14</sup> But its inclusion in the Constitution raises questions, because prior to or shortly after the Constitution became effective, nearly all states had legally banned slave importation. “Thus,” according to Phillips (1918, p. 133), “at the time when the framers of the Federal Constitution were stopping congressional action for twenty years, the trade was legitimate only in a few of the Northern states, all of which soon enacted prohibitions, and in Georgia alone in the South.” Georgia subsequently prohibited slave imports from the West Indies, Bahamas, and Florida in 1793 and from Africa in 1798 (Phillips 1918, p. 133). South Carolina repealed its prohibition effective January 1, 1804, when slaves were imported in large numbers until a national prohibition became effective January 1, 1808.<sup>15</sup>

Following its agreement on the export tax prohibition on August 21, the convention undertook a contentious debate on the Committee of Detail’s slave trade clause, which precluded prohibiting or taxing slave imports (2:183). It turns out that the delegates from the upper and lower South were hopelessly divided on the slave trade. Luther Martin (Mary-

13. Although only the votes of the states at the Constitutional Convention were officially recorded, scholars have inferred individual delegate votes from the convention’s records (see McDonald 1958; McGuire 2003). It should be noted, however, that because these delegate votes are inferred from, among other information, the recorded voting sentiments of the delegates, the votes are not independent information that can be used to corroborate whether a particular delegate voted as part of a specific North-South alliance at the convention. Nor can such delegate votes be used as a variable in a statistical test of whether delegates participated in a particular agreement because the votes are inferred from sentiments expressing how delegates intended to vote.

14. The slave trade clause did allow a tax up to \$10 per slave, but none was ever enacted.

15. Details of state restrictions on slavery and the slave trade can be found in Phillips (1918, pp. 132–33) and Fogel and Engerman (1974, pp. 33–34). DuBois (1896, pp. 223–29) presents slightly different information on slave trade restrictions for Massachusetts, New Hampshire, and New York.

land), an upper South delegate, opposed the committee's clause, as he wanted to prohibit or tax slave imports to prevent importation, because "such a clause wd. leave an encouragement to this trafic. . . . [I]t was inconsistent with the principles of the revolution and dishonorable to the American character to have such a feature in the Constitution" (2:364). But C. Pinckney (South Carolina), a lower South delegate, proclaimed, "South Carolina can never receive the plan if it prohibits the slave trade" (2:364). Suggesting his involvement in the agreement, Sherman said he "was for leaving the clause as it stands" even though "[h]e disapproved of the slave trade: yet as the States were now possessed of the right to import slaves . . . it best to leave the matter as we find it" (2:369). Mason, on the other hand, expressed the upper South's opposition to slave imports, which he considered "nefarious traffic" (2:370). Oliver Ellsworth (Connecticut), supporting the lower South, believed a prohibition on the slave trade would "be unjust towards S. Carolina & Georgia" (2:371). C. C. Pinckney agreed, articulating the economic argument for the lower South position: "S. Carolina & Georgia cannot do without slaves. As to Virginia she will gain by stopping the importations. Her slaves will rise in value, & she has more than she wants. It would be unequal to require S. C. & Georgia to confederate on such unequal terms" (2:371). In short, the lower South recognized that the upper South would benefit from a slave trade prohibition.<sup>16</sup>

Recognizing an impasse, C. C. Pinckney made a motion that he hoped would remove the problems: to wit, "to commit [to a committee of the states] the clause that slaves might be made liable to an equal tax with other imports" (2:373). Gouverneur Morris (Pennsylvania) then responded by explicitly proposing the three components of the Slave Trade Agreement, wishing that "the whole subject to be committed including the clauses relating to taxes on exports & to a navigation act. These things may form a bargain among the Northern & Southern States" (2:374). Pierce Butler (South Carolina) reacted strongly to Morris's mention of taxes on exports, arguing that "he never would agree to the power of taxing exports"; while Sherman, in support of the lower South position, declared,

16. The economic argument here is that the upper South delegates wanted a prohibition on slave imports because their region exported its "excess" slaves to other regions and an import prohibition would increase slave values; the lower South delegates wanted the slave trade open because they wanted a cheap supply of slaves to support their region's rapidly expanding plantation economy. Anderson, Rowley, and Tollison (1988) make this argument as well.

“[I]t was better to let the S. States import slaves than to part with them, if they made that a sine qua non” (2:374).

The convention agreed to commit the clauses. When the Committee of Eleven reported to the convention on August 24, the clauses had been amended and the essentials of the Slave Trade Agreement proposed. The committee proposed that (1) the national legislature could not prohibit the international slave trade prior to 1800, (2) a tax on slave imports up to the average duties on other imports could be levied, (3) the two-thirds congressional vote requirement to enact navigation acts was to be struck out, and (4) the export tariff prohibition would remain in the constitution (2:400).

The convention took up the committee’s report the next day. C. C. Pinckney proposed extending the slave trade restriction to 20 years, meaning the national legislature could not prohibit the international slave trade prior to 1808, which passed, 7–4, with the support of all southern states except Virginia, and with the support of Connecticut, Massachusetts, and New Hampshire (2:415). The entire amended clause then passed in the affirmative, 7–4.

The convention began its formal debate on the two-thirds vote on August 29, when C. Pinckney immediately moved to delay consideration of the committee’s report in favor of a new clause. To wit, “That no act of the Legislature for the purpose of regulating the commerce of the U--S. with foreign powers, or among the several States, shall be passed without the consent of two thirds of the members of each House” (2:449). C. Pinckney argued that “different interests would be a source of oppressive regulations if no check to a bare majority should be provided” (2:449). He further maintained, “The power of regulating commerce was a pure concession on the part of the S. States” (2:449).

