



HOW THE ANTISLAVERY CONSTITUTION WON THE CIVIL WAR¹²

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INTRODUCTION

Was the United States Constitution of 1787 proslavery or anti-slavery? The basic contours of the academic debate remain what they were in 2007 when Professor Michael Zuckert divided the main antagonists into Neo-Garrisonian and Neo-Lincolnian camps.³ The

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¹ This article is dedicated to Harry V. Jaffa, 1918-2015.

² A dissent, in reference to Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405 (2013).

³ Michael Zuckert, *Legality and Legitimacy in Dred Scott: The Crisis of the Incomplete Constitution*, 82 CHI.-KENT L. REV. 291 (2007). Since Zuckert wrote this article, important Neo-Garrisonian monographs include; MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006); DAVID WALDSTREICHER, *SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* (2009); GEORGE W. VAN CLEVE, *A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY*

Neo-Garrisonians maintain, as did their namesake, William Lloyd Garrison, that the Constitution was a “covenant with death” and an “agreement with hell.” The framers were a proslavery lot for the most part—they intended to aid the proslavery cause, and the Constitution achieved their intention. The Neo-Lincolnians maintain that the framers of the Constitution were mostly antislavery in intention, but concede that a few proslavery statesmen wrung limited accommodations for slavery from the Constitutional Convention.

Zuckert is critical of both sides. Wherever the Neo-Garrisonians calculate a theoretically possible proslavery effect from a constitutional provision, they impute a proslavery intention to the framers of that the provision, even in cases when evidence cannot be adduced proving intention. They underrate the importance of the framers’ deliberate avoidance of using the words “slave” or “slavery” in the text, ignoring the connection between that avoidance and their widespread denunciations of slavery. The Neo-Lincolnians do not sufficiently recognize that the framers fought little against the proposed accommodations to slavery. Zuckert concludes that the Constitution tolerated slavery where it existed but did not endorse it: “Within the constitutional order slavery was legal but not legitimate.”⁴ Slavery was illegitimate because it was incompatible with the Founding generation’s natural rights principles. But, although the Constitution did not explicitly recognize man’s right to hold property in man, it tacitly acknowledged and addressed the fact of slavery’s legality under state laws—at least to a limited degree—and maybe more, by contingent arrangements to return slaves to masters, to enumerate slaves

AMERICAN REPUBLIC (2010). Important Neo-Lincolnian monographs include; JAMES OAKES, *FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865* (2013); JUSTIN B. DYER, *NATURAL LAW AND THE ANTISLAVERY CONSTITUTIONAL TRADITION* (2012).

⁴ Zuckert, *supra* note 3, at 299.

in apportioning taxes and representation, and to bar prohibitions on slave importations for twenty years.

This article accepts Zuckert's "legal but illegitimate" thesis as correct, but maintains that the Constitution nevertheless favored freedom over slavery, as the leading founders intended. To show this, the Constitution's disposition towards slavery is placed in the context of American political development. The work of the delegates to the Constitutional Convention was a significant act in an unusually ambitious founding enterprise. In the founding era the Americans were simultaneously attempting to create a revolutionary form of government and a new national dominion from politically diverse sections. The Constitution reflected a difficulty faced by all regime founders: how to achieve what is possible in light of what is held to be best. The tension between the illegitimacy and legality of slavery in the Constitution is the result of the founders' regime and nation-building enterprise. The illegitimacy of slavery is connected to the leading founders' aspirations, the legality of slavery to their constraints. The first principle of the founders' new regime model placed a moral ban on slavery. The introduction of that principle in the constitutional order created the tension. But the founders could not resolve that tension more in favor of liberty without hazarding the unity of the new nation and the stability of the new regime dedicated to liberty. The concessions to slavery were the means by which the framers of the Constitution could placate extant political forces and acquire the constitutional authority better to shape the Union into the new political regime they had in mind.

Scholars who support the "proslavery Constitution" hypothesis generally see slavery as a central concern to founding-era politics. That premise is well-taken, but accepted in a way that differs from what they mean. It is contended here that the founders regarded slavery as a singularly potent threat to the revolutionary political regime they were attempting to establish. This crucial point has been obscured by doubts concerning the nature of that regime. A long scholarly debate asked whether the American political regime was

fundamentally liberal, republican or a mélange of ideas.⁵ The debate also questioned the centrality of slavery in the American founding⁶ and the antislavery character of the founders' regime principles.⁷ Without general agreement about these important theoretical matters, regime analysis is difficult. We cannot see the parts of a developing political regime as the founding-era statesmen saw them, if we are uncertain of their theoretical frame of reference. This article defines the regime model that guided the founders' statesmanship, classifies the statesmen and the parts of the developing regime, and clarifies the position of slavery in that regime, culminating in the framing of Constitution.

THE MODEL POLITICAL REGIME OF THE LEADING FOUNDERS

The delegates at the Constitutional Convention and other leading statesmen of their generation participated in establishing new government for a newly independent America. The differences between the new government and the prior monarchy suffice to qualify their work as revolutionary in Aristotle's sense, a change in regime form.⁸ Founders of regimes are by definition revolutionaries — transitional statesmen — bridging old and new political orders. Both an-

⁵ Alan Gibson, *Ancients, Moderns and Americans: the Republicanism-Liberalism Debate Revisited*, 21 HIST POLIT THOUGHT 261.

⁶ Van Cleve observes that scholars from the "republican school" regard slavery as incidental to the founding. See VAN CLEVE, *supra* note 3, at 5.

⁷ Gordon Wood, a leading "republican school" scholar, denies that the principles of the Declaration were antislavery in character. See Gordon S. Wood, *Equality and Social Conflict in the American Revolution*, 51 WILLIAM MARY QUART 677, 707 (1994).

⁸ ARISTOTLE, *POLITICS* bk. V, 1301a20-26 (Carnes Lord trans., University of Chicago Press ed. 1984) (c. 384-322 BCE). Citations of Aristotle use the numbering system devised by Immanuel Bekker.

cient and contemporary political science recognize that even revolutionary regimes do not begin with a *tabula rasa*.⁹ Founding statesmen inherit institutions and principles from the prior order, but then reshape that material, as well as human hands can, into a new form, to approximate a new regime model that they have in mind. In this work, founders make choices when reshaping the old order into the new, and the legacy of the old order can sometimes pose limits on the choices they can make. Other statesmen who participate in establishing new government, but who do not favor the new regime model, might also pose limits. These statesmen may be erroneously numbered among the revolutionary founders because they are contemporaries. But they are not revolutionary founders in the precise sense of the term, because they oppose the objects of the revolution. These statesmen might not have the power to stop the course of events, but they might have sufficient political leverage to insure that the regime departs, in some respects, from the model desired by other statesmen with more power.

In describing the regime model that the leading American founders had in mind, Zuckert coins the phrase “a natural rights republic,” which differs from the term the founders themselves used: simply “republic.”¹⁰ Zuckert’s annexation of “natural rights” to “republic” in talking about this regime model, forces us to keep in mind what the founders meant by “republic.” The founders conceived of their

⁹ Aristotle shows that unique, inherited institutional arrangements constrain the statesman’s choices in establishing the best practicable democracy, and if the statesman ignores these arrangements and is guided by democratic principle only, he will err. *Id.* at bk VI, 1317a35-38; also *e.g., id.* at bk IV, 1289a5-8. Recent American political development scholars Orren and Skowronek argue that “[C]hange confronts a prior state of affairs....By virtue of its historical character, political change is always a reconstruction.” KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* 21 (2004).

