In this session, we will explore the role, if any, that natural law (particularly as articulated in the Declaration of Independence) plays or should play in constitutional interpretation.

Readings for January 22, 2019 Session:

Declaration of Independence, July 4, 1776

When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.

***

We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies solemnly publish and declare, That these United Colonies are, and of right ought to be, ***FREE AND INDEPENDENT STATES;*** that they are absolved from all allegiance to the British crown and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent states may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

[Signed by] JOHN HANCOCK [President]

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[*]Justice O'Connor announced the judgment of the Court and delivered an opinion, in which the Chief Justice, Justice Ginsburg, and Justice Breyer join.

Section 26.10.160(3) of the Revised Code of Washington permits "[a]ny person" to petition a superior court for visitation rights "at any time," and authorizes that court to grant such visitation rights whenever "visitation may serve the best interest of the child." Petitioners Jenifer and Gary Troxel petitioned a Washington Superior Court for the right to visit their grandchildren, Isabelle and Natalie Troxel. Respondent Tommie Granville, the mother of Isabelle and Natalie, opposed the petition. The case ultimately reached the Washington Supreme Court, which held that §26.10.160(3) unconstitutionally interferes with the fundamental right of parents to rear their children.

Tommie Granville and Brad Troxel shared a relationship that ended in June 1991. The two never married, but they had two daughters, Isabelle and Natalie. Jenifer and Gary Troxel are Brad's parents, and thus the paternal grandparents of Isabelle and Natalie. After Tommie and Brad separated in 1991, Brad lived with his parents and regularly brought his daughters to his parents' home for weekend visitation. Brad committed suicide in May 1993. Although the Troxels at first continued to see Isabelle and Natalie on a regular basis after their son's death, Tommie Granville informed the Troxels in October 1993 that she wished to limit their visitation with her daughters to one short visit per month.

In December 1993, the Troxels commenced the present action by filing, in the Washington Superior Court for Skagit County, a petition to obtain visitation rights with Isabelle and Natalie. The Troxels filed their petition under two Washington statutes, Wash. Rev. Code §§26.09.240 and 26.10.160(3) (1994). Only the latter statute is at issue in this case. Section 26.10.160(3) provides: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." At trial, the Troxels requested two weekends of overnight visitation per month and two weeks of visitation each summer. Granville did not oppose visitation altogether, but instead asked the court to order one day of visitation per month with no overnight stay. In 1995, the Superior Court issued an oral ruling and entered a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays.

Granville appealed, during which time she married Kelly Wynn. Before addressing the merits of Granville's appeal, the Washington Court of Appeals remanded the case to the Superior Court for entry of written findings of fact and conclusions of law. On remand, the Superior Court found that visitation was in Isabelle and Natalie's best interests:

> The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the Petitioners can provide opportunities for the children in the areas of cousins and music.
>
> …The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens' [*sic*] nuclear family. The court finds that the childrens' [*sic*] best interests are served by spending time with their mother and stepfather's other six children.

Approximately nine months after the Superior Court entered its order on remand, Granville's husband formally adopted Isabelle and Natalie.

The Washington Court of Appeals reversed the lower court's visitation order and dismissed the Troxels' petition for visitation, holding that nonparents lack standing to seek visitation under §26.10.160(3) unless a custody action is pending. In the Court of Appeals' view, that limitation on nonparental visitation actions was "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the care, custody, and management of their children." Having resolved the case on the statutory ground, however, the

[*] This opinion (copied from the court's slip opinion) has been edited, with most citations removed and some content removed for the sake of brevity.

Court of Appeals did not expressly pass on Granville's constitutional challenge to the visitation statute.

The Washington Supreme Court granted the Troxels' petition for review and, after consolidating their case with two other visitation cases, affirmed. The court disagreed with the Court of Appeals' decision on the statutory issue and found that the plain language of §26.10.160(3) gave the Troxels standing to seek visitation, irrespective of whether a custody action was pending. The Washington Supreme Court nevertheless agreed with the Court of Appeals' ultimate conclusion that the Troxels could not obtain visitation of Isabelle and Natalie pursuant to §26.10.160(3). The court rested its decision on the Federal Constitution, holding that §26.10.160(3) unconstitutionally infringes on the fundamental right of parents to rear their children. In the court's view, there were at least two problems with the nonparental visitation statute. First, according to the Washington Supreme Court, the Constitution permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child. Section 26.10.160(3) fails that standard because it requires no threshold showing of harm. Second, by allowing "'any person' to petition for forced visitation of a child at 'any time' with the only requirement being that the visitation serve the best interest of the child," the Washington visitation statute sweeps too broadly. "It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision." The Washington Supreme Court held that "[p]arents have a right to limit visitation of their children with third persons," and that between parents and judges, "the parents should be the ones to choose whether to expose their children to certain people or ideas." Four justices dissented from the Washington Supreme Court's holding on the constitutionality of the statute.

We granted certiorari, 527 U. S. 1069 (1999), and now affirm the judgment.

II

The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing. In many cases, grandparents play an important role. For example, in 1998, approximately 4 million children—or 5.6 percent of all children under age 18—lived in the household of their grandparents.

The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family. Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The States' nonparental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents. The extension of statutory rights in this area to persons other than a child's parents, however, comes with an obvious cost. For example, the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship. Contrary to Justice Stevens' accusation, our description of state nonparental visitation statutes in these terms, of course, is not meant to suggest that "children are so much chattel." Rather, our terminology is intended to highlight the fact that these statutes can present questions of constitutional import. In this case, we are presented with just such a question. Specifically, we are asked to decide whether §26.10.160(3), as applied to Tommie Granville and her family, violates the Federal Constitution.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." *Washington* v. *Glucksberg,* 521 U. S. 702, 719 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.*, at 720.

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce* v. *Society of Sisters,* 268 U. S. 510,

534–535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." We returned to the subject in *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, "*[a]ny person* may petition the court for visitation rights *at any time*," and the court may grant such visitation rights whenever "visitation may serve *the best interest of the child*." §26.10.160(3) (emphases added). That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. The Washington Supreme Court had the opportunity to give §26.10.160(3) a narrower reading, but it declined to do so.

Turning to the facts of this case, the record reveals that the Superior Court's order was based on precisely the type of mere disagreement we have just described and nothing more. The Superior Court's order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters. To be sure, this case involves a visitation petition filed by grandparents soon after the death of their son—the father of Isabelle and Natalie—but the combination of several factors here compels our conclusion that §26.10.160(3), as applied, exceeded the bounds of the Due Process Clause.

First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. As this Court explained in *Parham*:

> [O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations…. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." 442 U. S., at 602 (alteration in original) (internal quotation marks and citations omitted).

Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption. In reciting its oral ruling after the conclusion of closing arguments, the Superior Court judge explained:

> The burden is to show that it is in the best interest of the children to have some visitation and some quality time with their grand-

> parents. I think in most situations a commonsensical approach [is that] it is normally in the best interest of the children to spend quality time with the grandparent, unless the grandparent, [*sic*] there are some issues or problems involved wherein the grandparents, their lifestyles are going to impact adversely upon the children. That certainly isn't the case here from what I can tell.

The judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impact[ed] adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of *disproving* that visitation would be in the best interest of her daughters. The judge reiterated moments later: "I think [visitation with the Troxels] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children."

The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. See *Parham*, *supra*, at 602. In that respect, the court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters. In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

Finally, we note that there is no allegation that Granville ever sought to cut off visitation entirely. Rather, the present dispute originated when Granville informed the Troxels that she would prefer to restrict their visitation with Isabelle and Natalie to one short visit per month and special holidays. In the Superior Court proceedings Granville did not oppose visitation but instead asked that the duration of any visitation order be shorter than that requested by the Troxels. While the Troxels requested two weekends per month and two full weeks in the summer, Granville asked the Superior Court to order only one day of visitation per month (with no overnight stay) and participation in the Granville family's holiday celebrations. The Superior Court gave no weight to Granville's having assented to visitation even before the filing of any visitation petition or subsequent court intervention. The court instead rejected Granville's proposal and settled on a middle ground, ordering one weekend of visitation per month, one week in the summer, and time on both of the petitioning grandparents' birthdays. Significantly, many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party.

Considered together with the Superior Court's reasons for awarding visitation to the Troxels, the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters. The Washington Superior Court failed to accord the determination of Granville, a fit custodial parent, any material weight. In fact, the Superior Court made only two formal findings in support of its visitation order. First, the Troxels "are part of a large, central, loving family, all located in this area, and the [Troxels] can provide opportunities for the children in the areas of cousins and music." Second, "[t]he children would be benefitted from spending quality time with the [Troxels], provided that that time is balanced with time with the childrens' [*sic*] nuclear family." *Ibid.* These slender findings, in combination with the court's announced presumption in favor of grandparent visitation and its failure to accord significant weight to Granville's already having offered meaningful visitation to the Troxels, show that this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests. The Superior Court's announced reason for ordering one week of visitation in the summer demonstrates our conclusion well: "I look back on some personal experiences…. We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out." As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a "better" decision could be made. Neither the Washington nonparental visitation statute generally—which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted—nor the Superior Court in this specific case required anything more. Accordingly, we hold that §26.10.160(3), as applied in this case, is unconstitutional.

Because we rest our decision on the sweeping breadth of §26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." *Post*, at 9 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.[1]

Justice Stevens criticizes our reliance on what he characterizes as merely "a guess" about the Washington courts' interpretation of §26.10.160(3). *Post*, at 2. Justice Kennedy likewise states that "[m]ore specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself." *Post*, at 10. We respectfully disagree. There is no need to hypothesize about how the Washington courts *might* apply §26.10.160(3) because the Washington Superior Court *did* apply the statute in this very case. Like the Washington Supreme Court, then, we are presented with an actual visitation order and the reasons why the Superior Court believed entry of the order was appropriate in this case. Faced with the Superior Court's application of §26.10.160(3) to Granville and her family, the Washington Supreme Court chose not to give the statute a narrower construction. Rather, that court gave §26.10.160(3) a literal and expansive interpretation. As we have explained, that broad construction plainly encompassed the Superior Court's application of the statute. See *supra*, at 8–9.

There is thus no reason to remand the case for further proceedings in the Washington Supreme Court. In this case, the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial. As we have explained, it is apparent that the entry of the visitation order in this case violated the Constitution. We should say so now, without forcing the parties into additional litigation that would further burden Granville's parental right. We therefore hold that the application of §26.10.160(3) to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her daughters.

Accordingly, the judgment of the Washington Supreme Court is affirmed.

It is so ordered.

[1] All 50 States have statutes that provide for grandparent visitation in some form. *Citations omitted in this printing.*

Troxel v. Granville 530 U.S. 57 (2000)
Clarence Thomas, Concurring, Supreme Court of the United States

Justice Thomas, concurring in the judgment.

I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision. As a result, I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day.[1]

Consequently, I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. Our decision in *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties. On this basis, I would affirm the judgment below.

Troxel v. Granville 530 U.S. 57 (2000)
Antonin Scalia, Dissenting, Supreme Court of the United States

In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all Men…are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children[1]—two of them from an era rich in substantive due process holdings that have since been repudiated. See *Meyer* v. *Nebraska,* 262 U.S. 390, 399, 401 (1923); *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-535 (1925); *Wisconsin* v. *Yoder,* 406 U.S. 205, 232-233 (1972). Cf. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937) (overruling *Adkins* v. *Children's Hospital of D. C.*, 261 U.S. 525 (1923)). The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.

Judicial vindication of "parental rights" under a Constitution that does not even mention them requires (as Justice Kennedy's opinion rightly points out) not only a judicially crafted definition of parents, but also—unless, as no one believes, the parental

[1] This case also does not involve a challenge based upon the Privileges and Immunities Clause and thus does not present an opportunity to reevaluate the meaning of that Clause. See *Saenz* v. *Roe,* 526 U. S. 489, 527–528 (1999) (THOMAS, J., dissenting).

[1] Whether parental rights constitute a "liberty" interest for purposes of procedural due process is a somewhat different question not implicated here. *Stanley* v. *Illinois,* 405 U.S. 645 (1972), purports to rest in part upon that proposition, see *id*., at 651–652; but see *Michael H.* v. *Gerald D.*, 491 U.S. 110, 120–121 (1989) (plurality opinion), though the holding is independently supported on equal protection grounds, see *Stanley*, *supra*, at 658.

rights are to be absolute—judicially approved assessments of "harm to the child" and judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents. If we embrace this unenumerated right, I think it obvious—whether we affirm or reverse the judgment here, or remand as Justice Stevens or Justice Kennedy would do—that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.[2]

For these reasons, I would reverse the judgment below.