Contentious debate followed as delegates took positions on the two-thirds vote requirement for commercial regulation. Hugh Williamson (North Carolina) said that he favored “making two thirds instead of a majority requisite, as more satisfactory to the Southern people” (2:450). Mason maintained, “The *Majority* will be governed by their interests. The Southern States are the *minority* in both Houses. Is it to be expected that they will deliver themselves bound hand & foot to the Eastern States, and enable them to exclaim, in the words of Cromwell on a certain occasion—‘the lord hath delivered them into our hands’” (2:451). Likewise, Edmund Randolph (Virginia) claimed, “[T]here were features so odious in the Constitution as it now stands, . . . [a] rejection of the motion would compleat the deformity of the system,” as he took “notice of the

argument in favor of giving the power over trade to a majority . . . [but] did not think there was weight in that consideration” (2:452–53).<sup>17</sup>

On the other side of the debate were the New England delegates, as well as the South Carolina delegates, Butler, C. C. Pinckney, and Rutledge. Given their reputed participation in the agreement, the positions of the three are of particular interest. Suggesting their involvement, each supported the northern position. Butler “differed from those who considered the rejection of the motion as no concession on the part of the S. States. He considered the interests of these and of the Eastern States, to be as different as the interests of Russia and Turkey. Being notwithstanding desirous of conciliating the affections of the East: States, he should vote agst. requiring  $\frac{2}{3}$  instead of a majority” (2:451). C. C. Pinckney argued that “it was the true interest of the S. States to have no regulation of commerce; but” citing the “liberal conduct towards the views of South Carolina, . . . no fetters should be imposed on the power of making commercial regulations” (2:449–50). Similarly, Rutledge believed “[a]t the worst a navigation act could bear hard a little while only on the S. States. . . . [Yet] we ought to take a permanent view of the subject” (2:452).<sup>18</sup>

The final vote to consider the two-thirds rule for enacting commercial regulations failed, 4–7, with all southern states voting yes except South Carolina (2:453). The committee report to strike out the two-thirds clause to pass a navigation act then passed unanimously.

#### ANALYSIS OF THE AGREEMENT AND CONSEQUENCES FOR THE SOUTH

What can be concluded about the Slave Trade Agreement? Southern delegates were nearly unanimous in their support for a prohibition on

17. Of the delegates who attended the Constitutional Convention until the end, neither Mason nor Randolph signed the final Constitution (nor did Massachusetts’s Elbridge Gerry).

18. Note that when Rutledge discusses C. Pinckney’s motion, he refers to a “navigation act,” while the actual motion was about “regulating the commerce” generally. While the initial British Navigation Acts enacted in the seventeenth century were about regulating ships and shipping per se, by the time of the Constitutional Convention in the late eighteenth century, various British Trade Acts also had been enacted (after circa 1700). The entire British system then became known as the British Navigation and Trade Acts, which included import and export duties designed to regulate commerce and trade. At the convention, the terms “navigation act” and “commercial regulation” appear to have been used interchangeably. Also note that when Randolph discusses the arguments of the opponents of C. Pinckney’s motion, he refers specifically to them wanting a majority power “over trade.” Moreover, it is clear from the actual wording of the motion that had the two-thirds requirement been adopted, it would have applied to taxes on foreign trade.

export taxes. But lower South delegates overwhelmingly supported allowing states to import slaves, while upper South delegates equally opposed slave imports. Southern delegates, with the notable exception of a handful of South Carolina delegates, adamantly supported a two-thirds vote for commercial regulation. Among southern states, only South Carolina voted against the two-thirds rule. Northern delegates adamantly opposed the export tax prohibition and slave importation, with the notable exception of a few Connecticut delegates who actively supported the lower South's position on both issues. Northern delegates steadfastly opposed the two-thirds vote for commercial regulation.

That the desires of southerners for an export tariff prohibition would be defeated not at the convention but by the national government's ability to enact import tariffs raises an important question. Namely, what was the position of the southern delegates on such tariffs? While they were suspicious of commercial regulation, they understood, as did everyone at the convention, the importance of tariff revenue for financing government expenditures (2:305–8). Support for import tariffs for government revenue was well established by the time of the convention. Mercantilists certainly supported tariffs. Adam Smith was an ardent free trader who argued that “were it possible to defray the expences of government by any other method, all duties, customs, and excise should be abolished” (Irwin 1996a, pp. 75–76). Smith, though, was willing to allow tariffs (1) when an industry was necessary for national defense and (2) when domestic production was subject to taxes not levied on foreign production. For Smith, two other considerations were the possibility of tariffs as bargaining chips in securing reciprocal tariff reductions and the speed of tariff reductions in moving to free trade when the reductions would initially cause severe dislocations (Irwin 1996a, pp. 81–82).<sup>19</sup> Edmund Burke, a contemporary of Smith, was a free-trade proponent who opposed tariffs; David Hume, another contemporary, appears to have had no clear stance on tariffs. Alexander Hamilton actively promoted import tariffs. And by early 1792, contrary to common belief, Congress adopted nearly all the tariff recommendations in Hamilton's 1791 *Report of Manufactures* (Irwin 2004).

Consequently, the southern delegates did not oppose import tariffs. Most southerners at the convention, however, with the notable exception of Rutledge and the other South Carolina delegates involved in the agree-

19. It is worth noting that tariff symmetry is not part of Adam Smith's free-trade position in *Wealth of Nations* (Smith 1776).

ment, sought a two-thirds vote for commercial regulation, but they did not prevail (2:449–53). So when the Committee of Detail proposed the congressional authority to enact duties and taxes, no explicit objections were made. Southerners were still concerned, though. Recalling a conversation with fellow Maryland delegate Daniel Carroll, James McHenry said, “We almost shuddered at the fate of the commerce of Maryland should we be unable to make any change in this extraordinary power. We agreed that our deputation ought never to assent to this article in its present form” (2:211, McHenry’s “Notes”).

When the tax clause was taken up August 16, Carroll “reminded the Convention of the great difference of interests among the States,” and other southerners insisted on an assurance against a tax on exports (2:305–8). Yet with no explicit objections to the congressional power to tax per se, the tax clause passed nearly unanimously; only Elbridge Gerry (Massachusetts) voted no (2:308).