¹⁰ MICHAEL ZUCKERT, *THE NATURAL RIGHTS REPUBLIC* (1996).

republicanism in terms of natural rights.¹¹ This regime model meant popular self-government, justified and limited by natural rights, distinguished from prior republican societies in which majority power justified majority rule and the majority's rule was unlimited.

The natural rights principles proclaimed in the Declaration flatly impugned the justice of slavery, and the founders—many of them slaveholders themselves—left behind a raft of antislavery statements. Even the Neo-Garrisonian Wiecek acknowledges the “wide-spread and heartfelt opposition to slavery expressed by so many of the Framers.”¹² Yet the continuing practice of slavery contradicted principle. This contradiction later called into question the founders' universal application of their natural rights principles. Notably, Roger Taney and Stephen Douglas averred that when the founders declared that “all men are created equal,” they meant “all white men,” prefiguring a bevy of modern scholars and a large share of public opinion in America today.¹³

¹¹ Harry V. Jaffa consistently maintained this interpretation of the founders' principles throughout his long career; compare HARRY V. JAFFA, *EQUALITY AND LIBERTY* (1965) with HARRY V. JAFFA, *A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR* (2000). The republicanism-liberalism debate turned on whether the American founders were interested in the security of natural rights with less emphasis on regime form (the liberal position) or interested in popular self-government for virtue (the republican position). Key contributions to the view, now generally accepted, that the founders combined both positions, and anchored their republicanism in “liberal” natural rights (Jaffa's consistent position), include; PAUL RAHE, *REPUBLICS ANCIENT AND MODERN: CLASSICAL REPUBLICANISM AND THE AMERICAN REVOLUTION* (1992); MICHAEL ZUCKERT, *NATURAL RIGHTS AND THE NEW REPUBLICANISM* (1994); ZUCKERT, *supra* note 10. Rahe writes, “[T]he republicanism of the American founders was in most regards a liberal republicanism...” Paul Rahe, *Introduction*, in *MACHIAVELLI'S LIBERAL REPUBLICAN LEGACY* xix, xx (Paul Rahe ed., 2006).

¹² Quoted in Zuckert, *supra* note 3, at 298.

¹³ “The signers of the Declaration of Independence never dreamed of the negro when they were writing that document. They referred to white men, to men of European birth and European descent, when they declared the equality of all men.” Stephen A. Douglas, Speech Delivered at the Fifth Joint Debate at Galesburg (October 7

The historical record does not favor the “all white men” school of interpretation. Plenty of evidence shows that when the founding statesmen referred to natural rights, they understood that those rights applied to all members of the human family, including slaves. Patrick Henry appealed to the “Rights of Humanity when he denounced slavery.¹⁴ Thomas Jefferson wrote that the enslavement of the African was “in flagrant violation of his own consent, and of his natural right in his own person.”¹⁵ Fellow Virginian Richard Henry Lee defended the idea that slaves were “equally entitled to liberty and freedom by the law of nature.”¹⁶ In the Virginia state constitutional convention in 1776, delegates read “all men are by nature equally free” in the proposed draft of Article I of their constitution to mean that it would “have the effect of abolishing” slavery in the state, and they had to qualify the text to prevent that immediate result.¹⁷

1858), reprinted in *THE LINCOLN-DOUGLAS DEBATES: THE FIRST COMPLETE, UNEXPURGATED TEXT* 247 (Harold Holzer ed., 2004). Taney says that the words “all men are created equal... would seem to embrace the whole human family... But it is too clear for dispute that the enslaved African race were not intended to be included.” *Dred Scott v. Sandford*, 60 U.S. (19 How.) at 410 (opinion of the court). Many contemporary scholars across academic disciplines agree with Douglas and Taney; see, e.g., Linda L. Black & David Stone, *Expanding the Definition of Privilege: The Concept of Social Privilege*, 33 *J MULTICULT COUNS D* 243, 246 (2005); Joy L. Lei & Carl A. Grant, *Multicultural Education in the United States: A Case of Paradoxical Equality*, in *GLOBAL CONSTRUCTIONS OF MULTICULTURAL EDUCATION: THEORIES AND REALITIES* 201, 206 (Carl A. Grant & Joy L. Lei eds., 2001); Bruce Kuklick, *Introduction*, in *PAINÉ: POLITICAL WRITINGS* vii, xiii (Bruce Kuklick ed., 2000); DANA NELSON, *NATIONAL MANHOOD: CAPITALIST CITIZENSHIP AND THE IMAGINED FRATERNITY OF WHITE MEN* 53 (1998); THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* 42 (1997); SARA M. EVANS & BARBARA J. NELSON, *WAGE JUSTICE: COMPARABLE WORTH AND THE PARADOX OF TECHNOCRATIC REFORM* 17 (1989). Many of the author’s students also take this position for granted.

¹⁴ HENRY MAYER, *A SON OF THUNDER: PATRICK HENRY AND THE AMERICAN REPUBLIC* 168 (1991).

¹⁵ THOMAS JEFFERSON, *POLITICAL WRITINGS* 138 (Joyce O. Appleby & Terence Ball, eds., 1999).

¹⁶ EDMUND J. LEE, *LEE OF VIRGINIA, 1642-1892* 174 (Franklin Printing Co. 1895).

¹⁷ MAYER, *supra* note 14, at 300-01.

Article I of the Massachusetts state constitution, ratified in 1780, contained the words “all men are born free and equal” without the Virginians’ qualification, and this did have the effect of abolishing slavery in their state, because it was understood to apply to all mankind.¹⁸

However, slavery was more than a moral wrong condemned by their principles. The founders knew that slavery was also dangerous to the new political regime they were attempting to establish upon those founding principles. In his denunciation of slavery quoted above, Patrick Henry wrote that slavery was “destructive of liberty.”¹⁹ Benjamin Rush wrote that slavery “will in Time destroy the liberty of the [country]” and that “[t]he plant of liberty is of so tender a Nature, that it cannot thrive long in the neighbourhood of slavery.”²⁰ Jefferson closed a passage on slavery in the *Notes on the State of Virginia* with the question, “[a]nd can the liberties of a nation be thought secure when we have removed their only firm basis, the conviction in the minds of the people that these liberties are of the gift of God . . . ?”²¹ In the Constitutional Convention, Gouverneur Morris referred to “domestic slavery” as “a nefarious institution” and said that it was “the most prominent feature in the aristocratic countenance of the proposed Constitution.”²² In 1788, Luther Martin said “[s]lavery is inconsistent with the genius of republicanism, has a tendency to destroy those principles on which it is supported, as it lessens the sense of the equal rights of mankind, and habituates us to

¹⁸ EDGAR J. MCMANUS, *BLACK BONDAGE IN THE NORTH* 165 (1973).

¹⁹ MAYER, *supra* note 14, at 168.

²⁰ Benjamin Rush, *An Address to the Inhabitants of the British Settlements in America upon Slave-Keeping* (1773), reprinted in 1 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805* 217, 228-29 (Charles S. Hyneman & Donald Lutz, eds., 1983).

²¹ THOMAS JEFFERSON: *WRITINGS* 289 (Merrill D. Peterson ed., 1984) [hereinafter *JEFFERSON WRITINGS*].