[2] I note that respondent is asserting only, *on her own behalf*, a substantive due process right to direct the upbringing of her own children, and is not asserting, *on behalf of her children*, their First Amendment rights of association or free exercise. I therefore do not have occasion to consider whether, and under what circumstances, the parent could assert the latter enumerated rights.

James Tallmadge's Amendment to the Bill Authorizing the People of the Territory of Missouri To Form a Constitution and State Government

(February 13, 1819)

And provided, That the further introduction of slavery or involuntary servitude be prohibited, except for the punishment of crimes, whereof the party shall have been fully [duly] convicted; and that all children born within the said State, after the admission thereof into the Union, shall be free at the age of twenty-five years.

Speech to the House of Representatives on the Bill Authorizing the People of the Territory of Missouri To Form a Constitution and State Government (excerpt)

Timothy Fuller, *Annals of Congress* (February 15, 1819)

Mr. FULLER, of Massachusetts, said, that in the admission of new States into the Union, he considered that Congress had a discretionary power. By the 4th article the 3d section of the Constitution, Congress are authorized to admit them but nothing in that section, or in any part of the Constitution, enjoins the admission as imperative, under any circumstances. If it were otherwise, he would request gentlemen to point out what were the circumstances or *conditions precedent*, which being found to exist, Congest *must* admit the new State. All discretion would, in such case, be taken from Congress, Mr. F said and deliberation would be useless. Then Hon. Speaker (Mr. Clay) has said that congress has no right to prescribe any condition whatever to the newly organized States, but must admit them by a simple act, leaving their sovereign unrestricted. [Here the SPEAKER explained—he did not intend to be understood in so broad a sense as Mr. F. stated.] With the explanation of the honorable gentleman, Mr. F. said, I still think his ground as untenable as before. We certainly have a right and our duty to the nation requires, that we should examine the actual state of things in the proposed State; and, above all, the Constitution expressly makes a REPUBLICAN form of government in the several States a fundamental principle, to be preserved under the sacred guarantee of the national legislature. [Art. 4, sec. 4.] It clearly, therefore, is the duty of Congress, before admitting a new sister into the Union, to ascertain that her constitution or form of government is republican.

Now, sir, the amendment proposed by the gentleman from New York, Mr. Tallmadge, merely requires that Slavery shall be prohibited in Missouri. Does this imply anything more than that its constitution shall be republican? The existence of slavery in any State is, so far, a departure from republican principles. The Declaration of Independence, penned by the illustrious statesman then, and at this time, a citizen of a State which admits Slavery, defines the principle on which our national and state constitutions are all professedly founded. The second paragraph of that instrument begins thus: "We hold these truths to be self-evident—that all men are created equal—that they are endowed by their Creator with certain unalienable rights; that among these are life, LIBERTY, and the pursuit of happiness." Since, then, it cannot be denied that slaves are men, it follows that they are, in a purely republican government, born free and are entitled to liberty and the pursuit of happiness. [Mr. Fuller was here interrupted by several gentlemen, who thought it improper to question in debate the republican character of the slave-holding States, which had also a tendency, as one gentleman (Mr. Colston, of Virginia) said, to deprive those States of the right to hold slaves as property, and he adverted to the probability that there might be slaves in the gallery, listening to the debate.] Mr. F. assured the gentleman that nothing was farther from his thoughts, than to question on that floor, the right of Virginia and other states, which held slaves when the Constitution was established, to continue to hold them. With that subject the National Legislature could not interfere, and ought not to attempt it. But, Mr. F. continued, if gentlemen will be patient, they will see that my remarks will neither derogate from the constitutional rights of the States, nor from a due respect to their several forms of government. Sir, it is my wish to allay, and not to excite local animosities, but I shall never refrain from advancing such arguments in debate as my duty requires, nor do I believe that the reading of our Declaration of Independence, or a discussion of republican principles on any occasion, can endanger the rights, or merit the disapprobation of any portion of the Union.

My reason, Mr. Chairman, for recurring to the Declaration of our Independence, was to draw from an authority admitted, in all parts of the Union, a definition of the basis of republican government. If then,

all men have equal rights, it can no more comport with the principles of a free government to exclude men of a certain color from the enjoyment of "liberty and the pursuit of happiness," than to exclude those who have not attained a certain portion of wealth, or a certain stature of body, or to found the exclusion on any other capricious or accidental circumstance. Suppose Missouri, before her admission as a State, were to submit to us her Constitution, by which no person could elect, or be elected to any office, unless he possessed a clear annual income of twenty thousand dollars; and suppose we had ascertained that only five, or a very small number of persons had such an estate, would this be anything more or less than a real aristocracy, under a form nominally republican Election and representation, which some contend are the only essential principles of republics, would exist only in name—a shadow without substance, a body without a soul. But if all the other inhabitants were to be made slaves, and mere property of the favored few, the outrage on principle would be still more palpable.

Yet, sir, it is demonstrable, that the exclusion of the black population from all political freedom, and making them the property of the whites, is an equally palpable invasion of right, and abandonment of principle. If we do this in the admission of new States, we violate the Constitution, and we have not now the excuse which existed when our National Constitution was established. Then, to effect a concert of interests, it was proper to make concessions. The States where slavery existed not only claimed the right to continue it, but it was manifest that a general emancipation of slaves could not be asked of them. Their political existence would have been in jeopardy; both masters and slaves must have been involved in the most fatal consequences.

To guard against such intolerable evils, it is provided in the Constitution, "that the migration or importation of such persons, as any of the existing States think proper to admit, shall not be prohibited till 1808." Art. 1, sec. 9. And it is provided elsewhere, that persons held to service y the laws of any State, shall be given up by other States, to which they may have escaped, etc. Art. 4, sec. 2.

These provisions effectually recognized the right in the States, which, at the time of framing the Constitution, held the blacks in Slavery, to continue so to hold them until they should think proper to meliorate their condition. The Constitution is a compact among all the States then existing, by which certain principles of government are established for the whole, and for each individual State. The predominant principle in both respects is, that ALL MEN are FREE, and have an EQUAL RIGHT To LIBERTY, and all other privileges; or, in other words, the predominant principle is REPUBLICANISM, in its largest sense. But, then, the same compact contains certain exceptions. The States then holding slaves are permitted, from the necessity of the case, and for the sake of union, to exclude the republican principle so far, and only so far, as to retain their slaves in servitude, and also their progeny, as had been the usage until they should think it proper or safe to conform to the pure principle, by abolishing Slavery. The compact contains on its face the general principle and the exceptions. But the attempt to extend Slavery to the new States, is in direct violation of the clause, which guarantees a republican form of government to all the States. This clause, indeed, must be construed in connection with the exceptions before mentioned; but it cannot, without violence, be applied to any other States than those in which Slavery was allowed at the formation of the Constitution.

The honorable speaker cites the first clause in the 2d section of the 4th article—"The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," which he thinks would be violated by the condition proposed in the Constitution of Missouri. To keep slaves—to make one portion of the population the property of another, hardly deserves to be called a privilege, since what is gained by the masters must be lost by the slaves. But, independently of this consideration, I think the observations already offered to the committee, showing that holding the black population in servitude is an exception to the general principles of the Constitution, and cannot be allowed to extend beyond the fair import of the terms by which that exception is provided, are a sufficient answer to the objection. The gentleman proceeds in the same train of reasoning, and asks, if Congress can require one condition, how many more can be required, and where these conditions will end? With regard to a republican constitution, Congress are obliged to require that condition, and that is enough for the present question; but I contend, further, that Congress has a right, at their discretion, to require any other reasonable condition. Several others were required of Ohio, Indiana, Illinois and Mississippi. The State of Louisiana, which was a part of the territory ceded to us at the same time with Missouri, was required to provide in her Constitution for trials by jury, the writ of habeas corpus, the principles of civil and religious liberty, with several others, peculiar to that State. These, certainly, are none of them more indispensable ingredients in a republican form of government than the equality of privileges of all the population; yet these have not been denied to be reasonable, and warranted by the National Constitution in the admission of new

States. Nor need gentlemen apprehend that Congress will set no reasonable limits to the conditions of admission. In the exercise of their constitutional discretion on this subject, they are, as in all other cases, responsible to the people. Their power to levy direct taxes is not limited by the Constitution. They may lay a tax of one million of dollars, or of a hundred millions, without violating the letter of the Constitution; but if the latter enormous and unreasonable sum were levied, or even the former, without evident necessity, the people have the power in their own hands—a speedy corrective is found in the return of the elections. This remedy is so certain, that the representatives of the people can never lose sight of it; and, consequently, an abuse of their powers to any considerable extent can never be apprehended. The same reasoning applies to the exercise of all the powers entrusted to Congress, and the admission of new States into the Union is in no respect an exception.

One gentleman, however, has contended against the amendment, because it abridges the rights of the slaveholding States to transport their slaves to the new States, for sale or otherwise. This argument is attempted to be enforced in various ways, and particularly by the clause in the Constitution last cited. It admits, however, of a very clear answer, by recurring to the 9th section of article 1st, which provides that "the migration or importation of such persons as any of the States then existing shall admit, shall not be prohibited by Congress till 1808." This clearly implies; that the migration and importation may be prohibited after that year. The importation has been prohibited, but the migration has not hitherto been restrained; Congress, however, may restrain it, when it may be judged expedient. It is, indeed, contended by some gentlemen, that migration is either synonymous with importation, or that it means something different from the transportation of slaves from one State to another. It certainly is not synonymous with importation, and would not have been used if it had been so. It cannot mean exportation, which is also a definite and precise term. It cannot mean the reception of free blacks from foreign countries, as is alleged by some, because no possible reason existed for regulating their admission by the Constitution; no free blacks ever came from Africa, or any other country, to this; and to introduce the provision by the side of that for the importation of slaves, would have been absurd in the highest degree. What alternative remains but to apply the term "migration" to the transportation of slaves from those States, where they are admitted to be held, to other States. Such a provision might have in view a very natural object. The price of slaves might be affected so far by a sudden prohibition to transport slaves from State to State, that it was as reasonable to guard against that inconvenience as against the sudden interdiction of the importation. Hitherto it has not been found necessary for Congress to prohibit migration or transportation from State to State. But now it becomes the right and duty of Congress to guard against the further extension of the intolerable evil and the crying enormity of Slavery.

The expediency of this measure is very apparent. The opening of an extensive slave market will tempt the cupidity of those who, otherwise, who otherwise perhaps might gradually emancipate their slaves. We have heard much, Mr. Chairman, of the Colonization Society; an institution which is the favorite of the humane gentlemen in the slaveholding States. They have long been lamenting the miseries of Slavery, and earnestly seeking for a remedy compatible with their own safety, and the happiness of their slaves. At last the great desideratum is found—a colony in Africa for the emancipated blacks. How will the generous intentions of these humane persons be frustrated, if the price of slaves is to be doubled by a new and boundless market! Instead of emancipation of the slaves, it is much to be feared, that unprincipled wretches will be found kidnapping those who are already free, and transporting and selling the hapless victims into hopeless bondage.

…Sir, I really hope that Congress will not contribute to discountenance and render abortive the generous and philanthropic views of this most worthy and laudable society. Rather let us hope, that the time is not very remote, when the shores of Africa, which have so long been a scene of barbarous rapacity and savage cruelty, shall exhibit a race of free and enlightened people—the offspring, indeed, of cannibals or of slaves; but displaying the virtues of civilization and the energies of independent freemen. America may then hope to see the development of a germ, now scarcely visible, cherished and matured under the genial warmth of our country's protection, till the fruit shall appear in the regeneration and happiness of a boundless continent.

One argument still remains to be noticed. It is said, that we are bound, by the treaty of cession with France, to admit the ceded territory into the Union, "as soon as possible." It is obvious that the President and Senate, the treaty-making power, cannot make a stipulation with any foreign nation in derogation of the constitutional powers and duties of this House, by making it imperative on us to admit the new territory according to the literal tenor of the phrase; but the additional words in the treaty, "according to the principles of the Constitution," put it beyond all doubt that no such compulsory admission was intended,

and that the republican principles of our Constitution are to govern us in the admission of this, as well as all the new States, in the national family.