In terms of the slave trade clause, delegates from the lower South wanted a prohibition on national government interference in the slave trade. The trade was important to Georgia and South Carolina, as each imported slaves during parts of the period from the end of the Revolutionary War to the first decade of the next century.<sup>20</sup> But how important were slave imports to the rest of the South? Apparently, not very. Of the slaves imported during the postwar period, nearly all were imported into Georgia and South Carolina. Recent estimates for 1783–1810 indicate that of the 130,600 slaves imported by the states involved in the Constitution’s drafting, South Carolina imported 97,900, Georgia imported 32,200, North Carolina imported 500, and Maryland and Virginia none.<sup>21</sup> In fact, at the time of the convention, the upper South,

20. Some may wonder whether Georgia and South Carolina’s slave importations during this period were inconsistent with their various state restrictions on the slave trade discussed above. According to Brady (1972) and Goldfarb (1994), the agreement gave the lower South the right to determine the extent of its involvement in the trade on its own terms for 20 years; the key issue for Georgia and South Carolina was national versus state restrictions on the slave trade. Brady and Goldfarb both contend that the lower South states wanted to be able to manipulate the slave trade to their advantage, that is, let slaves in when each state’s economy was expanding and keep them out when slaveholders wanted to boost slave values for financial reasons.

21. McMillin (2004, pp. 30–48 and tables 7 and 9) provides a detailed breakdown by year and by state of entry of slave imports for 1783–1810. In addition to the 130,600 slaves imported into the three southern states, another 39,700 slaves were imported into Florida, Mississippi, and Louisiana, which were Spanish and French territory at the time the Constitution was drafted. Fogel and Engerman (1974, pp. 24–25) provide an oft-cited indirect estimate of 291,000 slave imports into “North America” for 1780–1810, but their estimate does not include any year or state-by-state breakdown.

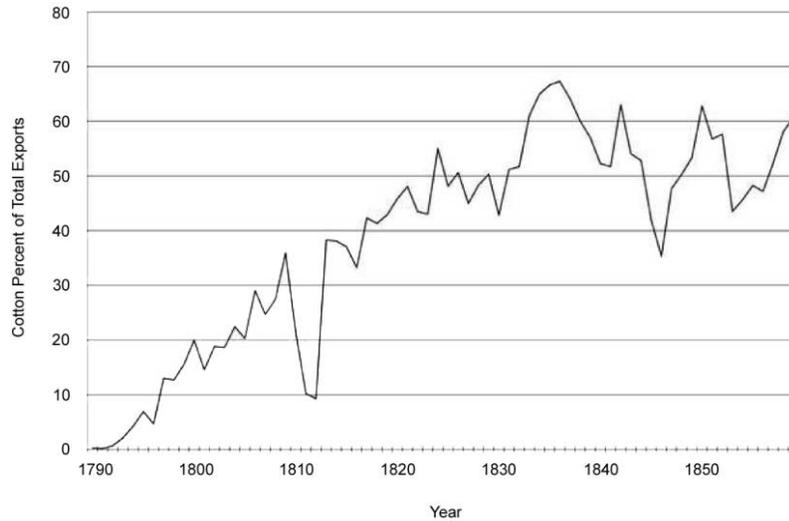
Virginia in particular, besides not importing any slaves, was exporting them to other areas of the South (Kulikoff 1983).

As the slave import figures indicate, the lower South gained from extending the restriction on prohibiting the slave trade to 1808. But the lower South framers gave up the two-thirds congressional vote to get the 20-year moratorium (and to keep the prohibition on export tariffs). Yet a supermajority vote for commercial regulations would have gone a long way toward closing the constitutional tax loophole hiding behind the export tariff prohibition.

So why would some southern delegates participate in the agreement? Given the export-driven nature of the southern economy, they focused on export issues, seemingly unaware of tariff symmetry. Perhaps they wanted to prohibit taxation of particular exports even if exports in general were still subject to *de facto* taxation. Perhaps they simply made a strategic mistake. We can never know for certain why they made the decisions they did. What we can say, though, is that the willingness of some lower South framers to trade the two-thirds vote to get the slave trade extension and retain the export tariff prohibition meant the overall South paid a very steep price for a 20-year restriction on any national prohibition on the slave trade. The slave trade clause apparently benefited two lower South states only, but the other components of the agreement cost the overall southern economy, both the upper and lower South. The unforeseen and unintended economic and political consequences of the decisions of the lower South participants in the agreement appear to have trumped their constitutional intentions.<sup>22</sup>

The U.S. economy underwent a significant transformation from 1787 to the Civil War. One major development was in the Northeast, as the economy shifted from the old colonial activities toward manufacturing, where cotton textiles played a leading role. Another development was in the South; the production of cotton became the primary driver of its economy. Cotton production measured in bales increased nearly 54-fold from 1801 to 1859 (U.S. Department of Commerce 1975, 1:518). Yet the southern economy was still export driven; only now cotton was the major export. Following the War of 1812, an average of about 75 percent of the total southern cotton output per year was exported. From 1820

22. Similarly, Brady (1972) and Goldfarb (1994) both maintain that lower South framers participated in the bargain because of the expected benefits to their states' dominant economic interests in keeping the slave trade open, even if only for 20 years. Yet neither recognizes that tariff symmetry and the simple-majority vote component of the bargain cost the overall southern economy.



**Figure 3.** Cotton export value as percentage of total U.S. export value

to 1860, total U.S. exports of goods and services increased over fivefold, of which about 90 percent were goods (U.S. Department of Commerce 1975, 2:865), and cotton exports from the South increased from about 40 percent to 60 percent of U.S. exports of goods (see Figure 3).<sup>23</sup>

The export data point toward the southern economy being the primary recipient of the adverse consequences of de facto export taxes. Once Congress began passing tariff legislation, the Slave Trade Agreement, economic events, and the importance of tariff revenue to the national government's finances combined to bring the adverse consequences of tariff symmetry home to the South. Early on, producers of tobacco, rice, and indigo faced consequences similar to those they would have faced had there been explicit export taxes: decreased profitability of southern exports and, consequently, decreased value of the inputs, including slaves, employed in export production. Events then shifted the adverse consequences to cotton following the development of the cotton

23. Cotton export value is from U.S. Department of Agriculture (1912, p. 5); U.S. Congress (1884, vol. 24, no. 49, pt. 2, table 2). Total export value is from U.S. Department of Commerce (1975, 2:885–86).

gin in 1793.<sup>24</sup> Tariff symmetry circumvented the supposed benefits of the constitutional safeguard that “No Tax or Duty shall be laid on Articles exported from any State” (U.S. Constitution, art. I, sec. 9, cl. 5).