²² 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 221 (Max Farrand ed., 1911) [hereinafter *RECORDS*].

tyranny and oppression.”²³ Addressing the Maryland legislature in 1789, William Pinckney warned of the “dangerous consequences” of slavery to their new system of government. “Nothing,” he said, “is more clear, than that it will one day destroy the reverence for liberty, which is the vital principle of a republic.”²⁴

James Madison is especially revealing. He privately wrote, “In proportion as slavery prevails in a State, the Government, however democratic in name, must be aristocratic in fact. The power lies in a part instead of the whole” Due to slavery’s potent, transformative effect, he wrote, the southern states were all aristocracies.²⁵ Whatever a state’s constitution or laws might say, the inexorable result of a high density of slaves was the concentration of ruling power in a minority. Even under a republican constitution, wherever slavery prevailed, republicanism became “fallacious.”²⁶ But in urging for ratification of the Constitution, Madison wrote that “no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution” than a “strictly republican” government.²⁷

Not only justice to others, but also self-interest required the end of slavery. The elimination of slavery served their highest political

²³ JONATHAN ELLIOT, 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 374 (J.B. Lippincott Co. 1891) [hereinafter DEBATES].

²⁴ SOME ACCOUNT OF THE LIFE, WRITINGS, AND SPEECHES OF WILLIAM PINKNEY 13 (Henry Wheaton ed., J.W. Palmer & Co. 1826).

²⁵ GAILLARD HUNT, THE LIFE OF JAMES MADISON 75 (1902). Apparently contradicting himself, Madison says in *Federalist* 43 that all of the pre-existing state constitutions are republican in form. But he is talking about the forms of the written constitutions and not the forms of the actual governments, which are altered by a high density of slaves. See THE FEDERALIST NO. 43 (James Madison), at 271-72 (Clinton Rossiter & Charles Kesler eds., Signet Classics 2003) [hereinafter THE FEDERALIST].

²⁶ 3 THE WRITINGS OF JAMES MADISON 215 (Gaillard Hunt ed., 1902) [hereinafter MADISON WRITINGS].

²⁷ THE FEDERALIST NO. 39 (James Madison), *supra* note 25, at 236.

ambitions, and its extenuation threatened to destroy everything for which they had fought in the Revolution. The founders' declarations of the mutual hostility of slavery and republicanism challenge the still-standing scholarly thesis of Edmund Morgan that they deliberately perpetuated slavery because they believed that it nourished republican liberty.²⁸ The founders themselves say the opposite. But it would be impossible to dispute Morgan's thesis if we replaced the founders' names with the later antebellum names of George McDuffie, John C. Calhoun or Lawrence Keitt. These South Carolina statesmen did indeed claim that slavery nourished republican liberty.²⁹ Many contemporary scholars, like Morgan, interpret the founders through the prism of later avowedly proslavery Southern statesmen such as these, or at least narrow the difference between them and the founders to a simple difference of opinion—or moral candor—regarding slavery. This is a fatal scholarly mistake, because if we conflate them, we fail to see the vastly different regime aspirations that correlated with their respective antislavery and proslavery aspirations.

²⁸ Edmund S. Morgan, *Slavery and Freedom: The American Paradox*, 59 J AM HIST 5, 29 (1972).

²⁹ "Domestic slavery, instead of being a political evil, is the cornerstone of our republican edifice." George McDuffie, *Governor McDuffie's Message on the Slavery Question, 1835*, reprinted in 10 AMERICAN HISTORY LEAFLETS: COLONIAL AND CONSTITUTIONAL 2, 10 (1893). "Many in the South once believed that it was a moral and political evil. That folly and delusion are gone. We see it now in its true light, and regard it as the most safe and stable basis for free institutions in the world." John C. Calhoun, *Remarks Made During the Debate on his Resolutions, in respect to the Rights of States and the Abolition of Slavery, December 27, 1837*, reprinted in 3 THE WORKS OF JOHN C. CALHOUN 140, 180 (Richard K. Cralle ed., D. Appleton & Co. 1854). "The destruction of African slavery would be the destruction of republicanism." Lawrence Keitt, *Speech in Columbia, South Carolina (December 15, 1851)*, reprinted in *Critical Notices* in 5 THE SOUTHERN QUARTERLY REVIEW 536, 538 (New Series 1852).

The leading founders tell us that their republicanism rested upon the equal rights of mankind, not upon slavery. They say that the institution of slavery was a living rebuke to that moral foundation and a potent threat to their republicanism. Therefore, when studying early American statesmen, wherever we see the principled embrace of slavery and the principled rejection of natural equality, we ought to be suspicious of the substance of their republicanism. A useful example is the aforementioned Governor McDuffie of South Carolina. In the same 1835 speech in which he claims that domestic slavery “is the corner-stone of our republican edifice,” he argues that slavery “supersedes the necessity of an order of nobility and all other appendages of a hereditary system of government.”³⁰ That is, slavery achieved a result that the Constitution’s Article I, section 10, sought to suppress: “No Title of Nobility shall be granted by the United States.”³¹ The Constitution’s “absolute prohibition of titles of nobility,” Madison says in *Federalist* 39, gave further proof “of the republican complexion” of the system of government. Ruling nobles had no place in Madison’s definition of a republic. He says that others often used the title of “republic” with “extreme inaccuracy,” and one of his examples of a falsely denominated republic is a state that sounds like McDuffie’s description of South Carolina: Venice, “where absolute power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles.”³² Ruling nobles did have a place in McDuffie’s definition of a republic and slavery was its cornerstone in South Carolina. McDuffie, the principled proslavery governor, was no republican in the founders’ sense of that term. In substance, he was an aristocrat or less charitably, an oligarch.

³⁰ McDuffie, *supra* note 29, at 9-10.

³¹ U.S. CONST. art. I, § 9, cl. 8.

³² THE FEDERALIST NO. 39 (James Madison), *supra* note 25, at 236-37.

The American founders' new regime principles cannot account for slavery's legality under the Constitution, and in fact those principles could not be securely established without slavery's abolition.

DISSIMILAR POLITICAL SOCIETIES

When the Constitutional Convention met, the political character of the American states widely differed. The states and statesmen stood far apart between the poles of natural rights republicanism and slaveholding aristocracy. The British colonies that later comprised the United States had developed unevenly. When considering the differences among the colonies and the prospects for confederation in 1775, John Adams confessed that he dreaded "the consequences of this dissimilitude of character."³³ Though national union may have been politically consummated in 1776, the unity and uniformity of the states extolled by John Jay a little more than a decade later in *Federalist* 2³⁴ was emergent, not an accomplished fact.³⁵

³³ 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 367 (Charles Francis Adams ed., Charles C. Little & James Brown 1854) [hereinafter WORKS OF JOHN ADAMS].

³⁴ See THE FEDERALIST NO. 2 (John Jay), *supra* note 25, at 31-32.

³⁵ See John M. Murrin, *A Roof without Walls: The Dilemma of American National Identity*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN IDENTITY 333 (Richard R. Beemen et al. eds., 1987); see also Alan Taylor, *The People of British America, 1700-75*, 47 ORBIS 247 (2003).

Alexis de Tocqueville located the home of American republicanism in New England.³⁶ Education,³⁷ suffrage³⁸ and land ownership,³⁹ all valuable props to republicanism, were diffused broadly in colonial New England. In the decade when John Locke was born, New England settlers were already asserting their God-given natural rights against their local governments' trespasses against them, and New England government was already developing in conformity with those principles.⁴⁰ So it is not surprising that when Adams recollected first seeing Jefferson's draft of the Declaration of Independence, he affected indifference, pointing out that its political principles matched his native New England principles, which antedated the Revolution and Locke, and which had been long since popularly sanctioned by the people. "The essence" of the Declaration, he wrote, was "contained in a pamphlet voted and printed by the town of Boston before the first Congress met."⁴¹ From Adams's perspective, Jefferson's draft reflected sentiments that were already deeply embedded in the ancient beliefs and practices of New England. The stronghold of American republicanism was there.

Looking south, that republican character weakened, and Adams was critical. Frustrated by the lack of stronger confederation among

³⁶ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 27-44 (Harvey C. Mansfield & Delba Winthrop trans., 2000).