Speech to the House of Representatives on the Bill Authorizing the People of the Territory of Missouri To Form a Constitution and State Government (excerpt)

James Tallmadge, *Annals of Congress* (February 16, 1819)

Mr. TALLMAGE, of New York, rose.—Sir, said he, it has been my desire and my intention to avoid any debate on the present painful and unpleasant subject. When I had the honor to submit to this House the amendment now under consideration, I accompanied it with a declaration, that it was intended to confine its operation to the newly acquired territory across the Mississippi; and I then expressly declared, that I would in no manner intermeddle with the slaveholding states, nor attempt manumission in any one of the original states in the Union. I even went further, and stated, that I was aware of the delicacy of the subject—and, that I had learned from southern gentlemen, the difficulties and the dangers of having free blacks intermingling with slaves; and, on that account, and with a view to the safety of the white population of the adjoining states, I would not even advocate the prohibition of slavery in the Alabama territory; because, surrounded as it was by slaveholding states, and with only imaginary lines of division, the intercourse between slaves and free blacks could not be prevented, and a servile war might be the result. While we deprecate and mourn over the evil of slavery, humanity and good morals require us to wish its abolition, under circumstances consistent with the safety of the white population. Willingly, therefore, will I submit to an evil, which we cannot safely remedy. I admitted all that had been said of the danger of having free blacks visible to slaves, and therefore did not hesitate to pledge myself, that I would neither advise nor attempt coercive manumission. But, sir, all these reasons cease when we cross the banks of the Mississippi, a newly acquired territory, never contemplated in the formation of our government, not included within the compromise or mutual pledge in the adoption of our Constitution—a territory acquired by our common fund, and ought justly to be subject to our common legislation.

…Sir, the honorable gentleman from Missouri, (Mr. Scott,) who has just resumed his seat, has told us of the ides of March, and has cautioned us to "beware of the fate of Caesar and of Rome." Another gentleman, (Mr. Cobb,) from Georgia, in addition to other expressions of great warmth, has said, that if we persist the Union will he dissolved; and, with a look fixed on me, has told us, "we have kindled a fire, which all the waters of the ocean cannot put out; which seas of blood can only extinguish!"

Language of this sort I as no effect on me; my purpose is fixed; it is interwoven with my existence; its durability is limited with my life; it is a great and glorious cause, setting bounds to a slavery, the most cruel and debasing the world has ever witnessed; it is the freedom of man; it is the cause of unredeemed and unregenerated human beings.

If a dissolution of the Union must take place, let it he so! If civil war, which gentlemen so much threaten, must come, I can only say, let it come! My hold on life is probably as frail as that of any man who now hears me; but, while that hold lasts, it shall be devoted to the service of my country—to the freedom of man. If blood is necessary to extinguish any fire which I have assisted to kindle, I can assure gentlemen, while I regret the necessity, I shall not forbear to contribute my mite. The violence, to which gentlemen have resorted on this subject, will not move my purpose, nor drive me from my place. I have the fortune and the honor to stand here as the representative of freemen, who possess intelligence to know their rights, who have the spirit to maintain them. Whatever might be my own private sentiments on this subject, standing here as the representative of others, no choice is left me. 1 know the will of my constituents, and, regardless of consequences, I will avow it—as their representative, I will proclaim their hatred to slavery, in every shape—as their representative, here will I hold my stand, till this floor, with the Constitution of my country which supports it, shall sink beneath me. If I am doomed to fall, I shall at least have the painful consolation to believe that I fall, as a fragment, in the ruins of my country.

…Extend your view across the Mississippi, over your newly acquired territory—a territory so far surpassing, in extent, the limits of your present country, that that country which gave birth to your nation, which achieved your Revolution, consolidated your Union, formed your Constitution, and has subsequently acquired so much glory, hangs but as an ap-

pendage to the extended empire over which your republican government is now called to bear sway. Look down the long vista of futurity; see our empire, in extent unequalled, in advantageous situation without a parallel, and occupying all the valuable part of our continent! Behold this extended empire, inhabited by the hardy sons of American freemen, knowing their rights, and inheriting the will to protect them—owners of the soil on which they live, and interested in the institutions which they labor to defend; with two oceans laving your shores, and tributary to your purposes; bearing on their bosoms the commerce of your people! Compared to yours, the governments of Europe dwindle into insignificance, and the whole world is without a parallel. But, reverse this scene; people this fair dominion with the slaves of your planters; extend slavery, this bane of man, this abomination of heaven, over your extended empire, and you prepare its dissolution; you turn its accumulated strength into positive weakness; you cherish a canker in your breast; you put poison in your bosom; you place a vulture on your heart—nay, you whet the dagger and place it in the hands of a portion of your population, stimulated to use it by every tie, human and divine! The envious contrast between your happiness and their misery, between your liberty and their slavery, must constantly prompt them to accomplish your destruction! Your enemies will learn the source and the cause of your weakness. As often as external dangers shall threaten, or internal commotions await you, you will then realize, that, by your own procurement, you have placed amidst your families, and in the bosom of your country, a population producing, at once, the greatest cause of individual danger and of national weakness. With this defect, your government must crumble to pieces, and your people become the scoff of the world!

We have been told, with apparent confidence, that we have no right to annex conditions to a State, on its admission into the Union; and it has been urged that the proposed amendment, prohibiting the further introduction of slavery, is unconstitutional. This position, asserted with so much confidence, remains unsupported by any argument, or by any authority derived from the Constitution itself. The Constitution strongly indicates an opposite conclusion, and seems to contemplate a difference between the old and the new States. The practice of the government has sanctioned this difference in many respects.

The third section of the fourth article of the Constitution says, "new States may be admitted by the Congress into this Union," and it is silent as to the terms and conditions upon which the new States may be so admitted. The fair inference from this silence is, that the Congress which might admit should prescribe the time and the terms of such admission. The tenth section of the first article of the Constitution says, "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 1808." The words "now existing" clearly show the distinction for which we contend. The word slave is no where mentioned in the Constitution; but this section has always been considered as applicable to them, and unquestionably reserved the right to prevent their importation into any new State before the year 1808.

Congress, therefore, have power over the subject, probably as a matter of legislation, but more certainly as a right, to prescribe the time and the condition upon which any new State may be admitted into the family of the Union. Sir, the bill now before us proves the correctness of my argument. It is filled with conditions and limitations. The territory is required to take a census, and is to be admitted only on condition that it have 40,000 inhabitants. I have already submitted amendments preventing the State from taxing the lands of the United States, and declaring that all navigable waters shall remain open to the other States, and be exempt from any tolls or duties. And my friend, (Mr. Taylor,) has also submitted amendments, prohibiting the State from taxing soldiers' lands for the period of five years. And to all these amendments we have heard no objection—they have passed unanimously. But now, when an amendment, prohibiting the further introduction of slavery, is proposed, the whole House is put in agitation, and we are confidently told that it is unconstitutional to annex conditions on the admission of a new State into the Union. The result of all this is, that all amendments and conditions are proper, which suit a certain class of gentlemen, but whatever amendment is proposed, which does not comport with their interests or their views, is unconstitutional, and a flagrant violation of this sacred charter of our rights. In order to be consistent, gentlemen must go back and strike out the various amendments to which they have already agreed. The Constitution applies equally to all, or to none.

We have been told, that this is a new principle for which we contend, never before adopted, or thought of. So far from this being correct, it is due to the memory of our ancestors to say, it is an old principle, adopted by them as the policy of our country. Whenever the United States have had the right and the power, they have heretofore prevented the extension of slavery. The States of Kentucky and Tennessee were taken off from other States, and were admitted into the Union without condition, because their lands were never owned by the United States. The territory

northwest of the Ohio is all the land which ever belonged to them. Shortly after the cession of those lands to the Union, Congress passed, in 1787, a compact which was declared to be unalterable, the sixth article of which provides that "there shall he neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment for crimes, whereof the party shall have been duly convicted. In pursuance of this compact, all the States formed from that territory have been admitted into the Union upon various considerations, and amongst which the sixth article of this compact is included as one.

Let gentlemen also advert to the laws for the admission of the State of Louisiana into the Union; they will find it filled with conditions. It was required not to form a constitution upon the principles of a republican government, but it was required to contain the "fundamental principles of civil and religious liberty." It was even required, as a condition of its admission, to keep its records and its judicial and legislative proceedings in the English language; and also to secure the trial by jury, and to surrender all claim to unappropriated lands in the territory, with the prohibition to tax any of the United States lands.

After this long practice and constant usage to annex conditions to the admission of a State into the Union, will gentlemen yet tell us it is unconstitutional, and talk of our principles being novel ad extraordinary? It has been said, that if this amendment prevails, we shall have a union of States possessing unequal rights. And we have been asked whether we wished to see such a "chequered union?" Sir, we have such a union already. If the prohibition of slavery is the denial of a right, and constitutes a chequered union, gladly would I behold such rights denied, and such a chequer spread over every State in the Union. It Is now spread over the States northwest of the Ohio, and forms the glory and the strength of those States. I hope It will be extended from the Mississippi to the Pacific Ocean.

We have been told that the proposed amendment cannot be received, because it is contrary to the treaty and cession of Louisiana.

> Article 3. The Inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages, and Immunities of citizens of the United States, and In the mean time they shall be maintained and protected in the free enjoyment of their liberty, their property, and the religion which they profess.

I find nothing, said Mr. T., in this article of the treaty, incompatible with the proposed amendment. The rights, advantages, and Immunities of citizens of the United States are guaranteed to the inhabitants of Louisiana. If one of them should choose to remove into Virginia, he could take his slaves with him; but If he removes to Indiana, or any of the States northwest of the Ohio, he cannot take his slaves with him. If the proposed amendment prevails, the inhabitants of Louisiana, or the citizens of the United States, can neither of them take slaves Into the State of Missouri. All, therefore, may enjoy equal privileges. It is a disability, or what I call a blessing, annexed to the particular district of country, and in no manner attached to the Individual.

But, said Mr. T., while I have no doubt that the treaty contains no solid objection against the proposed amendment, if it did, it would not alter my determination on the subject. The Senate, or the treaty-making power of our government, have neither the right nor the power to stipulate, by a treaty, the terms upon which a people shall be admitted into the Union. This House have a right to be heard on the subject. The admission of a State into the Union is a legislative act, which requires concurrence of all the departments of legislative power. It is an important prerogative of this House, which I hope will never be surrendered.

The zeal and the ardor of gentlemen, in the course of this debate, has induced them to announce to this House, that, if we persist and force the State of Missouri to accede to the proposed amendment, as the condition of her admission into the Union, she will not regard it, and, as soon as admitted, will alter her constitution, and introduce slavery into her territory. Sir, I am not now prepared, nor is it necessary to determine, what would be the consequence of such a violation of faith—of such a departure from the fundamental condition of her admission into the Union. I would not cast upon a people so foul an imputation, as to believe they would be guilty of such fraudulent duplicity. The States northwest of the Ohio have all regarded the faith and the condition of their admission; and there is no reason to believe the people of Missouri will not also regard theirs. But, sir, whenever a State admitted into the Union shall disregard and set at nought the fundamental conditions of its admission, and shall, in violation of all faith, undertake to levy a tax upon lands of the United States, or a toll upon their navigable waters, or introduce slavery, where Congress have prohibited it, then it will be in time to determine the consequence. But, sir, if the threatened consequences were known to be the certain result, yet would I insist upon the proposed

amendment. The declaration of this House, the declared will of the nation, to prohibit slavery, would produce its moral effect, and stand as one of the brightest ornaments of our country.

…Sir, in the course of the debate on this subject, we have been told that, from the long habit of the southern and western people, the possession of slaves has become necessary to them, and an essential requisite in their living. It has been urged, from the nature of the climate and soil of the southern countries, that the lands cannot be occupied or cultivated without slaves. It has been said that the slaves prosper in those places, and that they are much better off there than in their own native country. We have even been told that, if we succeed, and prevent slavery across the Mississippi, we shall greatly lessen the value of property there, and shall retard, for a long series of years, the settlement of that country.

Sir, said Mr. T., if the western country cannot be settled without slaves, gladly would I prevent its settlement till time shall be no more. If this class of arguments is to prevail, it sets all morals at defiance, and we are called to legislate on the subject, as a matter of mere personal interest. If this is to be the case, repeal all your laws prohibiting the slave trade; throw open this traffic to the commercial states of the East; and, if it better the condition of these wretched beings, invite the dark population of benighted Africa to be translated to the shores of Republican America. But, sir, I will not cast upon this or upon that gentleman an imputation so ungracious as the conclusion to which their arguments would necessarily tend. I do not believe any gentleman on this floor could here advocate the slave trade, or maintain, in the abstract, the principles of slavery. I will not outrage the decorum, nor insult the dignity of this House, by attempting to argue in this place, as an abstract proposition, the moral right of slavery. How gladly would the "legitimates of Europe chuckle," to find an American Congress in debate on such a question.