As tariff rates rose from the end of the War of 1812 through the 1820s, southern economic interests came to realize that the southern framers’ aspirations were being thwarted as rising import tariffs were increasingly penalizing southern exports and the southern economy. A manifestation of this concern was the South Carolina–centered Nullification Crisis, which followed passage of what were then historically high tariff rates in the 1828 Tariff of Abominations. In his opposition to this bill, John C. Calhoun, perhaps the most prominent southern opponent of high tariffs, voiced southern concerns in clear terms of tariff symmetry:

[T]here is little or no difference between an export and an import duty. . . . To the growers of cotton, rice, and tobacco, it is the same, whether, the Government takes one-third of what they raise, for the liberty of sending the other two-thirds abroad, or one-third of the iron, salt, sugar, coffee, cloth, and other articles they may need in exchange, for the liberty of bringing them home. . . . A third of his labor is taken; yet the one is an import duty, and the other an export. . . . Whatever duty may be imposed . . . must fall on the foreign trade which remains, and be paid by the South almost exclusively—as much so, as an equal amount of duty on their exports (Lence 1992, pp. 317–18).

The South now understood what its delegates to the Constitutional Convention had missed.

As southerners came to the realization that import tariffs were de facto taxes on their exports, various issues emerged in the political arena. Among them was the tariff on imported British textiles. As some southerners now saw it, this tariff led to higher textile prices, thereby reducing the quantity demanded of textiles and, as a result, the quantity demanded of raw cotton. Reduced U.S. purchases of British textiles due to the import tariff left Britain, the South’s major market, with fewer dollars to purchase cotton (for a full exposition, see Walton and Rockoff 2002,

24. It is true, however, that later when the U.S. market position as a seller of cotton was quite strong (when the United States had some price-making capabilities in the world), foreigners would bear a percentage of the de facto export tax. But it is also true that the dollar magnitudes of cotton exports would eventually be substantial, so even if southerners were not bearing all of the de facto export tax, the absolute magnitudes that southern cotton producers faced would have been large.

pp. 221–23). Another issue that emerged was that some southerners came to view the tariff policy of protecting industrial interests in the Northeast by taxing southern exports as one that redistributed income from the South to the North. In a speech to the Senate, John C. Calhoun again put it this way: “It is well known that the Government has derived its revenue mainly from duties on imports. . . . [S]uch duties must necessarily fall mainly on the exporting States, and . . . the South, as the great exporting portion of the Union, has in reality paid vastly more than her due portion of the revenue. . . . [With] a far greater portion of the revenue . . . disbursed at the North, . . . the joint effect . . . has been to transfer a vast amount from South to North” (Rozwenc 1961, p. 5).

Has the South’s view of the effects of U.S. tariff policy that emerged during the antebellum period stood the test of time? In a survey of a sample of Economic History Association members, 93 percent agreed with the statement, “Antebellum tariffs harmed the southern states and benefited the Northern states” (Whaples 1995, p. 141). This consensus among economic historians has a long history, as reflected in textbooks published as long ago as the 1940s (Faulkner 1943, p. 173). More recent studies have only served to reinforce this long-held view.

Of particular importance are the studies of James (1978, 1981) and Harley (1992). One aspect of their research was to establish the effect of antebellum tariffs on national welfare. There is a long-held notion in international trade theory that under certain circumstances a nation with monopoly power in trade can raise its income with the optimal use of tariffs. Given that the United States dominated the world trade in raw cotton, both James and Harley assessed whether antebellum tariff policy exploited this monopoly power. James (1978, 1981) concluded that while the United States did not levy an optimal tariff rate, the tariffs levied did increase national income relative to what it would have been with free trade. On the other hand, by changing only a few of James’s specifications, Harley (1992) concluded that antebellum tariffs actually reduced national income relative to what it would have been with free trade. Thus, the jury is still out on the effect of antebellum tariffs on national income.

Nonetheless, both James and Harley agree that antebellum tariffs brought about a redistribution of income in the United States. James (1978) concluded that had antebellum tariffs been removed, the return to labor and capital in the import-competing industries would have declined. At the same time, “We find that the South was in fact injured by the tariff; the price of cotton and the return to slaveholding would

have both risen significantly with its elimination” (p. 253). Thus, “[t]he South . . . did have a correct perception of its economic interests” (p. 249). Harley (1992, pp. 397–99) drew the same conclusion: “Northern industrialists, with income primarily from capital, clearly gained from the tariff.” Moreover, “Southern planters, with their wealth primarily in slaves and land, would have gained noticeably from tariff removal.” Thus, “These distribution effects . . . fit well with the political debate in antebellum America.”<sup>25</sup>

Antebellum import tariffs not only protected northern industry and generated most of the revenue for the U.S. government, they did so largely at the expense of de facto taxes on southern exports. For the South, however, outside of arguing for lower import tariffs, little could be done. It had given up the two-thirds voting rule in exchange for the prohibition on explicit export taxes and a 20-year moratorium on the national government restricting slave importation. The slave trade moratorium had long since lapsed. All that remained was an emasculated export tariff prohibition. The agreement’s legacy was decades of ongoing North-South constitutional and fiscal conflict, a conflict that eventuated in southern secession and the Civil War.