³⁷ See KENNETH A. LOCKRIDGE, *LITERACY IN COLONIAL NEW ENGLAND: AN ENQUIRY INTO THE SOCIAL CONTEXT OF LITERACY IN THE EARLY MODERN WEST* 13 (1974); LAWRENCE CREMIN, *AMERICAN EDUCATION: THE COLONIAL EXPERIENCE, 1607-1783* (1970).

³⁸ See J.R. Pole, *Suffrage and Representation in Massachusetts: A Statistical Note*, 14 *WILLIAM MARY QUART* 560 (1957).

³⁹ See MARGARET ELLEN NEWELL, *FROM DEPENDENCY TO INDEPENDENCE: ECONOMIC REVOLUTION IN COLONIAL NEW ENGLAND* (1998); Margaret Ellen Newell, *The Birth of New England in the Atlantic Economy: From Its Beginning to 1770*, in *ENGINES OF ENTERPRISE: AN ECONOMIC HISTORY OF NEW ENGLAND* 11 (Peter Temin ed., 2000).

⁴⁰ Eric T. Freyfogle, *Land Use and the Study of Early American History*, 94 *YALE L.J.* 717, 728 (1985).

⁴¹ 2 *WORKS OF JOHN ADAMS*, *supra* note 33, at 514 & n.1.

the colonies after the war for independence began, he explained to General Horatio Gates, "all our misfortunes arise from a single source, the reluctance of the southern colonies to republican government This can be done only on popular principles and axioms, which are so abhorrent to the inclinations of the barons of the south" ⁴² Adams recognized that were some exceptional Southerners, "gentlemen of free spirits and liberal minds," who were few but dedicated to advancing republican principles. ⁴³ According to Adams's grandson, at the Continental Congress these Southern statesmen "were naturally brought into consultation with the delegates from New England, already long familiarized with the working of the most republican system then known in the world." ⁴⁴ The strongest Southern republicans were among the Virginians, whose prestige carried great influence over the rest of the South. Adams became their chief consultant, and at their behest, he wrote the pamphlet *Thoughts on Government*, to disseminate republican principles among the southern colonies. ⁴⁵ These Virginia statesmen expressed admiration for New England republicanism and lamented Virginia's un-republican political character and the un-republican principles of their colleagues at home. In a letter in 1776, Patrick Henry thanks Adams for sending his pamphlet, professes his agreement with the sentiments it contained, but warns that among the wealthy Virginia families was "a strong bias to aristocracy." The Virginia legislature having convened to form a state constitution, he promises Adams, "[i]t shall be my incessant study, so to form our portrait of government,

⁴² 1 *Id.* at 207.

⁴³ JOHN ADAMS & ABIGAIL ADAMS, FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE ABIGAIL ADAMS 135 (Charles Francis Adams ed., Hurd and Houghton 1876).

⁴⁴ 1 WORKS OF JOHN ADAMS, *supra* note 33, at 206.

⁴⁵ *Id.* at 208-09, 440-41; 4 *id.* at 191-202; 10 *id.* at 94-96.

that a kindred with New England may be discerned in it”⁴⁶ Another recipient of Adams’s pamphlet, Richard Henry Lee, sends his regards to Adams for his assistance in establishing good government in America and expresses his hope to spend the rest of his days in Massachusetts, because the “hasty, unpersevering, aristocratic genius of the south suits not my disposition, and is inconsistent with my ideas of what must constitute social happiness and security.”⁴⁷ And in another letter to Massachusetts Congressmen James Lovell, Lee writes, “I love liberty and wish that the whole human race enjoy’d it; and I have a peculiar affection for that of the eastern part of this Union.”⁴⁸

A comparison between the adoptions of the first state constitutions by Massachusetts and Virginia illustrates the difference between their established governing habits, but the commonality of their republican ideals. This further illustrates the maturity of republicanism in Massachusetts and its nascence in Virginia. Both constitutions begin with appeals to natural rights principles as the basis of government. How they finally framed their constitutions around those foundational republican principles is a different matter. Massachusetts followed a republican mode, Virginia an aristocratic one. In Massachusetts the people pressed the legislature to alter the process of establishing their state constitution. The legislature then called for a constitutional convention separate from the legislature, and ultimately, Adams’s draft of the constitution was submitted to the people for ratification, article by article.⁴⁹ In Virginia the state legislators simply resolved itself into a convention, drafted their constitution and approved it themselves. Because Virginia’s legislators

⁴⁶ 4 *Id.* at 201-02.

⁴⁷ 2 THE LETTERS OF RICHARD HENRY LEE 155 (James C. Ballagh ed., 1914).

⁴⁸ *Id.* at 236.

⁴⁹ RONALD M. PETERS, THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT 18-23 (1978).

side-stepped the popular will, the state adopted its constitution in the same year that they began their work to create one, in 1776.⁵⁰ Massachusetts began the process of establishing a state constitution in 1775, but due to popular participation, it was not adopted until 1780.

Whereas New England had developed the durable form of natural rights republicanism, Virginia had developed an aristocratic system. But that system seemed to be cracking. In 1776 the Virginia ruling class was split between the ascendant republican faction, bent on revolutionizing their political society, and the defenders of the existing system. Those defenders were formidable. Adams later recollected that Virginia delegate Thomas Nelson declared to the Continental Congress that, although he would vote for independence because it was the wish of his constituents, he privately opposed independence as "he knew the people would institute Republican governments, and for his part he acknowledged that he dreaded and abhorred Republican governments."⁵¹ Among Virginia statesmen, he had many supporters. Immediately after the convention members adopted their state constitution, they selected Patrick Henry for their first governor over Nelson by 60 to 45 votes, which a later writer on the Virginia convention said, "probably showed the state of the parties."⁵² Patrick Henry, Richard Henry Lee and their faction were aristocrats by birth and habit, but partisans of republicanism. The Virginia republicans were attempting to reshape their society and government in the New England mold. Jefferson documented this. In

⁵⁰ JOHN J. DINAN, *THE VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE* 1-3 (2006); see also *JEFFERSON WRITINGS*, *supra* note 21, at 246-48.

⁵¹ John Adams, *Correspondence Between John Adams and Mercy Warren*, in 4 *COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY* 317, 352 (5th series, 1878) [hereinafter *John Adams, Correspondence Between John Adams and Mercy Warren*].

⁵² HUGH BLAIR GRIGSBY, *THE VIRGINIA CONVENTION OF 1776* 34 (J.W. Randolph 1855).

his autobiography, Jefferson writes that the work of adapting Virginia's laws to a "republican form of government" began in 1776.⁵³ That work achieved some success, but the Virginia reformers also made errors and they encountered opposition. Defects in their republicanism persisted, and Jefferson remained critical of those defects in *Notes on the State of Virginia*⁵⁴ (especially Query XIII) and beyond. In an 1816 letter, he wrote, "[w]here is our republicanism to be found? Not in our constitution, certainly, but merely in the spirit of our people"⁵⁵

Because slavery was causally linked to aristocratic government, we should expect to find that partisanship for aristocracy and slavery was linked. They did align in this way, and again, Virginia provides the instructive example for all of the states with a high density of slaves in the South. Thomas Ludwell Lee recounted the tenacity of the defenders of the old aristocratic order and slavery at the 1776 state constitutional convention. Opposition immediately rose over the first words of Virginia's constitution, "all men are by nature equally free." The aristocratic faction recognized the antislavery import of these foundational republican principles. Lee says of them:

[A] certain set of aristocrats, for we have such monsters here, finding that their execrable system cannot be reared on such foundations, have to this time kept us at bay on the first line, which declares all men to be born equally free and independent The words as they stand are approved by a very great majority.⁵⁶

⁵³ JEFFERSON WRITINGS, *supra* note 21, at 34, 36-37.