As an evil brought upon us without our own fault, before the formation of our government, and as one of the sins of that nation from which we have revolted, we must of necessity legislate upon this subject. It is our business so to legislate, as never to encourage, but always to control this evil; and, while we strive to eradicate it, we ought to fix its limits, and render it subordinate to the safety of the white population, and the good order of civil society.

On this subject the eyes of Europe are turned upon you. You boast of the freedom of your constitution and your laws; you have proclaimed, in the Declaration of Independence, "That all men are created equal; that they are endowed by their Creator with certain unalienable rights—that amongst these are life, liberty, and the pursuit of happiness; and yet you have slaves in your country. The enemies of your government, and the legitimates of Europe, point to your inconsistencies, and blazon your supposed defects. If you allow slavery to pass into territories where you have the lawful power to exclude it, you will justly take upon yourself all the charges of inconsistency; but, confine it to the original slaveholding States, where you found it at the formation of your government, and you stand acquitted of all imputation.

This is a subject upon which I have great feeling for the honor of my country. In a former debate upon the Illinois constitution, I mentioned that our enemies had drawn a picture of our country, as holding in one hand the Declaration of Independence, and with the other brandishing a whip over our affrighted slaves. I then made it my boast that we could cast back upon England the accusation, and that she bad committed the original sin of bringing slaves Into our country. Sir, I have since received through the post office, a letter, post-marked in South Carolina, and signed, "A Native of England," desiring that, when I had occasion to repeat my boast against England, I would also state that she had atoned for her original sin, by establishing in her slave colonies a system of humane laws, meliorating their condition and providing for their safety, while America had committed the secondary sin of disregarding their condition, and had even provided laws by which it was not murder to kill a slave. I felt the severity of the reproof; I felt for my country. I have inquired on the subject, and I find such were formerly the laws in some of the slaveholding States; and that even now, in the State of South Carolina, by law, the penalty of death is provided for stealing a slave, while the murder of a slave is punished by a trivial fine. Such is the contrast and the relative value which is placed, in the opinion of a slaveholding State, between the property of the master and the life of a slave.

Gentlemen have undertaken to criminate and to draw odious contrasts between different sections of our country—I shall not combat such arguments; I have made no pretence to exclusive morality on this subject, either for myself or my constituents; nor have I cast any imputations on others. On the contrary, I hold that mankind under like circumstances are alike, the world over. The vicious and unprincipled are confined to no district of country, and it is for this portion of the community we are bound to legislate. When honorable gentlemen inform us, we overrate the cruelty and the dangers of slavery, and tell us that their slaves are happy and contented, and would even contribute to their safety, they tell us but very little: they

do not tell us, that while their slaves are happy, the slaves of some depraved and cruel wretch, in their neighborhood, may not be stimulated to revenge, and thus involve the country in ruin. If we had to legislate only for such gentlemen as are now embraced within my view, a law against robbing the mail would be a disgrace upon the nation; and, as useless, I would tear it from the pages of your statute book; yet sad experience has taught us the necessity of such laws—and honor, justice, and policy, teach us the wisdom of legislating to limit the extension of slavery.

…Sir, there is yet another, and an important point of view, in which this subject ought to be considered. We have been told by those who advocate the extension of slavery into the Missouri, that any attempt to control this subject by legislation, is a violation of that faith and mutual confidence, upon which our Union was formed, and our Constitution adopted. This argument might be considered plausible, if the restriction was attempted to be enforced against any of the slaveholding states, which had been a party in the adoption of the Constitution. But it can have no reference or application to a new district of country, recently acquired, and never contemplated in the formation of government, and not embraced in the mutual concessions and declared faith, upon which the Constitution was adopted. The Constitution provides, that the representatives of the several states to this House, shall be according to their number, including three-fifths of the slaves in the respective states. This is an important benefit yielded to the slaveholding states, as one of the mutual sacrifices for the Union. On this subject I consider the faith of the Union pledged; and I never would attempt coercive manumission in a slaveholding state.

But none of the causes which induced the sacrifice of this principle, and which now produce such an unequal representation of the free population of the country, exists as between us and the newly acquired territory across the Mississippi. That portion of country has no claims to such an unequal representation, unjust in its results upon the other states. Are the numerous slaves in extensive countries, which we may acquire by purchase, and admit as states into the Union, at once to be represented on this floor, under a clause of the Constitution, granted as a compromise and a benefit to the southern states, which had borne part in the Revolution? Such an extension of that clause in the Constitution, would be unjust in its operations, unequal in its results, and a violation of its original intention. Abstract from the moral effects of slavery, its political consequences, in the representation under this clause of the Constitution, demonstrate the importance of the proposed amendment.

Sir, I shall bow in silence to the will of the majority, on which ever side it shall be expressed; yet I confidently hope that majority will be found on the side of an amendment, so replete with moral consequences, so pregnant with important political results.

Federalist No. 43 (Madison)

To the People of the State of New York:

THE FOURTH class comprises the following miscellaneous powers:

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6. "To guarantee to every State in the Union a republican form of government; to protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be SUBSTANTIALLY maintained. But a right implies a remedy; and where else could the remedy be deposited, than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort, than those of a kindred nature. "As the confederate republic of Germany," says Montesquieu, "consists of free cities and petty states, subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland. " "Greece was undone," he adds, "as soon as the king of Macedon obtained a seat among the Amphictyons." In the latter case, no doubt, the disproportionate force, as well as the monarchical form, of the new confederate, had its share of influence on the events. It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves.

These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be, of course, bound to pursue the authority. But the authority extends no further than to a GUARANTY of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for antirepublican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.

A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to secure each State, not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors. The history, both of ancient and modern confederacies, proves that the weaker members of the union ought not to be insensible to the policy of this article. Protection against domestic violence is added with equal propriety. It has been remarked, that even among the Swiss cantons, which, properly speaking, are not under one government, provision is made for this object; and the history of that league informs us that mutual aid is frequently claimed and afforded; and as well by the most democratic, as the other

cantons. A recent and well-known event among ourselves has warned us to be prepared for emergencies of a like nature. At first view, it might seem not to square with the republican theory, to suppose, either that a majority have not the right, or that a minority will have the force, to subvert a government; and consequently, that the federal interposition can never be required, but when it would be improper. But theoretic reasoning, in this as in most other cases, must be qualified by the lessons of practice. Why may not illicit combinations, for purposes of violence, be formed as well by a majority of a State, especially a small State as by a majority of a county, or a district of the same State; and if the authority of the State ought, in the latter case, to protect the local magistracy, ought not the federal authority, in the former, to support the State authority? Besides, there are certain parts of the State constitutions which are so interwoven with the federal Constitution, that a violent blow cannot be given to the one without communicating the wound to the other. Insurrections in a State will rarely induce a federal interposition, unless the number concerned in them bear some proportion to the friends of government. It will be much better that the violence in such cases should be repressed by the superintending power, than that the majority should be left to maintain their cause by a bloody and obstinate contest. The existence of a right to interpose, will generally prevent the necessity of exerting it.

Is it true that force and right are necessarily on the same side in republican governments? May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succors from foreign powers, as will render it superior also in an appeal to the sword? May not a more compact and advantageous position turn the scale on the same side, against a superior number so situated as to be less capable of a prompt and collected exertion of its strength? Nothing can be more chimerical than to imagine that in a trial of actual force, victory may be calculated by the rules which prevail in a census of the inhabitants, or which determine the event of an election! May it not happen, in fine, that the minority of CITIZENS may become a majority of PERSONS, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the constitution of the State has not admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous scenes of civil violence, may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves. In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms, and tearing a State to pieces, than the representatives of confederate States, not heated by the local flame? To the impartiality of judges, they would unite the affection of friends. Happy would it be if such a remedy for its infirmities could be enjoyed by all free governments; if a project equally effectual could be established for the universal peace of mankind! Should it be asked, what is to be the redress for an insurrection pervading all the States, and comprising a superiority of the entire force, though not a constitutional right? the answer must be, that such a case, as it would be without the compass of human remedies, so it is fortunately not within the compass of human probability; and that it is a sufficient recommendation of the federal Constitution, that it diminishes the risk of a calamity for which no possible constitution can provide a cure. Among the advantages of a confederate republic enumerated by Montesquieu, an important one is, "that should a popular insurrection happen in one of the States, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound. "

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PUBLIUS

Fragment on the Constitution and Union

Abraham Lincoln (January 1861)

All this is not the result of accident. It has a philosophical cause. Without the Constitution and the Union, we could not have attained the result; but even these, are not the primary cause of our great prosperity. There is something back of these, entwining itself more closely about the human heart. That something, is the principle of "Liberty to all"—the principle that clears the path for all—gives hope to all—and, by consequence, enterprize, and industry to all.

The expression of that principle, in our Declaration of Independence, was most happy, and fortunate. Without this, as well as with it, we could have declared our independence of Great Britain; but without it, we could not, I think, have secured our free government, and consequent prosperity. No oppressed, people will fight, and endure, as our fathers did, without the promise of something better, than a mere change of masters.

The assertion of that principle, at that time, was the word, "fitly spoken" which has proved an "apple of gold" to us. The Union, and the Constitution, are the picture of silver, subsequently framed around it. The picture was made, not to conceal, or destroy the apple; but to adorn, and preserve it. The picture was made for the apple—not the apple for the picture.

So let us act, that neither picture, or apple shall ever be blurred, or bruised or broken.

That we may so act, we must study, and understand the points of danger.

The Declaration of Independence As Viewed From the States

John C. Eastman, *Claremont Review of Books Online* (March 27, 2014)

The Declaration of Independence. It is the grand embodiment of the principles upon which this nation was founded, the document that defined what President Abraham Lincoln would later describe as his "ancient faith." It is the very first document printed in the United States Statutes at Large, described there by Congress as one of the organic laws of the United States. All this majesty; all this reverence; yet its principles are believed to be unenforceable in the courts of law. The Declaration "is not a legal prescription conferring powers upon the courts," U.S. Supreme Court Justice Antonin Scalia recently wrote in a dissenting opinion in Troxel v. Granville (2000). In other words, no matter how self-evidently true the principles articulated in the Declaration of Independence or how much mandated by the laws of nature and of nature's God, they do not have the status of positive law that can be enforced by the courts of law.

Whether or not Justice Scalia's opinion is correct with respect to the federal government, it is clearly not correct in the state government arena. Beginning with the admission of Nebraska and Nevada during the Civil War, Congress has specifically required as a condition of admission to statehood that state constitutions conform to the principles of the Declaration of Independence. These enabling acts, the State constitutions drafted in conformity to them, and the statutes or presidential proclamations acknowledging admission together give the Declaration of Independence the sanction of positive law, at least in the eleven states admitted to the Union since the Civil War that were statutorily bound by the principles of the Declaration.

For those states not explicitly bound by the Declaration itself, the language used in many of them—the northern state constitutions prior to the Civil War, and the reconstruction constitutions adopted by the former confederate states after the Civil War—explicitly tracked the principled language of the Declaration of Independence. Thus, these States are also bound by the *principles* of the Declaration.

More significantly, the historical development of state constitutional provisions that parallel the language of the Declaration demonstrates, or at least strongly suggests, that specific textual provisions of the Constitution were themselves designed to codify the principles of the Declaration and make them enforceable as positive law. The provisions of Article IV (and later of the Fourteenth Amendment) guaranteeing the "privileges and immunities" of citizenship and a "republican" form of government simply cannot be understood apart from the natural law principles of the Declaration from which they were drawn. Although the courts have effectively treated these provisions as nonjusticiable, they are clearly commands of the positive law, and not just some vague, philosopher's ideal of higher justice such as is recognized in the Ninth Amendment of the U.S. Constitution and parallel state constitutional provisions. But

now that I have boldly stated my conclusion, let us wend our way through the state constitutions to see how I arrived at that somewhat controversial destination.

The Declaration in the Original States

No state was expressly bound by the Declaration of Independence, as such, until Nevada and Nebraska were admitted to the Union during the Civil War, but most of the original colonies, in one way or another, relied heavily upon the Declaration's principles to legitimize the revolutionary steps they were taking in writing new constitutions and erecting new governments. And in many, those principles were included in the state's own Declaration of Rights, and therefore given the same judicially-enforceable status as other provisions found in the declarations of rights.