#### CONGRESSIONAL TARIFF VOTES AND SECTIONAL REPRESENTATION

The Slave Trade Agreement was the final chapter in a long ongoing process to sort out, among other issues, what voting rule would be employed to implement congressional power over regulating commerce, including levying tariffs. Under the terms of the Articles of Confederation, unanimity among the states in the Continental Congress was required to levy tariffs. The result was that none were levied at the national level. Following the disastrous reliance on printing money to finance the Revolutionary War, congressional leaders began to consider a new voting rule for imposing tariffs. Congress considered but did not act on the recommendation of a report issued March 28, 1785 for a voting rule of nine out of the 13 states (Continental Congress 1785, 28:201, 29:

25. James (1978) and Harley (1992) are confirmations of the long-held view in the economic history literature that antebellum tariffs redistributed income from the South to the North. The only exception to this view was an earlier paper by Pope (1972), who attempted to demonstrate by using the notion of an economics paradox—the Metzler paradox—that tariffs redistributed income from the North to the South. Within a little over a year later, Baack and Ray (1974) showed the existence of the Metzler paradox during the antebellum period not to hold, thus reaffirming the long-held view.

533). The same nine out of 13 voting rule was recommended in a second committee report issued August 7, 1786 (31:495).

In 1787, among the several plans proposed at the Constitutional Convention was one offered by C. Pinckney. Under the Pinckney plan, a two-thirds vote was again proposed to enact tariffs. In his words, “I think it unwise ever to leave the decision to a mere majority: no Acts of this kind should pass, unless Two-Thirds of both Houses are of the opinion they are beneficial” (Farrand 1911, vol. 3, appendix, CXXIX, pp. 118). But such a view did not prevail at the convention, as other lower South delegates (including C. Pinckney’s older cousin) gave up the two-thirds vote for commercial regulations (settling for a simple majority) in return for support for the export tax prohibition and the slave trade clause.

Import tariffs were the largest source of pre-1860 national revenue every year except in 1836, when land sales generated more revenue (U.S. Department of Commerce 1975, 2:1106).<sup>26</sup> It follows that whatever the level of government spending, revenue from the de facto export tariff, contrary to the southern framers’ aspirations, would figure prominently in financing that spending. Accordingly, an examination of congressional tariff legislation (and sectional representation) during 1789–1860 indicates how the decision to give up the two-thirds vote was a fundamental mistake on the part of the South. (All major tariff legislation from 1789 to the early 1860s is described in Table A1.)

The Tariff of 1789 was the nation’s first tariff. While no roll call votes were recorded and no Senate debates survive, the surviving House debates indicate major sectional differences on the tariff.<sup>27</sup> From the outset, southern representatives were adamantly opposed to the tariff being used for protection.<sup>28</sup> Following the Tariff of 1789, the next major tariff bills were in 1816, 1824, and 1828; southerners strongly opposed and northerners supported all three tariffs, as duties were significantly increased in each. (The House and Senate roll call votes for each section

26. From 1866 to 1910, tariffs were the largest national revenue source in 37 of the 45 years. With the constitutional sanctioning of the income tax in 1913, tariffs’ importance for revenue receded.

27. As revenue legislation, tariff bills originated in the House and were forwarded to the Senate; the Senate often amended the House bills rather than taking a straight up or down vote. Consequently, because the votes in the two chambers were not always on identical legislation, some caution is warranted when drawing conclusions from the votes for particular tariffs.

28. For the 1789 House tariff debates, see *Annals of Congress* (1789), 1st Cong., 1st Sess., pp. 106–240, 303–30, 337–81.

of the nation on all major tariff legislation for 1816–60 are presented in Table 1.)<sup>29</sup> Given the modest reductions in the Tariff of 1832, southern representatives mildly supported the tariff, but southern senators opposed it. The South overwhelmingly supported the substantial reductions scheduled in the Compromise Tariff of 1833; northerners strongly opposed them in the House and split in the Senate; sectional differences over the tariff continued with the votes on the Tariff of 1842 and the 1846 Walker Tariff (see Table 1).<sup>30</sup> The votes on the Tariff of 1857 are somewhat problematic because the House and Senate versions of the tariff differed substantially. The House bill contained several instances of specific protection for northern manufacturing; the Senate attempted to significantly limit industry-specific protection.<sup>31</sup>

There was a near-unanimous North-South split over the sharp increase in duties in the Morrill Tariff, which passed the House on May 10, 1860, 1 year prior to southern secession and the Civil War. The handwriting was on the wall for the South. On the eve of secession, the North wanted substantially higher tariffs; the South did not. Given the simple-majority vote, the prospect confronting the South was that northerners would be able to pursue their agenda of high import tariffs well into the future.<sup>32</sup>

What would have happened in this tug of war over tariff policy had the South not given up the two-thirds vote? The southern states likely

29. The state-by-state votes for all members of Congress for all roll calls taken in the House and Senate on each of the major tariff bills during 1816–60 are available from the authors on request.

30. It is interesting to note that in the Senate in 1833, the adversaries Henry Clay (Kentucky) and John C. Calhoun (South Carolina) both voted in favor of the Compromise Tariff; in the Senate in 1842, Calhoun voted against the Tariff of 1842. It also is worth pointing out that in the House in 1846 both Jefferson Davis (Mississippi) and Andrew Johnson (Tennessee) voted in favor of the reductions of the Walker Tariff, while John Quincy Adams (Massachusetts) and Alexander Stephens of Georgia (later vice-president of the Confederacy) voted against them.

31. For the 1857 tariff debates in the House, see *Congressional Globe* (1857), 34th Cong., 3rd Sess., pp. 247, 315–22, 343–44, 491, 496–97, 573, 589–90, 642–44, 675–77, 703–04, 712, 733, 742–51, 773, 786–92. See also *Appendix to the Congressional Globe* (1857), 34th Cong., 3rd Sess., pp. 180–93, 215–93, 327–28. For the 1857 tariff debates in the Senate, see *Congressional Globe* (1857), 34th Cong., 3rd Sess., pp. 849, 882, 908. See also *Appendix to the Congressional Globe* (1857), 34th Cong., 3rd Sess., pp. 328–58.