⁵⁴ *See id.* at 123-325. *See also* ZUCKERT, *supra* note 10, at 219-231 (an excellent analysis of Jefferson's criticism of Virginia republicanism).

⁵⁵ JEFFERSON WRITINGS, *supra* note 21, at 1397.

⁵⁶ Thomas Ludwell Lee, *Selections and Excerpts from the Lee Papers* (May 18, 1776), in 6 SOUTHERN LITERARY MESSENGER 324, 325 (New Series, 1858).

Lee called those first words “the foundation stone” upon which they were trying to erect their “Temple to Liberty.”⁵⁷ Partisanship for republicanism and abolition was also linked. Four of the five Virginia statesmen whom Jefferson names, and who served on the committee to adapt Virginia’s laws to a republican form of government, are known for their denunciations of slavery: George Mason, Thomas Ludwell Lee, George Wythe and Jefferson himself. They drafted 126 bills that they planned to present to the legislature, among them a bill for establishing religious freedom, bills for the diffusion of education, and a bill touching slavery with an amendment for the gradual emancipation of slaves.⁵⁸

Further south, a brief glance at South Carolina indicates that the aristocratic system and slavery were firmly entrenched there and supported each other. The state adopted three constitutions, in 1776, 1778 and 1790 – none of which was submitted to the people for ratification and none of which was prefixed with an expression of republicanism’s foundational statement of natural rights.⁵⁹ Certainly, they intended this omission for the same reason that Virginia’s relatively weaker aristocratic faction fought to omit theirs. In explaining to the South Carolina ratifying convention why their state’s delegation to the federal Convention opposed the inclusion of a bill of rights in the national constitution, Charles Cotesworth Pinckney said, “[s]uch bills generally begin with declaring that all men are by nature born free. Now, we should make that declaration with a very bad grace

⁵⁷ *Id.*

⁵⁸ See JEFFERSON WRITINGS, *supra* note 21, at 37-44.

⁵⁹ 6 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3241, 3248, 3258 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE].

when a large part of our property consists in men who are actually born slaves.”⁶⁰

In South Carolina, political power was annexed to slave-ownership, consistent with Madison’s observation. The state’s constitutions after national independence reveal an intention to enshrine aristocracy, rather than to reform it as the Virginia republicans had attempted. On the surface, the 1790 constitution seemed to bow to republicanism. Article IX, Section 1, maintained, “[a]ll power is originally vested in the people; and all free governments are founded on their authority.”⁶¹ This claim had no force in South Carolina government. The real rulers were a minority. The constitution required that members of their legislature’s lower house own 500 acres of land or ten slaves, and twice those property qualifications for members of the upper house. Voters outside cities had to own at least fifty acres of land, but even if the freeman met the property requirement, the value of the vote diminished outside of high slave density areas. This was because the apportionment of the lower house’s districts was determined by a ratio of population and wealth, but nevertheless weighted wealth, and hence density of slaves. The apportionment of the upper house’s districts was fixed, but followed the density of slaves. This malapportioned legislature drawn from the minority chose the governor, all state and local offices and appointed electors for President of the United States.⁶²

⁶⁰ 4 DEBATES, *supra* note 23, at 316.

⁶¹ 6 THORPE, *supra* note 59, at 3264.

⁶² *See id.* at 3266; MANISHA SINHA, THE COUNTERREVOLUTION OF SLAVERY: POLITICS AND IDEOLOGY IN ANTEBELLUM SOUTH CAROLINA 13 (2000); DONALD E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 11 (1989); COLE BLEASE GRAHAM, JR., THE SOUTH CAROLINA STATE CONSTITUTION 22-23 (2011).

The unique colonial origins of South Carolina explain why slavery and aristocracy were so strongly established there and in Georgia. Slave-owning immigrants from the British West Indies, especially Barbados, dominated the early settlers of South Carolina in the late 1600s and replicated their institutions there.⁶³ Nine of the eleven names for Barbados parishes became the names for South Carolina parishes.⁶⁴ In seventeenth century Barbados, European political norms had lost their significance, and wealth through slave-intensive cash crops became the basis for political power.⁶⁵ According to a 1680 Barbados census, only seven percent of the landowners possessed a majority of the land. These men were the richest in English America and controlled the governing offices.⁶⁶ Half the freemen could not meet the property qualifications for voting.⁶⁷ The government deemed all Africans on the island enslaved and all slaves property, and these chattel African slaves outnumbered whites two to one.⁶⁸ A stalk from the plant in Barbados was planted in South Carolina, which later resembled that “mother colony”. By 1720 chattel African slaves also outnumbered whites two-to-one in the low-country, where the large plantations predominated.⁶⁹ South Carolina’s colonial constitution heavily weighted property as the basis for political power and gave slave owners “absolute power and authority over his negro slave.”⁷⁰ John Adams called its colonial constitution

⁶³ See WALTER B. EDGAR, *SOUTH CAROLINA: A HISTORY* chs. 3-4 (1998).

⁶⁴ See *id.* at 36.

⁶⁵ See *id.* at 37.

⁶⁶ See Richard S. Dunn, *The Barbados Census of 1680: Profile of the Richest Colony in English America*, 26 *WILLIAM MARY QUART* 3, 4, 17-18 (1969).

⁶⁷ See *id.* at 12; EDGAR, *supra* note 63, at 44.

⁶⁸ See Dunn, *supra* note 66, at 8; BETTY WOOD, *SLAVERY IN COLONIAL AMERICA, 1619-1776* 5 (2005).

⁶⁹ See EDGAR, *supra* note 63, at 62.

⁷⁰ *Id.* at 43-4.

“oligarchical,” which “created at once three orders of nobility.”⁷¹ Its 1790 constitution shows that the basis for power in South Carolina government continued to be wealth.

South Carolina’s unique colonial origins contrasted with Virginia’s, where as late as 1650, of a total population of 15,300, only 300 were Africans—possibly indentured servants—who worked alongside European indentured servants.⁷² The move to grow African chattel slavery in Virginia began in the late 1600s, when white indentured servants rebelled, but this occurred long after Virginia’s institutions and population had taken initial root.⁷³ In South Carolina, widespread chattel slavery attended the initial establishment of their institutions, and Georgia was cloned from South Carolina. At first it was the only colony where slavery was prohibited, as late as 1750. But South Carolina planters moved across the Savannah River, and the “Barbadized” Georgia inhabitants successfully petitioned the Trustees of Georgia to lift the ban.⁷⁴

VARYING REGIONAL DISPOSITIONS TOWARDS SLAVERY

The regions of America varied in their disposition towards slavery, between abolitionist and perpetualist tendencies.⁷⁵ The regional character of that variation was incidental. Because slavery and liberty were each causally linked to a different form of political regime, the nature of the local regime is the strong factor that influenced the

⁷¹ 4 WORKS OF JOHN ADAMS, *supra* note 33, at 463.

⁷² See WOOD, *supra* note 63, at 9.

⁷³ See *id.* at 10.

⁷⁴ See *id.* at 73; WATSON W. JENNISON, CULTIVATING RACE: THE EXPANSION OF SLAVERY IN GEORGIA, 1750-1860 14-18 (2012).