Just what are the *principles* of the Declaration upon which several of the states, in whole or in part, relied? There are several:

- First, that all men, all human beings,[1] are created equal, a proposition portrayed in the Declaration as self-evidently true, knowable both by human reason and by divine revelation (the "nature and nature's God" of the Declaration's opening paragraph);
- Second, that all human beings are endowed by their Creator with certain unalienable rights merely by virtue of the fact that they are equally created by God as human beings and not as lesser animals;
- Third, that among these unalienable rights are the rights of life, liberty, and the pursuit of happiness, which was Thomas Jefferson's eloquent rephrasing of John Locke's statement of the fundamental rights in life, liberty, and property that at once elevated and expanded Locke's conception of rights;
- Fourth, that the sole purpose of government is to secure these unalienable rights;
- Fifth, that the only just governments are those founded on the consent of the governed, which means that ultimately political power originates from the people; and
- Sixth, that whenever government becomes destructive of the ends for which it was formed, namely, the securing of the people's unalienable rights, the people have the right to alter or abolish the government, replacing it with a new government that they believe will be most likely to secure their rights.

Indeed, these *principles* began appearing in state constitutions even before the Declaration of Independence was issued.

On January 5, 1776, for example—six months before the Declaration of Independence was adopted—New Hampshire became the first of the American colonies to draft its own constitution. The New Hampshire delegates who drafted that constitution took care to point out at the outset of the document that they had been "chosen and appointed by the free suffrages of the people" of New Hampshire "and authorized and empowered by them…to establish some form of government…for the preservation of peace and good order, and for the security of the lives and properties of the inhabitants of this colony," thus demonstrating the same belief in the necessity of the consent of the people that would soon be articulated in the Declaration of Independence itself (New Hampshire Const. of 1776, Preamble). This was necessary, they asserted, because the British Parliament had deprived the people of New Hampshire of their "natural and constitutional rights and privileges" and because the departure of the governor and legislative council had left the colony "destitute of legislation" and without courts "to punish criminal offenders," leaving "the lives and properties of the honest people" of New Hampshire "liable to the machinations and evil designs of wicked men." In other words, because the existing government in England had failed to protect the *natural* rights of the people in New Hampshire (as well as rights and privileges to which they were entitled as Englishmen), the people of New Hampshire exercised their natural right to alter or abolish that government, and consented to the establishment of a new government that would more adequately fulfill the fundamental purpose of government.

The Provincial Congress of South Carolina adopted a constitution on March 26, 1776, complaining in the preamble that the British Parliament had imposed taxes "without the consent and against the will of the colonists," a situation that the Congress claimed (ironically, given later developments) "would at once reduce them from the rank of freemen to a state of the most abject slavery." New Jersey, too, on the eve of the signing of the Declaration of Independence, adopted a new constitution with a preamble noting that the King's authority, derived from

[1] The Declaration uses the language of "all men," of course, and not "all human beings," but here, the word "man" is used generically and not as a gender-specific reference. For an extended discussion of this point, see Thomas G. West, Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America (Lanham, Md.: Rowman & Littlefield, 1997).

the people *by compact*, was now dissolved, thus subscribing both to the principle of consent and the right to alter or abolish government.

But by far the most influential of the early enactments was the Virginia Declaration of Rights, drafted by George Mason and adopted by the Virginia Constitutional Convention on June 12, 1776. The first three sections of the Virginia Declaration of Rights contain, in substantially similar form, all six of the *principles* described above that just three weeks later would appear from the hand of Thomas Jefferson in the Declaration of Independence:

> Section 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.
>
> Section 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.
>
> Section 3. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually securing against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

Jefferson's explicit references to the "Creator" are missing—all men are "by nature" equal in the Virginia version rather than "created" equal in the Declaration's version—but the elaboration on the equality principle in the Virginia document provides great insight into just what Jefferson meant when he described the proposition that all men are created equal as a "self-evident truth."

Although that great moral truth would later be called a "self-evident lie" by Senator Pettit of Indiana and a proposition disproved by modern science by Confederate Vice-President Alexander Stevens,[2] both tapping into the obvious fact that human beings are self-evidently not at all equal in outward appearance, physical attributes, or intellectual capacity, Mason's rendition makes clear that such facial inequalities were beside the point. The logical self-evidence of Jefferson's proposition is rooted in the nature of what it is to be a human being, and that nature can only be understood in contrast to the nature from which it is derived (the "Creator," in Jefferson's language) and the nature of lesser animals from which it must be distinguished. It is in this sense—according to the "nature" of the thing—that all men are created equal, which is to say, equally free and independent. Jefferson's proposition is a self-evident truth rather than a self-evident lie once one understands the meaning of the word "man," which is to say, his "nature."

From this initial, self-evident proposition flow the remaining principles, found in both the Virginia Declaration of Rights and the Declaration of Independence, albeit in slightly different terms. Because human beings are created equally free and independent, they have—inherent in their nature and endowed by their Creator—the fundamental, inalienable right to protect that free and independent nature, or, in other words, the right to life and to liberty, and the right to acquire property in things that are the fruit of their own free and independent labor and to otherwise pursue their own individual happiness. They do this by establishing governments, whose sole purpose is to protect these equal and unalienable rights of equal human beings. Moreover, that being the purpose of government, the equal human beings for whose benefit the government is instituted must necessarily retain the right to alter or abolish their government whenever, in their judgment, it ceases to fulfill its purpose.

[2] Alexander Stephens, Cornerstone Speech (March 21, 1861), reprinted in Alexander H. Stephens in Public and Private with Letters and Speeches 721-722 (Philadelphia: National Publishing, 1866); see also Harry V. Jaffa, A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War 222-23 (Roman & Littlefield, 2000). Stephens' reference to modern science probably refers to Darwin's Origin of the Species, which had been published in 1859. Jefferson himself toyed with the idea of the inequality of the races three-quarters of a century earlier: "I advance it therefore as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstance, are inferior to the whites in the endowments both of body and mind." Thomas Jefferson, Notes on the State of Virginia, Query XIV, reprinted in Thomas Jefferson, Writings 256, 270 (Merrill D. Peterson, ed., Library of America, 1984). But for Jefferson, any inequality in physical or intellectual attributes that might exist between the races was only "a powerful obstacle" to emancipation, not a ground for denying that both races were equally human, and therefore endowed with the same inalienable rights.

Finally, all such governments, in order to be legitimate, must be based on consent, for it is precisely because human beings are equal—that is, neither gods nor beasts—that it is impermissible for any human being to rule another without that other's consent (as God may rule man, or man may rightly rule beasts), or for one man to take from another the fruit of that other's own labor. Thus, in the Virginia formulation, "all power is vested in, and consequently derived from, the people" (Va. Decl. of Rights, § 2), and in the Declaration's language, the governments that are instituted by men to secure their natural rights "deriv[e] their just powers from the consent of the governed."

Shortly after the Declaration of Independence was adopted, most of the remaining states drafted constitutions that likewise relied upon some or all of the key principles of the Declaration. North Carolina and Maryland both recognized the consent principle in the constitutions they enacted in the fall of 1776: "That all political power is vested in and derived from the people only" (North Carolina Const. of 1776, Decl. of Rights, §1); and "that all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole" (Maryland Const. of 1776, Decl. of Rights, Art. I.). Maryland also explicitly recognized the right of the people "to reform the old or establish a new government" "whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual" (Art. IV).

Pennsylvania's constitution, also adopted in the fall of 1776, included a more comprehensive reiteration of the Declaration's principles, very similar to that which had been adopted by Virginia three months earlier:

> I. That all men are born equally free and independent, and have certain natural, inherent, and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety….
>
> IV. That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.
>
> V. That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or sett (sic) of men, who are a part only of that community; And that the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.

Massachusetts similarly codified the principles of the Declaration in its Constitution of 1776, and when that Constitution was rejected (largely because it was drafted by a convention that had not been elected for the purpose, and thus made without the consent of the people), those principles were carried over to the constitution ultimately adopted in 1780. In the constitution's preamble, Massachusetts acknowledged that "whenever th[e] great objects [of government] are not obtained, the people have a right to alter the government," and also asserted that government is grounded in consent: "The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." Then, in Article I of its own Declaration of Rights, Massachusetts articulated a statement of equality and inalienable rights strikingly similar to the lead sentence of the second paragraph of the Declaration of Independence: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

New Hampshire included similar provisions in a Declaration of Rights when it replaced its original, pre-Declaration constitution with new constitutions in 1784 and 1792:

> Article I. All men are born equally free and independent; therefore, all government of right originates from the people, is founded on consent, and instituted for the general good.
>
> Article II. All men have certain natural, essential, and inherent rights; among which are—the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness.

> Article X.… whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old, or establish a new government.

Thus, the principles of the Declaration were common currency in the early state constitutions, but it was not until Georgia enacted its new constitution in February 1777 that the Declaration was actually mentioned, and then only with a passing reference in the preamble to the fact that independence had been declared. New York went further a few months later, reprinting the entire Declaration of Independence in the preamble to the constitution it adopted in April 1777. And South Carolina, like Georgia, mentioned the Declaration in passing when it replaced its temporary constitution of 1776 with a permanent constitution in 1778. In all three cases, though, the Declaration was mentioned in a "whereas" clause, suggesting a mere recitation of fact rather than judicially enforceable principle, much like the recitations of principle in the first constitutions in New Hampshire, South Carolina, New Jersey, North Carolina, and Maryland appear simply as a rationale for separation from the existing government.[3] Yet the fact remains that in Virginia, Pennsylvania, and Massachusetts—the most influential of the original states—as well as in New Hampshire, the substance of the Declaration's principles appears in those states' declarations of rights, alongside other statements of rights that had customarily been enforceable in the courts, such as the right to trial by jury, the freedom of speech and press, and the free exercise of religion. It is thus likely that these statements of principle were also understood to be judicially enforceable.

What is implicit in the constitutions of Virginia, Pennsylvania, Massachusetts, and New Hampshire was explicit in the first constitution enacted by Vermont in 1777 and again in the Vermont Constitutions of 1786 and 1793.[4] The preamble to the Vermont Constitution of 1777 contained the now-familiar statements that governments are formed, by consent, to protect the natural rights of the people and that the people have a right to change their government whenever it fails to meet those ends:

> Whereas, all government ought to be instituted and supported, for the security and protection of the community, as such, and to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever those great ends of government are not obtained, the people have a right, by common consent, to change it, and take such measures as to them may appear necessary to promote their safety and happiness.

But Vermont also reiterated these principles in a separate Declaration of Rights, declaring in Section 1: "That all men are born equally free and independent, and have certain, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety…." and further declaring in Section 6:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family or set of men, who are a part only of that community; and that the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish, government, in such manner as shall be, by that community, judged most conducive to the public weal.

As with Virginia, Pennsylvania, Massachusetts, and New Hampshire, these sentiments were expressed alongside other statements of rights commonly enforced by the courts. But Vermont went further, as if to emphasize the point. Section 43 of the main body of the Vermont Constitution provided: "The declaration of rights is hereby declared to be a part of the Constitution of this State, and ought never to be violated, on any pretense whatsoever." Although Section 43 does not expressly mention judicial review, the fact that it appears in the main body of the Constitution refutes any contention that the Declaration of Rights was designed to be merely a hortatory statement of aspirations.

[3] Of the remaining original states, Connecticut did not adopt a new constitution until 1818, and Rhode Island did not adopt a new constitution until 1842. Delaware adopted a constitution in 1776, but its accompanying Declaration of Rights and Fundamental Rules is not readily available. The preamble to the Delaware Constitution of 1792 contains many of the same principles discussed above, however: That all men by nature have the rights of life, liberty, and property; that just governments are established with the consent of the people; and that the people have a right to alter their constitution as circumstances require. Delaware Const. of 1792, Preamble.

[4] Vermont was not admitted to the Union until 1791, when a lingering dispute between New Hampshire, Massachusetts, and New York about whether Vermont was a separate territory or instead part of one of the aforementioned states was finally resolved. Nevertheless, it operated as an independent state in the interim, adopting its own constitutions in 1777 and 1786, and another in 1793 after it was admitted to the Union.

The Vermont Constitutions of 1777, 1786, and 1793 are significant for another reason, as well, for they explicitly drew the conclusion logically compelled by the statement in the Declaration of Independence that "all men are created equal." "All men" meant *all* human beings, Negro slaves included, and the Vermont constitutions powerfully made the point by concluding the statement of equality and inalienable rights in Section 1 of its Declaration of Rights with the following sentence:

> Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave or apprentice, after he arrives to the age of twenty-one years, nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by law, for the payment of debts, damages, fines, costs, or the like.