32. This was confirmed after the North's victory over the South in the Civil War when average tariff rates on dutiable imports were maintained at their Civil War levels of between 40 and 50 percent for the remainder of the century and up to 1913 (except in 1873 and 1874, when they were 38 percent). Average tariff rates on total imports ranged between 20 and 40 percent (except in 1912 and 1913, when they were 18 percent). See U.S. Department of Commerce (1975, 2:888).

**Table 1.** Congressional Tariff Votes, 1816–60

States	1816 Tariff				1824 Tariff				1828 Tariff of Abominations			
	House Vote (April 8, 1816)		Senate Vote <sup>a</sup> (April 19, 1816)		House Vote (April 16, 1824)		Senate Vote (May 13, 1824)		House Vote (April 22, 1828)		Senate Vote (May 13, 1828)	
	Yeas	Nays	Yeas	Nays	Yeas	Nays	Yeas	Nays	Yeas	Nays	Yeas	Nays
New England	17	10	6	2	15	23	9	3	16	23	6	5
Middle Atlantic	44	12	8	2	60	15	5	4	57	12	8	2
North Central	4	0	2	0	18	0	7	0	17	1	8	0
Southern	23	32	9	3	14	64	4	14	15	58	4	14
Confederate only	17	31	7	3	3	64	2	14	3	58	2	14
Total, all states	88	54	25	7	107	102	25	21	105	94	26	21
	1833 Compromise Tariff											
	1832 Tariff				1833 Compromise Tariff				1842 Tariff			
	House Vote (June 28, 1832)		Senate Vote (July 9, 1832)		House Vote (February 26, 1833)		Senate Vote (March 1, 1833)		House Vote (August 22, 1842)		Senate Vote <sup>b</sup> (August 27, 1842)	
	Yeas	Nays	Yeas	Nays	Yeas	Nays	Yeas	Nays	Yeas	Nays	Yeas	Nays
New England	17	17	12	0	11	27	6	6	26	7	9	2
Middle Atlantic	52	18	10	0	24	47	5	5	54	13	7	2
North Central	18	0	7	1	10	8	2	5	14	13	4	5
Southern	45	30	3	15	74	3	16	0	10	70	4	14
Confederate only	36	27	2	14	62	3	14	0	6	62	2	14
Total, all states	132	65	32	16	119	85	29	16	104	103	24	23

	1846 Walker Tariff				1857 Tariff				1860 Morrill Tariff			
	House Vote (July 3, 1846)		Senate Vote (July 28, 1846)		House Vote (February 20, 1857)		Senate Vote <sup>e</sup> (February 26, 1857)		House Vote (May 10, 1860)			
	Yeas	Nays	Yeas	Nays	Yeas	Nays	Yeas	Nays	Yeas	Nays	Yeas	Nays
New England	9	19	2	10	27	0	7	3	27	0		
Middle Atlantic	18	46	2	8	46	8	1	3	47	4		
North Central	29	11	8	2	25	26	6	4	26	16		
Southern	58	19	16	7	12	50	18	2	5	43		
Western	...	...	...	...	0	0	1	0	0	1		
Confederate only	55	12	16	5	8	45	18	1	1	39		
Total, all states	114	95	28	27	110	84	33	12	105	64		

Sources. *Journal of the House of Representatives of the United States* (1789–1861), 14th Cong., 1st Sess., pp. 610–12 (1816 vote); 18th Cong., 1st Sess., pp. 428–29 (1824 vote); 20th Cong., 1st Sess., pp. 607–9 (1828 vote); 22nd Cong., 1st Sess., pp. 1023–24 (1832 vote); 22nd Cong., 2nd Sess., pp. 428–29 (1833 vote); 27th Cong., 2nd Sess., pp. 1385–87 (1842 vote); 29th Cong., 1st Sess., pp. 1029–30 (1846 vote); 34th Cong., 3rd Sess., pp. 503–4 (1857 vote); 36th Cong., 1st Sess., pp. 821–22 (1860 vote). *Journal of the Senate of the United States of America* (1789–1857), 14th Cong., 1st Sess., p. 505 (1816 vote); 18th Cong., 1st Sess., p. 401 (1824 vote); 20th Cong., 1st Sess., p. 410 (1828 vote); 22nd Cong., 1st Sess., p. 431 (1832 vote); 22nd Cong., 2nd Sess., p. 224 (1833 vote); 27th Cong., 2nd Sess., p. 629 (1842 vote); 29th Cong., 1st Sess., p. 454 (1846 vote); 34th Cong., 3rd Sess., pp. 266–67 (1857 vote).

Note. The state-by-state votes for all members of Congress for all roll call votes taken in the U.S. House and U.S. Senate for each tariff act shown are available from the authors on request.

<sup>a</sup> The 1816 Senate vote was not formally on final passage of the tariff bill, but it was the roll call on the final version of the bill. The roll call was on the motion “Shall the amendments be engrossed, and the bill read a third time as amended?” The next day the bill was read a third time after which the Senate, without a roll call, “Resolved, that this bill pass with amendments.”

<sup>b</sup> The 1842 Senate vote was not formally on final passage of the tariff bill, but it was the roll call on the final version of the bill. The roll call was on the motion “Shall the amendments be engrossed, and the bill read a third time?” The bill was then read a third time, after which the Senate, without a roll call, “Resolved, That this bill pass.”

<sup>c</sup> The 1857 Senate vote was not formally on final passage of the tariff bill, but it was the roll call on the final amendments to the bill. The said bill, as amended, was then read a third time, after which the Senate, without a roll call, “Resolved, That it pass with an amendment.”

could have substantially altered, if not vetoed, tariff policy viewed as contrary to their economic interests, as indicated by a state-by-state breakdown of the U.S. House representation for all Congresses for 1789–1861.<sup>33</sup> From the 1st to the 12th Congresses (1789–1813), the Confederate states' representation ranged between 33 and 35.8 percent. The Confederate states alone would have had veto power until 1813. From the 13th to the 27th Congresses (1813–43), the Confederate states' representation ranged between 31.3 and 31.9 percent. While it no longer would have possessed absolute veto power, including the border state of Maryland in the South's representation adds between 3.3 and 5 percent to each Congress, which would have given the South veto power.<sup>34</sup> After 1843 (28th–36th Congresses), the Confederate states' representation ranged between 27.7 and 30.4 percent. Again, including Maryland for this period adds between 2.5 and 2.7 percent to each Congress. Thus, the South would have had close to veto power even after 1843.