⁷⁵ Berlin identifies three distinct systems of slavery; the North, the Chesapeake and the Carolina-Georgia lowcountry. See Ira Berlin, *Time, Space, and the Evolution of Afro-American Society on British Mainland North America*, 85 AM HIST REV 44 (1980). He later adds the lower Mississippi Valley, incorporated after the ratification of the Constitution. See IRA BERLIN, MANY THOUSANDS GONE (1998).

abolitionist or perpetualist tendency in the region. In the founding era, three archetypes can be identified: Republican New England was virtually impervious to slavery; aristocratic South Carolina-Georgia was virtually impervious to abolition. Virginia was mixed, because her political character was mixed. She was aristocratic and slave-dense, like South Carolina. As a result, she was structurally resistant to abolition and republicanism, but the dominant faction of the ruling class was republican and abolitionist in sentiment, like New England.

In New England, legal tolerance of slavery and the slave trade under the monarchy was not much of a factor in the prospective continuation of slavery after national independence, because New England had developed republicanism on her own. This inoculated her to slavery's deeper ingress when slavery was legal. One alternative explanation for the shallow penetration of slavery there is economic. Unlike the South, New England never had commercial plantations requiring a large labor force.⁷⁶ But wages were high in New England already in the seventeenth century, and capital invested in slaves could save labor costs and perhaps could have offered the basis for the cultivation of cash crops hospitable to New England soil.⁷⁷ When Barbadians scouted South Carolina, for example, they experimented with new cash crops, and eventually adapted slavery from sugar production to new agricultural enterprises.⁷⁸ No doubt if the Barbadians had been the first settlers of New England, they would have done the same.

New England's political character shaped her economy. Consistent with the prevalence of their natural rights principles, the New Englanders shifted to a fee simple model of property ownership in

⁷⁶ See WOOD, *supra* note 63, at viii.

⁷⁷ See NEWELL, *supra* note 39, at 46-47.

⁷⁸ See EDGAR, *supra* note 63, at 131-32.

the 1600s, before Great Britain did. The availability of land and Yankee determination to work the land themselves made wage labor scarce. This resulted in a relatively equal division of property ownership, and good incomes for wage laborers, so that prior distinctions among the people melted away.⁷⁹ But studies show that these effects were reversed wherever slavery spread and became dense: the owners of slaves engrossed more land, increasing the inequality of property, and left the common laborer poor and landless.⁸⁰ The self-interest of common laborers in republican government and a republican way of life militated against the ingress of slavery.

John Adams captured both self-interested and selfless motives when he explained to Jeremy Belknap in 1795 why slavery never took hold in New England. He acknowledges that New England principles urged abolition, that he “never knew a Jury, by a Verdict to determine a Negro to be a slave – They always found them free.” But “the real cause,” he says, “was the multiplication of labouring White People, who, would no longer suffer the Rich to employ these Sable Rivals, so much to their Injury.” The laboring white people were a free, middling people, and slavery would disturb their wages, prices and economic equality much to their disadvantage, pointing to class stratification, dependency and political subjugation. So Adams speculates, “[i]f the Gentlemen had been permitted by Law to hold Slaves, the common white People would have put the Negroes to Death and

⁷⁹ See Freyfogle, *supra* note 40, at 725-34; NEWELL, *supra* note 39, at 38, 40, 46-47, 55-71, 244; Newell, *supra* note 39, at 55.

⁸⁰ See Jackson Turner Main, *The Distribution of Property in Post-Revolutionary Virginia*, 41 *MISS VALLEY HIST REV* 241, 244, 249 (1954); RICHARD WATERHOUSE, *A NEW WORLD GENTRY: THE MAKING OF A MERCHANT AND PLANTER CLASS IN SOUTH CAROLINA, 1670-1770* 63-65 (2d ed. 2005); Steven Sarson, *Yeoman Farmers in a Planter's Republic*, 29 *J EARLY REPUB* 63, 63-65 (2009).

their Masters too perhaps.”⁸¹ This hypothetical act was brutal, of course, but it bears witness to the revulsion of a hardened republican society to the growth of slavery.

According to the 1790 census, Virginia was the second most slave-dense (39%) state, not far behind South Carolina (43%), and contained almost half the total number of slaves in the Union.⁸² Yet, it is amazing that within the ruling class of slaveholders of Virginia, so many professed allegiance to natural right and condemned slavery. While it is easy to recognize John Adams as a son of New England, it is hard to comprehend how Virginia’s slaveholding aristocracy gave birth to these antislavery republicans. Scholars have long studied their antislavery philippics, their colonial and post-national legislative assaults against the slave trade, their plans for state abolition and legislative bills⁸³ The scholarly explanations for their failure to abolish slavery can be grouped into two general causes: the loss of financial investment and the fear of civil disruption.

⁸¹ John Adams, *Queries Relating to Slavery*, in 3 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 378, 402 (5th series, 1877) [hereinafter John Adams, *Queries Relating to Slavery*].

⁸² Historical Census Browser, University of Virginia, Geospatial and Statistical Data Center (2004), available at <http://mapserver.lib.virginia.edu/> [hereinafter Historical Census Browser].

⁸³ See, e.g., VAN CLEVE, *supra* note 3, at 171-208; LACY FORD, *DELIVER US FROM EVIL: THE SLAVERY QUESTION IN THE OLD SOUTH 19-77* (2009); ERIK S. ROOT, *ALL HONOR TO JEFFERSON?: THE VIRGINIA SLAVERY DEBATES AND THE POSITIVE GOOD THESIS* 13-62 (2008); MATTHEW MASON, *SLAVERY AND POLITICS IN THE EARLY AMERICAN REPUBLIC* (2006); EVA SHEPPARD WOLF, *RACE AND LIBERTY IN THE NEW NATION: EMANCIPATION IN VIRGINIA FROM THE REVOLUTION TO NAT TURNER'S REBELLION* (2006); BEVERLEY B. MUNFORD, *VIRGINIA'S ATTITUDE TOWARD SLAVERY AND SECESSION* 15-44 (L. H. Jenkins New ed. 1914); HUNT, *supra* note 25, at 67-76; WILLIAM W. FREEHLING, *THE ROAD TO DISUNION, VOLUME 1: SECESSIONISTS AT BAY, 1776-1854* 119-143 (1991).

Freehling acknowledges that bankruptcy would follow the abolition of slavery in fulfillment of the Virginians' "natural rights philosophy."⁸⁴ In states where slave populations were higher, as in Virginia, a general emancipation of all slaves required a greater sacrifice of the citizenry's committed financial investment. If the legislators were drawn almost exclusively from the class of large slaveholders, as they would be in southern aristocracies, the sacrificed wealth would be a large share of the legislators' own wealth. It is easy to see that within the ruling class, these prospective financial losses could weaken support for the republican faction's emancipation policy and strengthen the faction of unapologetic defenders of aristocracy and slavery.

In states where the slave counts were low, the financial burden of emancipation fell more lightly on legislators, especially if they were drawn broadly from the state population, many of whom did not own slaves. A large slaveholder amidst such a republican sea of non-slaveholding citizens would have little chance to prevent his financial losses. The ruling citizenry would be expected to repel slavery and force the slaveholder to eat his investment. In parts of New Jersey and New York, slaves on southern-style plantations accounted for 30% of the population in those regions, but because the slaves comprised a much smaller share of the states' overall population, the vested financial interests in slavery were weakly represented in state government. One New York slaveholder complained that emancipationists "were robbing them of their property," but to no avail.⁸⁵

Virginia statesmen also feared the effect of freedmen on the states' body politic. The forecasts ranged from an actual race war to civil unrest.⁸⁶ Vengeance on one side and prejudice on the other

⁸⁴ *Id.* at 126.

⁸⁵ *Id.* at 132.