Of course, not every State subscribed to all of these principles in their own state constitutions, a fact that was the source of a growing discord that ultimately and tragically culminated in the Civil War. In its 1790 Constitution, for example, South Carolina limited its Due Process protections to "freemen," and apart from the Virginia Constitution of 1776, penned at the height of devotion to the Declaration's principles, not one of the early southern state constitutions mentioned equality. But the very fact that the slave states of the South felt compelled to ignore certain of the Declaration's principles in their own state constitutions in order to avoid highlighting the conflict between those principles and their own "peculiar" institution of slavery demonstrates just how uniform was the view among the founders—northern and southern alike—that the Declaration meant exactly what it said. It was a statement of universal truth, applicable to all men at all times, not just to white male Europeans of property, as the Supreme Court would later infamously hold in the *Dred Scott* case (1856), and a meaningless proposition, as twentieth century historian Carl Becker would later claim in an influential book that would misinform our understanding for generations. We will encounter many more examples of southern states trying to avoid the clear import of the Declaration's equality principle as they enacted new constitutions in the first half of the nineteenth century, but before that, there is another story to be told—that of the noble Northwest Ordinance and its ignoble sister south of the river Ohio.

The Declaration in the Northwest Territory

In 1783, after years of wrangling over the disposition of the western lands, Virginia ceded to the United States her claims to all land northwest of the Ohio River, a tract of land that would eventually become the states of Ohio, Indiana, Illinois, Michigan, and Wisconsin. The terms of the Virginia Act of Cession, which were scrupulously followed by Congress in the years to come, included this provision: "that the States so formed shall be distinct *republican* States, and admitted members of the Federal Union, having the *same rights* of sovereignty, freedom, and independence as the other States (emphasis added)." The two ideas codified in this Act of Cession are extremely important in the historical development of the United States as one nation composed of free and equal states rather than a nation composed of original states and a collection of colonial territories. The first would find its way into the U.S. Constitution of 1787, as the Republican Guaranty clause of Article IV, section 4. The second would come to be known as the Equal Footing Doctrine, pursuant to which every new state would be admitted to the Union on an "equal footing" with the original states (see, e.g., *United States v. Alaska*, 521 U.S. 1, 5 (1997); *Lessee of Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228-229 (1845)).

More importantly for present purposes, the two doctrines expressed in the Virginia Act of Cession shed a great deal of light on the role the Declaration of Independence and its principles—particularly the principle of equality and its derivative, consent—were intended to play in the expansion of the American regime to new territories in the West. The constitutional guaranty of a republican form of government, it was soon to be argued by those opposed to slavery, required Congress to deny admission to states that permitted slavery, while those in favor of slavery argued that the equal footing doctrine guaranteed to each new state the same constitutional protections of slavery as the original states enjoyed. The actions taken by Congress with respect to the Northwest Territory pretty clearly demonstrate that the former argument was more consistent with the thinking of the founders, but the latter argument would eventually prevail, placing the nation on the tragic road that culminated in the Civil War.

"The distinguishing feature" of a republican form of government, according to the Supreme Court, "is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves" (*Duncan v. McCall*, 139 U.S. 449, 461 (1891). In other words, in an extended territory, republican government is the *means* by which the Declaration's *principle* of consent by the governed is implemented. And because

the principle of consent is mandated by the self-evidence of the proposition that all men are created equal, the constitutional guaranty of a republican form of government is analytically incompatible with the existence of slavery. As James Madison, himself a slave-owner, wrote on the eve of the federal constitutional convention of 1787, "Where slavery exists the republican Theory becomes still more fallacious."

This conclusion, logically compelled by the nature of the matter, was given effect in the Northwest Ordinance, the ordinance adopted by the Continental Congress on July 13, 1787, "for the government of the territory of the United States northwest of the river Ohio" or, in other words, for the territory that had been ceded to the United States by Virginia in 1783. Article VI of that Ordinance provided: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crime, whereof the party shall have been duly convicted…."

The preamble to the Ordinance makes clear that the prohibition on slavery was not adopted simply because, as some historians would later argue, the soil and climate of the region would not support a slave economy. On the contrary, the preamble demonstrates that the anti-slavery provision was mandated by the *principles* upon which the nation and existing states had been founded, namely, the principles of the Declaration of Independence:

> And for extending the *fundamental principles* of civil and religious liberty, which form the basis whereon these republics [i.e. the existing states], their laws and constitutions, are erected; *to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory*; to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest: It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent (emphasis added)…

In other words, the anti-slavery article, like the other of the Ordinance's six articles, was to be considered an "article of compact" that was unalterable unless by the common consent of the original states and the people and states in the new territory because it was mandated by the fundamental principles of civil and religious liberty upon which the existing states were founded and which were to serve as the foundation of government in the new states as well.

The language of the preamble also gives lie to the later claim that the Equal Footing doctrine guaranteed to new states the same right to permit slavery as existed in the original states. The new states to be formed in the Northwest Territory were expressly guaranteed the right to enter the union on an "equal footing" with the original states, but the prohibition on slavery was to remain an unalterable principle, established as the basis for "all laws, constitutions, and governments" that would thereafter be formed in the territory.

While the hyper-technical argument might be (and eventually was) advanced that the prohibition applied only to all territorial governments, not to governments formed after admission to statehood, the word "constitutions" undermines that contention. Because the territories were governed by act of Congress until admission to statehood, they did not have separate constitutions; thus, the word "constitutions" must necessarily have been intended to apply to the constitutions of state governments even after admission to the Union.

Moreover, when the eastern portion of the territory petitioned for statehood in 1802, Congress mandated in the Ohio Enabling Act both that the new state "shall be admitted into the Union upon the same footing with the original States in all respects whatever" and that the new state's constitution and government "shall be republican, and not repugnant to the ordinance of the thirteenth of July, one thousand seven hundred and eighty-seven, between the original States and the people and States of the territory northwest of the river Ohio."[5]

The people of Ohio (and subsequently the people of each of the other Northwest Territory states) complied with that mandate by incorporating into Article VIII, Section 2 of their new constitution the requirement that "[t]here shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted." This provision was necessary, according to the Ohio constitution, in order "That the

[5] Congress imposed the same terms on each of the other states that were admitted to the Union from the Northwest Territory: Indiana in 1816, Illinois in 1818, Michigan in 1837, and Wisconsin in 1848.

general, great, and essential principles of liberty and free government may be recognized, and forever unalterably established." Section 1 of the same Article contained the litany of principles drawn from the Declaration of Independence: the equality of all men; the doctrine of inalienable rights, including the rights to life, liberty, property, and the pursuit of happiness; the requirement of consent; and the right to alter or abolish governments when necessary to effect the legitimate ends of government. Moreover, section 1 expressly tied these principles to the idea of "republican" government:

> That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety; and every free *republican government* being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties and securing their independence; to effect these ends, they have at all times a complete power to alter, reform, or abolish their government, whenever they may deem it necessary (emphasis added).

Equal footing, then, did not allow new states to avail themselves of the slavery compromises in the Constitution at the expense of the republican *principle*. Those compromises were to be cabined to the original states.

This conclusion is actually compelled not just by the theory of the Declaration, but by the explicit terms of both the Northwest Ordinance and the Constitution itself. The Northwest Ordinance's anti-slavery article, Article VI, contains a proviso clause, elided over above: "[P]rovided always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid."

As the emphasized words make clear, the obligation to return fugitive slaves expressly extended only to slaves escaping from the "original states." Article I, section 9 of the United States Constitution contains a similar limitation: "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 1808 (emphasis added)."[6] Thus, the Northwest Ordinance was a large step toward full vindication of the Declaration's principles, and the fact that the anti-slavery provisions were deemed in that document to be required by the *principles* upon which the nation was founded and also mandated by the requirement of republican government mandated by the Virginia Act of Cession bolsters the contention that those principles were themselves codified as positive law in the U.S. Constitution's Republican Guaranty clause.

Provisional Government in the Territories South of the Ohio River

The force and full import of the Northwest Ordinance was not long in coming, particularly in the South. When North Carolina ceded its western lands—present-day Tennessee—to the United States in 1789, it did so on condition that Congress would govern the area "in a manner similar to that which they support in the government west of the Ohio," protecting "the inhabitants against any enemies" and never barring or depriving them "of any privileges which the people in that territory west of the Ohio enjoy" (Act of April 2, 1790). Unlike the Virginia cession of several years earlier, though, the North Carolina cession contained a proviso: "Provided always, That no regulations made or to be made by Congress shall tend to emancipate slaves." Congress accepted North Carolina's conditions, and promptly provided by law for territorial government in the areas south of the Ohio River that followed the Northwest Ordinance "except so far as is otherwise provided in the conditions expressed" in the North Carolina cession—in other words, except for the prohibition on slavery (Act of May 26, 1790, §2).[7]

The North Carolina cession condition was repeated by South Carolina and Georgia, when those states ceded land that would eventually become the states of Alabama and Mississippi. The Georgia cession, for example, specifically required that the Northwest Ordinance "shall, in all its parts, extend to the territory contained in the present act of cession, *that article only excepted which forbids slavery*." Following the South Carolina cession, Congress authorized the President to establish a territorial government for the Mississippi Territory, "in all respects

[6] The Constitution's own fugitive slave clause, Art. IV, § 2, cl. 3, is not textually limited to the original states, but the greater power to exclude slaves from new states altogether would render such a protection unnecessary.

[7] It is worth noting that Congress itself, perhaps recognizing that the protection of slavery was contrary to republican principles, did not mention the protection of slavery, but rather chose simply to codify that protection only be referring obliquely to the North Carolina cession document.

similar to that now exercised in the territory northwest of the Ohio, *excepting and excluding the last article of the [Northwest Ordinance]*" (Act of April 7, 1798, §3, emphasis added).[8]

The states admitted to the Union out of these territories—Tennessee, Mississippi, and Alabama, as well as Kentucky, which was originally part of Virginia—were thus all exempted from the anti-slavery provision of the Northwest Ordinance, yet they were nevertheless admitted as though they were in compliance with the Republican Guaranty clause. Kentucky was admitted to statehood, for example, despite a provision in Article IX of its 1792 Constitution restricting the ability of the legislature even to emancipated slaves. Kentucky itself dealt with the facial contradiction with the Declaration's equality principle by simply "declaring" in Article XII, section 1 that "all men, *when they form a social compact*, are equal (emphasis added)"—a far cry from the self-evident proposition that all men are created equal contained in the Declaration of Independence.[9] Similarly, the Mississippi and Alabama Enabling Acts of 1817 and 1819, respectively, provided that the new government, "when formed, shall be republican, and not repugnant to the principles of the [Northwest Ordinance], *so far as the same has been extended to the said territory by the articles of agreement between the United States and the State of Georgia,* or of the Constitution of the United States" (Acts of March 1, 1817 and March 2, 1819, emphasis added). Both states complied with the terms of their respective enabling act with constitutions that, like Kentucky's, not only permitted slavery but severely restricted the ability of the legislature even to emancipate slaves; both states' own Declarations of Rights recognized only that "all *freemen*, when they form a social compact, are equal in rights."[10]

As should be clear, these subtle restatements of the Declaration's equality principle were made not because slavery was thought compatible with the Declaration, but precisely because it was understood that slavery was not compatible with the proposition that all men are created equal.[11] Alexander Stephens would confirm this point in his Cornerstone Speech, delivered after the South had seceded but before the Civil War had begin with the firing on Fort Sumter:

> The prevailing ideas entertained by [Jefferson] and by most of the leading statesmen of the time of the formation of the old constitution, were that the enslavement of the African was in violation of the laws of nature: that it was wrong in principle, socially, morally, and politically.

Once again, the actual record from the states proves Chief Justice Taney wrong.

Congress promptly admitted Mississippi to statehood on an equal footing with the existing states, noting in the Act of Admission that Mississippi's Constitution and state government was "republican and *in conformity to the principles of the Northwest Ordinance*" (Act of Dec. 10, 1817, emphasis added). Apparently, someone forgot to read all the way through to the end of the Northwest Ordinance, where Article VI expressly prohibited slavery. The mistake was corrected in the Alabama Act of Admission, in which Congress recognized only that the Alabama constitution and state government "is republican, and in conformity to the principles of the [Northwest Ordinance], *so far as the same have been extended to the said territory by the articles of agreement between the United States and the state of Georgia*" (Act of Dec. 14, 1819, emphasis added).