But more important is that the Senate representation of the Confederate states alone for every Congress during 1789–1861 was never less than 35 percent. Under a two-thirds voting rule, the Confederate states would have had veto power in the Senate; including Maryland would have given them a cushion in some Congresses. As a result, even if a tariff bill viewed contrary to southern interests had passed the House, it could have been vetoed in the Senate, or at least substantially altered through amendment.

The potential significance of the loss to the South by relinquishing the two-thirds voting rule can be seen in Figure 4, which illustrates the passage rates for all tariff votes listed in Table 1. For the nine House votes, the winning margin was less than two-thirds for all except the 1832 tariff vote. With a two-thirds voting rule, this means only one of the tariff acts would have been sent to the Senate. For the eight Senate votes, the winning margin was less than two-thirds for all except the 1816 and 1857 tariff votes. As Figure 4 indicates, a decision by the southern framers not to trade the two-thirds congressional voting rule would have greatly influenced the historical path of American tariff policy.<sup>35</sup>

33. The breakdown is available from the authors on request.

34. Although during the antebellum period Kentucky, Maryland, and later Missouri were considered border states in terms of slavery, only Maryland regularly sided with the South on the tariff.

35. Does the fact that the 1833, 1846, and 1857 tariff laws reduced tariff protection undermine the thrust of our argument? Not at all. Our point is that the Slave Trade

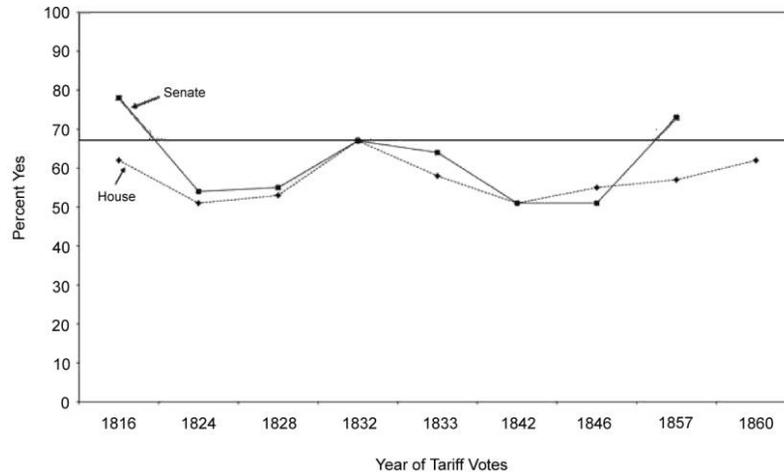


Figure 4. Passage rate of tariff votes

#### SOUTHERN INTERESTS DURING THE CONFEDERATE CONSTITUTION'S DRAFTING

Explicit evidence of southern interests comes from the Confederate constitution, further establishing the costs to southerners of the Slave Trade Agreement. This is important because when the Confederate constitution is compared to the U.S. Constitution, one is struck by the similarity, save some notable exceptions including issues involved in the Slave Trade Agreement. Indeed, as Holcombe (1991, p. 324) points out, “The Confederate Constitution can legitimately be viewed as an amended version of the U.S. Constitution.”

The question is, given the absence of northern interests, how did the Confederacy amend the U.S. Constitution’s treatment of tariffs, slave importation, and congressional voting rules? Concerning export tariffs, the Confederacy abolished the U.S. Constitution’s prohibition on export tariffs but required a two-thirds vote of both houses for their enactment (Confederate constitution, art. 1, sec. 9, cl. 6). Why the “amendment”? Southern domination of cotton production in the world market pre-

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Agreement, by offering southern export interests a hollow prohibition on explicit export duties in exchange for a legislative voting rule that made it easier to enact de facto export duties, did not serve southern interests well. Whatever the actual outcome of tariff legislation, a supermajority voting rule for enactment of import duties would have increased the voting strength of southern export interests, thereby reducing increases in tariff protection or augmenting any decreases.

sented the Confederacy with a situation in which it had obvious price-making capability when selling abroad. An explicit export tariff would be more capable of zeroing in on this price-making capability than its blunter alternative, namely, a *de facto*, across-the-board export tariff implicit in an existing set of import tariffs. Also, the experience under the U.S. Constitution had taught the Confederates that constitutional prohibitions on export tariffs were hollow anyway. If so, why not allow them?

Some might suggest that because export tariff revenue would accrue solely to the Confederate states, they were more open to export tariffs. This claim is tenuous. As long as import duties can be assessed, whether export duties can be enacted does not alter the revenue potential of taxing international trade. What Confederate independence would accomplish is to make the revenue potential of tariffs, import or export, more attractive to the Confederates.

More interesting is the treatment of import tariffs in the Confederate constitution. There were two important changes from the U.S. Constitution (see Confederate constitution, art. 1, sec. 8, cl. 1). In the Confederacy, import duties were to be for revenue purposes only and not promote or foster any branch of industry. It has been argued elsewhere that this clause instructs the Confederate Congress to weigh the benefits of tariff revenue against the adverse economic impact on others that arise from promoting or fostering a particular domestic industry. The clause thus was a *de facto* mandate for low import tariffs in the Confederate states (see McGuire and Van Cott 2002).

The treatment of the slave trade in the Confederate constitution is straightforward. The Confederates did not hesitate; they included an outright prohibition on international slave imports in their constitution (Confederate constitution, art. 1, sec. 9, cl. 1). With slaveowners dominating southern (Confederate) politics, a ban on the slave trade, which would have increased the value of southern slaves, made economic sense.