⁸⁶ See VAN CLEVE, *supra* note 3, at 269.

threatened civil peace and the self-preservation of both sides.⁸⁷ But even if the law could contain these disorders, there remained the problem of citizenship. In their view, the despotism of slavery ill-prepared the slave for self-government, either in civil life or in political participation.⁸⁸ The immediate injection of a large class of freedmen into the citizenry threatened to undermine the effort to develop the republican character of the whole society. The size of the risk correlated with the existing penetration of slavery relative to the free population, which meant that in Virginia, the risk was significant. Assimilation of freedmen into republican society was easier if the slave count was a smaller share of the overall population. If the slave-to-free ratio was high, a general emancipation might ruin self-government. On the other hand, genuine republican self-government would be unattainable if slavery were allowed to persist. What was a republican reformer to do?

Virginian St. George Tucker's abolition plan in his *Dissertation on Slavery* acknowledged these problems. Bondage, he wrote, had made slaves unfit for freedom and whites unfit for equality.⁸⁹ His solution proposed gradual abolition and limitations upon the freedmen's citizenship. Wolf contends that Tucker's plan amounted to "legally infantilizing blacks" and "institutionalizing racism in the law."⁹⁰ She is right if it is true that human beings freed from slavery or tyranny

⁸⁷ Jefferson writes, "Deep rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; [will] produce convulsions, which will probably never end but in the extermination of the one or the other race." 4 JEFFERSON WRITINGS, *supra* note 21, at 49.

⁸⁸ Madison recognizes that "the ill effects suffered from freedmen who retain the vices and habits of slaves" deterred some "humane masters" from manumitting them. SELECTED WRITINGS OF JAMES MADISON 188 (Ralph Ketchum ed., 2006). The slaves needed to be "sufficiently educated for a life of freedom." *Id.* at 323.

⁸⁹ *Quoted* in WOLF, *supra* note 83, at 105 & n.33.

⁹⁰ *Id.* at 106.

of any sort are instantly prepared for the responsibilities of republican citizenship.⁹¹ She could appeal to evidence in *Black Reconstruction* by W.E.B. Dubois to support her claim. But Tucker and the republicans believed that legalized slavery had already “infantilized” the enslaved. They tended to agree with the view of Benjamin Franklin that “the unhappy man” – black, white or whatever –

who has long been treated as a brute animal, too frequently sinks beneath the common standard of the human species. The galling chains, that bind his body, do also fetter his intellectual faculties . . .⁹²

Anti-racist respect for republican natural equality and recognition of “circumstances,” i.e., slavery’s “atrocious debasement of human nature,” persuaded republicans like Tucker and Franklin that carefully devised plans providing a pathway up from slavery were necessary. Tucker perfectly expressed the difficulty of transforming the aristocratic political regime into a republican one when he said that conditions had shaped some unfit for freedom and others unfit for equality. The normative standard implicit in his analysis was equal liberty, the basis of republicanism, but aristocracy, through the agency of slavery, had conditioned some for subservience and others for dominance.

The peculiarity of the problem faced by Virginia was that the strength of the economic and social causes that deterred abolition was relative to the density of slaves, and the Virginians were born

⁹¹ Is it not reasonable to believe in our present day, for example, that an immigrant from South Korea is far better prepared for republican citizenship than a refugee from the North Korean gulags? – and that a large and immediate influx of people of the latter description equal to one-half of a political society might undermine republican government and stability there?

⁹² 10 THE COMPLETE WORKS OF BENJAMIN FRANKLIN 167 (John Bigelow ed., G.P. Putnam’s Sons 1888).

into a society in which slave density was very high. Where slave density was low, the self-interest of the ruling class, the people, worked against the ingress of slavery in order to prevent social, economic and political inequality. Where the density of slaves was already high, as in Virginia, the ruling class of slaveholders was trapped in a dilemma between avarice or bankruptcy, between aristocracy or an unstable republican society. The stated antislavery principles of the leading statesmen in Virginia were as sound as the principles of New England statesmen, but no northern statesmen's antislavery principles were tested to the degree that Virginians' principles were.

The policy of the Virginians was to preserve the legality of slavery while they pursued coordinate strategies to alter the ratio of slave to free population in favor of freedom. From their point of view, this made sense. The northern experience proved that the feasibility of abolition improved as slave density decreased.⁹³ Also, Madison observed that "the indulgence & familiarity" between slaves and slaveholders increased as slave density lowered, suggesting that with lower slave density, more liberal contact would better prepare slaves for liberty and slaveholders for equality.⁹⁴ Hence, Virginia banned the foreign slave trade in 1778 to prevent the increase of slaves and eased curbs on private manumissions in 1782 to encourage the decrease.⁹⁵

⁹³ See MCMANUS, *supra* note 18, at 160-179; see generally ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* (1967) (for a general review of northern abolition).

⁹⁴ See 9 MADISON WRITINGS, *supra* note 26, at 132.

⁹⁵ See WOLF, *supra* note 83, at 6.

A third way to alter the ratio was diffusion.⁹⁶ The idea advanced by Virginia's diffusion theorists, including Madison⁹⁷ and Jefferson,⁹⁸ was to open the western territories to slavery, to drain off Virginia's high number of slaves. The success of the strategy depended upon an effective national ban on the slave trade. Eventually, it was hoped, the slave-to-free ratio would reach a tipping point. Manumissions would accelerate; slavery would be abolished everywhere. Of course, opening the West to slavery was a significant risk, possibly fatal to the nation, and sacrificed the West for the sake of rescuing Virginia and other southern states. In the absence of facts definitively proving otherwise, hope in diffusion could be sustained as late as 1820, when the census would measure the first full decade of population growth since the national ban on the foreign slave trade.

To more than a few scholars, the Virginia republicans are full of duplicitous, insincere antislavery rhetoric.⁹⁹ This interpretation of the Virginians requires us to discount years of their consistent denunciations of slavery, and to dismiss their fears that slavery would doom republicanism. We would have to believe that they were principled proslavery aristocrats in disguise. But why would they burden themselves with the massive moral responsibility of abolishing slavery in Virginia that their allegedly faux denunciations of slavery imposed? Why denounce slavery and risk posterity's charge of hypocrisy if they failed to end slavery in Virginia? The Virginians could more easily have adopted an unabashedly proslavery position and

⁹⁶ FORD, *supra* note 80, at 73-76 (for a discussion of the theory, based on the writings of Founding Era statesmen).

⁹⁷ See 9 MADISON WRITINGS, *supra* note 26, at 9-12.

⁹⁸ See JEFFERSON WRITINGS, *supra* note 21, at 1433-35.

⁹⁹ See, e.g., FREEHLING, *supra* note 83, at 122; A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 68, 70 (1996); VAN CLEVE, *supra* note 3, at xxi; Peter Wallenstein, *Flawed Keepers of the Flame: The Interpreters of George Mason*, 102 VA MAG HIST BIOG 229, 253 (1994).

substituted the applause of South Carolina for the applause of Massachusetts. The more plausible explanation is that the Virginians really were who they said they were. They were to revolutionary America what the Comte de Lameth and the Marquis de Lafayette were to revolutionary France. Though born aristocrats, they were republicans; though slaveholding, they were abolitionists.

“Slaveholding abolitionist” might seem to be contradictory; rather, the term is janus-faced, and aptly describes men living in two conflicting worlds that a revolutionary age bridges. In their time, it was most important for them to do all that they could to remake their world into a republican world in which slavery would be extinct on all private estates. What counted more was what they did to eliminate conditions in which good men had to answer the sad question, whether to release the slaves on their private estates into a hostile world, or to do their best to provide a humane existence for them at home, than how they themselves answered that question. The difficulty of abolition in Virginia may very well have provided a convenient excuse for the morally flaccid to do nothing while chirping anti-slavery sentiments, but the difficulty was a match for even strong moral character. Revolutionizing political society is not so easy as deciding to push a button. Adams himself recommended the policy that Virginia pursued. He wrote that in Virginia emancipation in “such Numbers” would be unwise. The better policy was to prohibit slave importations and to wait “until the increasing Population of the Country shall have multiplied the Whites to such a Superiority of Numbers, that the Blacks may be liberated by Degrees.”¹⁰⁰ This arithmetic is what secured abolition in the North, and Adams approved of applying the lessons of the northern experience to Virginia.