In light of these actions by Congress, it might be contended that Congress simply did not believe that the Republican Guaranty clause had anything to say about slavery or equality. A better reading, though—given the countervailing precedent in the Northwest Territory—is that these states, carved as they were out of original states, were all entitled to avail themselves of the Constitution's compromises with slavery to the same extent as were the original states from whence they came, and were to that extent exempt from the republican principle that had been applied to the Northwest Territory states. In other words, with respect to these states, Congress was duty bound—constitutionally, as well as contractually, by

[8] Again, it is worth noting how Congress could not bring itself to mention the word "slavery," but extended the protections mandated by the Georgia and South Carolina cessions only with an oblique reference.

[9] Kentucky was even clearer when it adopted a new constitution seven years later, providing, "That all *free* men, when they form a social compact, are equal." Kentucky Const. of 1799, Art. I, §1.

[10] Both constitutions also recognized the right of the people to alter or abolish their government, not when it becomes destructive of the inalienable rights that it was established to protect, but whenever the people think it "expedient."

[11] This point was made explicitly during debate over the Oregon Constitution of 1857. Oregon adopted language that paralleled the language first adopted a half century earlier by Kentucky, and opponents argued that the language "ignores all natural, unalienable rights inherited by man from his great Father. It acknowledges no rights outside of conventional compacts. The great fact enunciated by our forefathers, that 'all men enjoyed the unalienable right to life, liberty and the pursuit of happiness,' and that 'governments are instituted among men to secure these rights,' is purposely lost sight of by this Constitution." Editorial, "The Constitution," *Oregon Argus* A1 (Oct. 10, 1857), quoted in Claudia Burton & Andrew Grade, "A Legislative History of the Oregon Constitution of 1857—Part I (Articles I & II)," 37 Willamette L. Rev. 469, 490 (Summer 2001).

virtue of the cession agreements—not to consider the conflict between slavery and the constitutional command that each state have a republican form of government.

James Madison makes the same point, albeit obliquely, in *Federalist 43*. There, he contends that the authority given to Congress by the Republican Guaranty clause "extends no farther than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution." Congress could not challenge the existing governments' countenance of slavery as un-republican, but had to "suppose," or presume, the contrary. The effect of the several cession acts was to extend that presumption to the new states formed from the original beneficiaries of that presumption.

It appears that Madison himself thought slavery incompatible with the Republican Guaranty clause, though, for later in the same *Federalist* paper, he suggests, in language that is a model of studied ambiguity, that the participation of former slaves in the political process would make a government more republican:

> I take no notice of an unhappy species of population abounding in some of the States, who during the calm of regular government are sunk below the level of men; but who in the tempestuous scenes of civil violence may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves.
>
> In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms and tearing a State to pieces, than the representatives of confederate States not heated by the local flame? To the impartiality of Judges they would unite the affection of friends.

As I said, the passage is a model of studied ambiguity. Madison leads his readers to believe, without actually saying, that a slave insurrection would allow a state to call on the national government for assistance, but he also subtly suggests that "justice," and hence the stronger republican claim, would lie with those who emerged from slavery, a condition in which they were treated "below the level of men," into the "human character," which is to say, into a position of natural equality, entitled to the same inalienable rights and requirement that they be governed only by their consent as were the people who formed the existing government. In any event, the passage clearly shows Madison applying the Republican Guaranty clause to the slavery question.

The Debate Over the Admission of New States Carved Out of the Louisiana Territory

If the above analysis is correct—that the founders codified the Declaration's principles in the Republican Guaranty clause, but that those principles had limited operation in the original states because of the Constitution's compromises with slavery—we should expect to see the conflict between the Republican Guaranty *principle* and the slavery *compromise* come to a head as slave-holding states that were not carved from original states began seeking admission to the Union. That came about in short order, once the United States purchased the Louisiana Territory from France in 1803. Because this was new territory rather than territory ceded to the national government by existing states, it was not entitled to the pro-slavery contractual presumption, derived from the various deeds of cession by existing states, from which Kentucky, Tennessee, Mississippi and Alabama had benefited. Instead, its claim to admission was governed by the terms of the treaty between the United States and France, which provided: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the *principles* of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States" (Treaty of April 30, 1803, emphasis added).

Just what those *principles* were would soon give rise to one of the most profound debates in American history.

Predictably, the first challenge came when the southern portion of the Louisiana Territory, the Orleans district, sought admission in 1811.[12] Section 3 of

[12] Indeed, the lines of argument began even earlier, when Congress first sought to establish a provisional government for the new area. As David Currie has thoroughly detailed in his recent book, *The Constitution in Congress The Jeffersonians, 1801-1829*, at 99-114 (University of Chicago Press, 2001), northern Federalists appealed to the Republican Guaranty clause and to the "spirit" of the Constitution in opposing the plan for temporary government in the territory, which essentially combined legislative, executive, and judicial power into the hands of a single governor appointed by and serving under the direction of the President. Id. at 112 n.189 (citing 13 Annals of Congress 1056 (Rep. Elliott); Everett S. Brown, ed., *William Plumer's Memorandum of Proceedings in the United States Senate, 1803-1807*, p. 136 (Macmillan, 1923)). Ironically, it was the southern Democrats who argued that Congress

the Louisiana Enabling Act authorized the people of that district—present-day Louisiana—to adopt a constitution and to form a state government, "Provided, The constitution to be formed, in virtue of the authority herein given, shall be republican, and consistent with the constitution of the United States; that it shall contain the fundamental principles of civil and religious liberty." Section 4 provided that "the said state shall be admitted into the Union upon the same footing with the original states."

Here was the conflict presented in textual terms. Louisiana's new constitution was, on the one hand, to be "republican" and to contain the "fundamental principles of civil liberty," and, on the other hand, the state was to be admitted on an equal footing with the existing states. The guaranty of a republican form of government applied to all the existing states, of course (albeit with the slavery presumption discussed above). But the guarantees of civil and religious liberty were not imposed on the existing states by the federal Constitution (unless, of course, those "fundamental principles" are subsumed under the Republican Guaranty clause). Was it permissible, then, for Congress to impose such terms as a condition of statehood? Indeed, could it impose *any* terms on new states and still comply with the Equal Footing doctrine? The admission of Ohio stood as a precedent for the affirmative, but instead of resolving the question, Congress began to question whether the conditions it had imposed on Ohio's admission were themselves constitutional.

During the Louisiana admission debate, the thorny theoretical problem arose not over slavery—which was not addressed in the Louisiana constitution at all—but over some territory known as West Florida, over which the United States and Spain were having a dispute. Congress wanted to include West Florida in the new state of Louisiana, but also wanted to keep its options open in the event that the President reached a settlement with Spain that recognized Spain's claim to some or all of West Florida. Thus, Congress sought to impose two conditions on Louisiana's admission: that the title of West Florida would remain subject to future negotiations, and that the people then living in West Florida would, in the meantime, be entitled to representation in the Louisiana legislature.

Perhaps appreciating the full import of the principle that was about to be applied for the first time to a southern slave state, South Carolina Representative John C. Calhoun objected, and Congress shifted gears, imposing the conditions on the grant of land to Louisiana rather than its admission to statehood. Although that left the condition regarding civil and religious liberty, and others (such as the requirement that the government be conducted in English), the immediate issue of concern, the status of West Florida, having been resolved, the more fundamental debate was left to another day. Louisiana was admitted in 1812, with a Constitution that declared in its preamble that it was adopted "In order to secure to all the citizens thereof the enjoyment of the right of life, liberty and property." In its Act of Admission, Congress simply stated "That the said state shall be, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever."

The next portion of the Louisiana Territory to seek admission to statehood was Missouri in 1820. Mississippi and Alabama had by then been admitted, with constitutions permitting slavery that Congress was obligated to recognize because of the terms of the South Carolina and Georgia cessions. Indiana and Illinois had also been admitted, and in the latter case the arguments pro and con about the power of Congress to impose conditions on admission were honed (and brought into line with the politics of slavery).[13]

The Illinois Enabling Act, like its predecessors in Ohio and Indiana, mandated that the constitution and state government adopted by Illinois "shall be republican, and not repugnant to the" Northwest Ordinance, including the prohibition on slavery (Act of April 18, 1818). But Article VI of the Illinois Constitution of 1818 provided only that "[n]either slavery nor involuntary servitude shall *hereafter* be introduced into this States, otherwise than for punishment of crimes, whereof the party shall have been duly convicted" (emphasis added). Moreover, it specifically permitted slave labor to be used in the Shawneetown salt mines for seven years, and it recognized lifelong indentured servitude.

New York Representative James Tallmadge opposed Illinois' admission to statehood because these provisions permitted slavery, in contravention of the

had plenary power over the territories, a position that they would soon repudiate when Congress set its plenary power sights on slavery.

[13] A similar concern led to an important difference between the Mississippi admission in 1817 and the Alabama admission in 1819. In the former, certain conditions regarding federal tax exemptions and free navigation were imposed as a condition on statehood; in the latter, the same conditions were imposed as a condition on grants of land rather than statehood. As David Currie has noted, "The great Missouri debate had already begun, and Southern Congressmen had seen the dangers that inhered in broad authority to impose conditions on the admission of new states."

condition in the Illinois Enabling Act mandating that the state constitution conform to the principles of the Northwest Ordinance, which he asserted were in turn required by the terms of the Virginia cession in 1783 (33 *Annals of Congress* 306-07). Mississippi Representative Poindexter provided a three-fold response: First, the Illinois provision was not materially different than what had already been approved in Ohio;[14] second, that Illinois "virtually" complied with the terms of the Northwest Ordinance; and third, that Congress could not prevent a state from altering its constitution, even changing provisions that were enacted because required as a condition on admission to statehood (33 *Annals* 308). Kentucky Representative Anderson weighed in as well, contending that the anti-slavery provision was imposed by Congress, not the Virginia cession, and could therefore be altered by the consent of Congress. "The conditions reserved by Virginia on making the cession," he argued, "were that a certain number of States should be erected from the Territory, and all existing rights of the people preserved." Among those "rights," he contended, was the right to own slaves, since slavery was already in existence in the Illinois portion of the Northwest Territory at the time of the Virginia cession (33 *Annals* 309).

What Representative Anderson failed to mention, of course, was that the Virginia cession also required that the states admitted from the territory were to be "distinct republican States." Representative Tallmadge apparently thought that the "republican" condition barred the introduction of slavery, or at the very least was a solemn pledge made by Congress so simultaneously given as to amount to a compact with Virginia. Moreover, he contended "that the interest, honor, and faith of the nation, required it scrupulously to guard against slavery's passing into a territory where they have power to prevent its entrance" (33 *Annals* 310).

Illinois was ultimately admitted to statehood, and the brief exchange recounted here was too brief to determine definitively whether it was because Congress believed the Illinois constitution "virtually" complied with the anti-slavery requirement, or that the Virginia cession prohibited an anti-slavery requirement, or even that Congress was simply without power to impose any conditions on statehood. But in the brief exchange, the conflict between the republican principle and a vested "right" to own slaves was squarely broached. It would soon get a much more complete airing when Missouri knocked at Congress's door.

On February 13, 1819, Representative Tallmadge renewed the effort he had begun during the debate over admission of Illinois with the following amendment to the Missouri Enabling Act: "And provided, That the further introduction of slavery or involuntary servitude be prohibited, except for the punishment of crimes, whereof the party shall have been fully convicted; and that all children born within the said state, after the admission thereof into the Union, shall be free at the age of twenty-five years" (33 *Annals* 1166, 1170).

The House accepted Tallmadge's amendment, but the Senate rejected it, and the debate over the Missouri bill was held over to the next Congress, during which it centered on a proposal by New York Representative John Taylor to ban slavery in the new state altogether.