In the Confederate constitution, most voting rules stayed the same as in the U.S. Constitution. With the exception of the two-thirds rule to enact export taxes, the general powers to regulate commerce and to lay and collect taxes still required only a simple-majority vote. However, there was another important "amendment" that was destined to have a major effect on congressional decisions: the Confederate constitution inserted a clause concerning congressional appropriation of money from the Treasury. The new clause required a supermajority vote of both houses for the congressional appropriation of money from the Confed-

erate Treasury, with three exceptions—the most important being a direct request by a department head submitted by the president (Confederate constitution, art. 1, sec. 9, cl. 9). This was no minor change: it was a major constraint placed on the ability of the Confederate central government to spend government revenues. A two-thirds vote of both houses would have placed a significant constraint on increasing the scale of the government and on the ability of the Confederate Congress to redistribute wealth between the states of the Confederacy.

Overall, the Confederacy's "amendments" to the U.S. Constitution on issues related to the Slave Trade Agreement were important. They are not only strong evidence of southern interests; they also provide evidence of what the South believed went wrong in 1787.

#### CONCLUDING THOUGHTS AND IMPLICATIONS

What if economic principles end up trumping a brokered set of provisions in an otherwise successful constitution? Moreover, what if the interests of those who were instrumental in seeking the provisions bear a substantial burden as a consequence? And what if decades of constitutional and fiscal conflict ensue as a result? Issues surrounding these questions have organized our discussion of the constitutional agreement in 1787 on export tariffs, congressional voting rules, and the slave trade in the U.S. Constitution.

Heretofore, constitutional and historical scholars have focused on the Founding Fathers' aspirations for this agreement. Has this focus been an empty exercise? We do not believe so. The framers' aspirations on this and many other issues figured importantly in the U.S. Constitution's design and ratification. Nevertheless, an important parallel story lies behind the aspirations for the constitutional provisions that made up the Slave Trade Agreement. Indeed, other factors would doom southern aspirations for this agreement before the ink was even dry.

First, the constitutional prohibition on export tariffs, arguably the centerpiece of the agreement from the perspective of southern economic interests, was a triumph of form over substance. The Constitution's simultaneous authorization of import tariffs hid an unwritten mandate for *de facto* export tariffs. Second, when the lower South framers who participated in the agreement abandoned the supermajority congressional vote for commercial regulations, this exacerbated the Constitution's between-the-lines approval of *de facto* export tariffs. Easier-to-

enact import tariffs make a de facto export tariff regime easier to enact. Third, the slave trade clause, considered a crucial “part of one of the great constitutional compromises” (Walton and Rockoff 2002, p. 271), lacked substantive benefits for overall southern economic interests. Slave import data indicate that only two lower South states gained from the 20-year extension of the international slave trade. The bottom line is that the so-called “dirty compromise” was not so dirty after all because the South gained so little from it; neither was it much of a compromise because the South gave up so much for it.

The influence of the Slave Trade Agreement on the nation’s historical path before the Civil War was not unimportant. The direct aftermath was a 70-year de facto export tax regime and decades of ongoing North-South constitutional and fiscal conflict during which southern opposition to protective import tariffs flourished from the mid-1820s until southern secession in 1861. The culmination of the tariff struggles and sectional conflict was U.S. House passage of the Morrill Tariff in May 1860, which noticeably increased import duties, and southern secession and the Civil War in 1861, suggesting that the 1787 agreement played an important role in sectional tensions. The influence of the agreement on the nation’s historical path after the Civil War also was not unimportant. An important aspect of the aftermath of the North’s victory over the South in the Civil War was the nation’s “high-tariff” era, when tariff rates on dutiable goods remained highly protective at between 40 and 50 percent until the early twentieth century, at least in part because of the simple-majority voting rule.

Put bluntly, we suggest that more than a century of U.S. public finance and decades of ongoing North-South animosities can be understood as a consequence of one of the great but failed agreements during the Constitution’s drafting. An important lesson from our nation’s constitutional founding is that the optimal design of a constitution is no simple task. The ultimate lesson for the contemporary world is rather pessimistic, as evidenced by recent experiences in the European Union, Iraq, and elsewhere. In societies with widely divergent factions and interests, the necessary agreements for constitutional settlement will not be possible, or the agreements and deals that are made to achieve constitutional settlement will ultimately produce unforeseen and unintended consequences that are likely to doom the constitution over time.

**APPENDIX**

**Table A1.** Descriptions of Major Tariff Legislation, 1789–1865

Year	Name	Description
1789	Tariff of 1789	Primarily for revenue; some protection for “infant industries” (Washington administration)
1816	Tariff of 1816	First protective tariff; Clay and Calhoun supported it as part of American System; southern cotton growers opposed (Madison administration)
1824	Tariff of 1824	Further heightening of rates; growing opposition from South (Monroe administration)
1828	Tariff of Abominations	Higher protective measures for New England mills; southerners outraged, including Calhoun and South Carolina (J. Q. Adams administration)
1832	Tariff of 1832	Moderate reform returned rates to 1824 levels; unmoved, South Carolina sparked Nullification Crisis (Jackson administration)
1833	Compromise Tariff of 1833	Clay compromise; gradual reduction of rates over time to 1816 levels; New England states opposed (Jackson administration)
1842	Tariff of 1842	Upward revision for government revenue forced by depression following Panic of 1837 (Tyler administration)
1846	Walker Tariff	Democrats controlled Congress; rates sharply reduced as move toward tariff for revenue only; West supported tariff reduction in hope of selling grain abroad (Polk administration)
1857	Tariff of 1857	Downward tariff revision to almost free-trade status; North strongly opposed tariff reduction (Buchanan administration)
1860	Morrill Tariff	Upward tariff revision; returned overall tariff protection to its 1846 level; passed the House of Representatives on May 10, 1860, 1 year prior to secession and the Civil War (Buchanan administration)
1861–65	Wartime tariff acts (includes final passage of Morrill Tariff)	Steadily increased tariff protection to help fund Union war costs; South not represented in Congress during Civil War (Lincoln administration)

**Source.** U-S-History.com, Federal Government Tariff Table: Major Tariff and Trade Legislation, (<http://www.u-s-history.com/pages/h963.html>).

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