During that debate, Congress explored the full depth of the equal footing doctrine, the doctrine of unconstitutional conditions, and the monumental compromise between the equality principle of the Declaration of Independence and the Republican Guaranty Clause of the Constitution, on the one hand, and the slavery clauses of the Constitution, on the other. For purposes of the present inquiry, the most significant contribution to the debate was made by Massachusetts Representative Timothy Fuller. Fuller contended that Congress had the power—indeed, was obliged—to require that Missouri prohibit slavery as a condition on its admission to statehood because slavery was itself incompatible with the Republican Guaranty clause. Taylor added that slavery violated the "principle of the Constitution of the United States, that all men are free and equal." Predictably, the southern delegations strenuously objected. Representative Smyth articulated the main objection:

> It has been questioned by some, whether a constitution can be said to be republican, which does not exclude slavery. But we must understand the phrase, "republican

[14] In this, Representative Poindexter was mistaken. Ohio's Constitution of 1802 provided: "There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted; nor shall any male person, arrived at the age of twenty-one years, nor female person, arrived at the age of eighteen years, be held to serve any person as a servant, under the pretence of indenture or otherwise, unless such person shall enter into such indenture while in a state of perfect freedom, and on condition of a *bona-fide* consideration, received, or to be received, for their service, except as before excepted. Nor shall any indenture of any negro or mulatto, hereafter made and executed out of the State, or, if made in the State, where the term of service exceeds one year, be of the least validity, except those given in the case of apprenticeships" (Art. VIII, § 2).

form of government," as the people understood it when they adopted the Constitution.…It would be perfidious toward them to put on the Constitution a different construction from that which induced them to adopt it. The people of each of the States who adopted the Constitution, except Massachusetts, owned slaves; yet they certainly considered their own constitutions to be republican….

Sir, if this proposition is adopted, it will be regarded hereafter as an exercise of the power to guaranty a republican form of government to every State in the Union. You are about to admit a State, and you require her to insert in her constitution a clause against slavery. Will in not seem that you have done this by your authority to guaranty a republican form of government? I think it will; for you have no other power that seems to warrant prescribing in part the form of the State constitution. If, in the exercise of this power, you may require of a new State to insert in her constitution a clause against slavery, you may, under the same authority, require an old State to add such a clause to her constitution. Thus you may require of the old States to exclude slavery, or provide for its abolition. The slaveholding States must make common cause with Missouri; for the recognition of such a power in this Government would be fatal to them (35 *Annals* 993, 1004).

Representative Smyth's argument ignored Representative Tallmadge's earlier apparent reliance on the "republican" guaranty language in the Virginia Act of Cession to support his claim that the anti-slavery provision in the Northwest Ordinance was required; nor did it respond to the finer distinction involved in the Madisonian supposition, discussed above. Tragically, Fuller did not issue a rejoinder on either front, and the last great opportunity to reconcile the slavery compromises with the Declaration's principles by limiting the extent of the compromise to the territory of the original states was lost. As a result, the Declaration's self-evident truth of the equality of all human beings and its principle of God-given, inalienable rights took on a decidedly different cast. Responding directly to Taylor's invocation of the Declaration of Independence, Smyth observed, in an argument that unfortunately carried the day:

> [The Congress of 1776] asserted [in the Declaration of Independence] that man cannot alienate his liberty, nor by compact deprive his posterity of liberty. Slaves are not held as having alienated their liberty by compact. They are held under the law and usage of nations, from the remotest time of which we have any historical knowledge, and by the municipal laws of the States, over which the Congress of 1776 had not, and this Congress have not, any control. We agree with the Congress of 1776, that men, *on entering civil society*, cannot alienate their right to liberty and property, and that they cannot, by compact, bind their posterity. And, therefore, we contend that the people of Missouri, cannot alienate their rights, or bind their posterity, by a compact with Congress (35 *Annals* 1006, emphasis added).

Thus did the great principles of the Declaration get perverted into a defense of the very antithesis of those principles.

The Declaration and the Civil War

The shift away from the Declaration's principles continued as new states below the Missouri compromise line were admitted to the Union. Texas, Arkansas, and Florida drafted constitutions between 1836 and 1839 protecting slavery and advocating an altered version of the equality principle similar to the language first adopted by Kentucky in 1792. These state constitutions include a similarly subtle shift in the language of inalienable rights, a shift that further allowed some in the South ultimately to make the argument that the right to own property in other human beings was one of the fundamental rights recognized by the Declaration of Independence and hence protected by the Constitution. Where the Declaration of Independence—and the Declarations of Rights in Virginia, Pennsylvania, Massachusetts, and New Hampshire—spoke of the inalienable rights with which *all* men were endowed, the Arkansas Declaration of Rights in 1836 and the Florida Declaration of Rights in 1839 limited the claim of inalienable rights to the same class of people that were under the equality umbrella, namely, those forming the social compact. Thus was the inalienable right to property interpreted in a way that allowed some—those who had formed the social compact—to actually make claim to ownership of property in other human beings without creating a conflict with those other individuals' own inalienable right to liberty. And in this misapplication of the Declaration's principles, the only legitimate purpose of government was to protect that property interest in human chattels, and the South

was able with straight face to make the argument that it could alter or abolish its connection to the existing government, by secession, because that government, in pursing policies designed to vindicate the inalienable rights of all men, was actually failing to protect the new inalienable rights as defined by the South. No wonder Abraham Lincoln noted that a house divided against itself on such terms could not stand.

Following the Civil War, each of the southern states that had seceded from the Union adopted new constitutions. Perhaps not surprisingly, most of the new southern constitutions had provisions prohibiting slavery, but in addition the equality provision in several of these constitutions was amended to more closely track the language of the Declaration of Independence itself. In Article I of its Constitution of 1865, for example, Alabama reiterated its statement of equality but deleted the reference to "freemen." The Arkansas Constitution of 1864 similarly replaced "all freemen" with "all men" in its statement of equality. And Missouri began its 1865 Constitution by declaring "That we hold it to be self-evident that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."

Perhaps because the reconstruction republicans did not think the changes went far enough—several state constitutions, for example, continued to claim that only "freemen, when then form a social compact, have equal rights," and others continued to avoid any reference to equality or dropped their pre-existing circumscribed reference to equality—a new round of constitutions was enacted in most of the South between 1867 and 1868. In these, the equality and unalienable rights language of the Declaration of Independence was prominently featured. The Alabama, Louisiana, and North Carolina constitutions of 1867 and 1868, for example, tracked the equality and inalienable rights language of the Declaration of Independence virtually word for word, and Florida and South Carolina adopted language quite similar to that of the Declaration. The Arkansas Constitution of 1868 recognized that the "equality of all persons before the law is recognized and shall ever remain inviolate," and Georgia's new constitution in 1868 tracked the Equal Protection language of the Fourteenth Amendment. As with the earlier constitutions adopted by many of the northern states, these provisions were included in declarations of rights that also contained many of the same judicially-enforceable rights found in the U.S. Constitution's Bill of Rights. The principles of the Declaration, now codified in these states, thus should be viewed as judicially enforceable to the same extent as the rest of the provisions in those states' declarations of rights.

One additional point is worth noting before leaving the reconstruction era. The Declaration of Independence recognizes that the people have a right to alter or abolish their government not whenever it suits them but whenever the government becomes destructive of the ends for which it was established, namely, the protection of inalienable rights. Several of the northern states adopted "alter or abolish" provisions in their own constitutions that tracked both aspects of this principle. The Maryland Constitution of 1776, for example, provided: "whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old or establish a new government." Similarly, Massachusetts provided in the preamble to its Constitution of 1780 that "whenever these great objects [of government] are not obtained, the people have a right to alter the government." And the Ohio Constitution of 1802, the first formed under the Northwest Ordinance, provided in Article VIII: "to effect [the] ends [of protecting the people's rights and liberties and securing their independence, the people] have at all times a complete power to alter, reform, or abolish their government, whenever they may deem it necessary."

This principle was altered in several of the southern state antebellum constitutions, which recognized a right in the people to alter their government whenever they thought it expedient, not just when it ceased to protect inalienable rights. The Mississippi and Alabama constitutions of 1817 and 1819, for example, held that the people "have at all times an inalienable and indefeasible right to alter, reform, or abolish their form of government, in such manner as they may think expedient." The Missouri Constitution of 1820 similarly provided, in Article XIII, "that the people of this State have the inherent, sole, and excusive right of regulating the internal government and police thereof, and of altering and abolishing their constitution and form of government whenever it may be necessary to their safety and happiness."

This change if formulation, though subtle, was extremely significant, for it enabled the South to claim a "right" to secede from the Union that existed wholly apart from the purpose for which, in the Declaration's formulation, the right existed. Thus, in its 1860 Declaration of Secession, South Carolina claimed that the Declaration of Independence recognized the right of the people to abolish their government whenever it became "destructive of the ends for

which it was established," but South Carolina studiously avoided any mention of the Declaration's description of just what those ends were. In the South Carolina formulation, any ends would do; in the Declaration's formulation, only legitimate ends, grounded in human nature and hence unalienable, would support a claim of revolutionary right.

The southern formulation—a fallacy that had been put forward primarily by John C. Calhoun—was repudiated in several of the post-war constitutions. Missouri in 1865 recognized that the right to alter or abolish government "should be exercised in pursuance of law and consistently with the Constitution of the United States." The constitutions of Alabama, Arkansas, Florida, Mississippi, and Missouri all contained a provision expressly acknowledging that there was no right to secede from the Union. This, too, was more in line with the "alter or abolish" statement of principle actually contained in the Declaration of Independence—as long as the Union, now rid of the unfortunate compromises with slavery—was back in the business of protecting the unalienable and equal rights of all its citizens. The South's claim of a right to secede failed not because the confederate army was defeated on the battlefield, but because its claim was not grounded on moral truth, which alone can serve as the basis for a claim of right. Indeed, the South's claim of right would have been illegitimate even if the South had prevailed on the battlefield, for it was simply impossible for the South, having denied the self-evident truths of the Declaration, ever to make the appeal to nature and nature's God that Thomas Jefferson made in the Declaration.

Post-War Admissions and Conclusion

The nation had paid a dear price to vindicate the principles of the Declaration, and it was not about to let that victory slip away. We have just seen how the principles of the Declaration were codified—and thus rendered enforceable—in the reconstruction-era constitutions of the old confederate states. The Declaration was made even more binding on new states admitted thereafter. As noted at the outset, Nevada and Nebraska were admitted to statehood during the war years, and in the Enabling Acts for each, Congress required that the new state's constitution, "when formed, shall be republican, and not repugnant to the Constitution of the United States and the principles of the Declaration of Independence" (Acts of Mar. 21 and Apr. 19, 1864). The requirement was repeated in the Enabling Acts for Colorado in 1875, North Dakota, South Dakota, Montana and Washington in 1889, Utah in 1894, and Oklahoma, New Mexico, and Arizona in 1906 (Acts of Mar. 3, 1975; Feb. 22, 1889; June 16, 1906). In these 11 states, the Declaration of Independence thus has the explicit force of positive law. In most of the others, the principles of the Declaration have the same force of law as other provisions in those states' own Declaration of Rights. And finally, it might legitimately be said that all 50 states are bound by the principles of the Declaration, as encompassed by the Republican Guaranty clause of the Constitution. Every State admitted since the Civil War under an Enabling Act binding it to the principles of the Declaration of Independence was also admitted on an "equal footing" with the original states. In a fitting bit of irony, that can only be true if the original states are likewise bound by the principles of the Declaration of Independence. The Madisonian presumption, which prevented such a conclusion in 1787, was decisively rebutted in the aftermath of Appomattox, and the Constitution finally became, to paraphrase Abraham Lincoln, the shining picture of silver that it was intended to be, adorning and preserving the apple of gold, those fitly spoken principles of the Declaration of Independence.

On Property, *James Madison* March 29, 1792

This term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*.

In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them.

He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

He has a property very dear to him in the safety and liberty of his person.

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.

Where there is an excess of liberty, the effect is the same, tho' from an opposite cause.

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.

According to this standard of merit, the praise of affording a just securing to property, should be sparingly bestowed on a government which, however scrupulously guarding the possessions of individuals, does not protect them in the enjoyment and communication of their opinions, in which they have an equal, and in the estimation of some, a more valuable property.

More sparingly should this praise be allowed to a government, where a man's religious rights are violated by penalties, or fettered by tests, or taxed by a hierarchy. Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and unalienable right. To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.

That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest. A magistrate issuing his warrants to a press gang, would be in his proper functions in Turkey or Indostan, under appellations proverbial of the most compleat despotism.

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called. What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favour his neighbour who manufactures woolen cloth; where the manufacturer and wearer of woolen cloth are again forbidden the oeconomical use of buttons of that material, in favor of the manufacturer of buttons of other materials!

A just security to property is not afforded by that government, under which unequal taxes oppress one species of property and reward another species: where arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the poor; where the keenness and competitions of want are deemed an insufficient spur to labor, and taxes are again applied, by an unfeeling policy, as another spur; in violation of that sacred property, which Heaven, in decreeing man to earn his bread by the sweat of his brow, kindly reserved to him, in the small repose that could be spared from the supply of his necessities.

If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence [inference?] will have been anticipated, that such a government is not a pattern for the United States.

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.