Intentions and efforts do matter. By them, we can distinguish the goals and thereby the political character of the statesmen. It is

¹⁰⁰ John Adams, *Queries Relating to Slavery*, *supra* note 81, at 416.

therefore impossible to recognize republican goals in a state's deliberate determination to increase the slave-to-free ratio. But that is what the policy of South Carolina and Georgia was. While other states had been attempting to develop in a republican direction with respect to slavery, the public deeds of Georgia and South Carolina consistently supported aristocracy. During the colonial period, Virginia's House of Burgesses was petitioning the crown to end the slave importations,¹⁰¹ but Georgia was petitioning to open her colony to legalize slavery.¹⁰² Between 1750 and 1770, Georgia's slave population grew from 200 to 15,000.¹⁰³ The port of Charleston, South Carolina was importing slaves at breakneck speed. According to Peter Wood, South Carolina accounted for forty per cent of the slaves imported into America between 1700 and the war for independence.¹⁰⁴ When South Carolina and Georgia's insisted that Jefferson delete his philippic against the slave trade in the Declaration, Jefferson noted that the states "had never attempted to restrain the importation of slaves," and "on the contrary, still wished to continue it." He copied the first draft of the Declaration with the deleted text highlighted, because "the sentiments of men are known not only by what they receive, but what they reject also."¹⁰⁵ The sentiments among their statesmen were not republican.

The principles of the Revolution did not seem to alter Georgia and South Carolina's treatment of slavery at all. In 1770, Georgia is estimated to have had fewer slaves than New York, 15,000 to 19,062.¹⁰⁶ Yet, by 1800, New York had already enacted a general

¹⁰¹ See WOLF, *supra* note 83, at 21-23.

¹⁰² See JENNISON, *supra* note 74, at 14-18; WOOD, *supra* note 68, at 73.

¹⁰³ See *id.* at 90.

¹⁰⁴ PETER H. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION xvi (1974).

¹⁰⁵ JEFFERSON WRITINGS, *supra* note 21, at 18, 22.

¹⁰⁶ WOOD, *supra* note 68, at 90.

emancipation law the year before,¹⁰⁷ but Georgia's slave population had increased fourfold, to 59,699.¹⁰⁸ South Carolina and Georgia did not liberalize private manumissions and later acted to prevent them. In 1800 South Carolina enacted a law that forbade a slaveowner from freeing a slave without government officials' approval, and in 1801 Georgia required the legislature's approval.¹⁰⁹

On the other hand, South Carolina and Georgia statesmen did sign the Declaration. While other patriots might have hazarded rebellion to establish revolutionary republicanism in America, the controlling statesmen in South Carolina and Georgia aimed only for independence from Great Britain and a continuation of their prior way of life. Hence, South Carolina's introduction to its 1776 constitution reproduces Jefferson's grievances against the crown in the Declaration, but elides the important natural rights claims in the Declaration's second paragraph.¹¹⁰ And in the South Carolina ratifying convention, Charles Cotesworth Pinkney both denounced bills of rights that declare "all men are by nature born free," and heaped high praise on the Declaration ("a charter which our babes should be taught to lisp in their cradles"), which contains the sentiments that he denounced. When he praised the Declaration, he enthused over independence from Britain, and passed over the natural rights principles in the second paragraph.¹¹¹

The conduct of Georgia and South Carolina representatives in the First Congress illustrated their brazen anti-republicanism, and shed further light on their states' motives for joining the Union. Benjamin Franklin petitioned the Congress to "loosen the bands of slavery" and to "devise means for removing this inconsistency from the

¹⁰⁷ See MCMANUS, *supra* note 18, at 173-76.

¹⁰⁸ Historical Census Browser, *supra* note 82.

¹⁰⁹ See FORD, *supra* note 80, at 195-96.

¹¹⁰ See 6 THORPE, *supra* note 59, at 3241-43.

¹¹¹ 4 DEBATES, *supra* note 23, at 300-01.

character of the American people." Congress, he wrote, was vested with the duty, coincident with "the political creed of Americans," to secure "the blessings of liberty" for all, "without distinctions of color, to all descriptions of people," for "equal liberty" was "the birthright of all men."¹¹² In the subsequent debate, James Jackson from Georgia and William Smith from South Carolina proved that natural equality, and not slavery, was inconsistent with the creed of their states. Violently urging no further consideration of the petition, Jackson thundered that nothing but "force of arms" could make them part with their slaves and that they would "never suffer themselves to be divested of their property without a struggle." He astonishingly boasted that slavery was "the basis for the feudal system," thus agreeing with the leading founders (but without their consternation) that slavery and republicanism could not co-exist.¹¹³

Smith said that his state would never have agreed to join the Union had the Constitution prohibited slavery. South Carolina had joined the Union "from political, not from moral motives," suggesting that they had joined for political advantage, and not due to concurrence in the natural rights basis of American republicanism to which Franklin appealed. Smith and South Carolina rejected those views. His "constituents" did not "want to learn morals from the petitioners." If they needed moral improvement, "they can get it at home."¹¹⁴ Apparently, the local morals of South Carolina were different from "the political creed of Americans," as Franklin and the leading founders understood it. Here is the exception to Jefferson's statement that the Declaration was an expression of the American mind.¹¹⁵

¹¹² 1 ANNALS OF CONG. 1239-40 (1790).

¹¹³ *Id.* at 1242.

¹¹⁴ *Id.* at 1244.

¹¹⁵ See JEFFERSON WRITINGS, *supra* note 21, at 1501.

Smith's background strengthens the anti-republican interpretation of his comments and his state. He was in Britain when the American war broke out. Two of his American friends made their way home to fight, to one of whom Smith wrote a letter, chiding him for his decision.¹¹⁶ While Americans were in the field fighting and dying for republican liberty, Smith pleasantly rode out the war in the company of the British nobility. He vacationed with Lord Kinnaird at his country estate, Rossie Priory, attended balls in Carlisle, and "breakfasted, dined, and danced" at the castle of Sir James Lowther in Whitehaven — the same Whitehaven that American patriot John Paul Jones daringly raided in 1778.¹¹⁷ This was the man whom South Carolina sent to the first Congress of the new republic.

Tellingly, only the delegations from Georgia and South Carolina voted unanimously against committing Franklin's petition to committee for further consideration. But although Virginia had more than twice the number of slaves as South Carolina and Georgia combined, according to the 1790 census,¹¹⁸ the delegation from the Old Dominion voted eight to two in favor of considering the petition.¹¹⁹ The evidence points to the conclusion that the dominant statesmen of South Carolina and Georgia were practitioners of European-style *realpolitik*. They were statesmen of the founding era, but they were not revolutionary founders. They were determined to maintain the political character of their aristocratic slave societies.

THE CONSTITUTION

At the time of the Constitutional Convention, the states nominally formed one nation, but the bonds among the states were weak,

¹¹⁶ See GEORGE C. ROGERS, *EVOLUTION OF A FEDERALIST: WILLIAM LOUGHTON SMITH OF CHARLESTON (1758-1812)* 81, 85 (1962).

¹¹⁷ *Id.* at 93.

¹¹⁸ Historical Census Browser, *supra* note 82.

¹¹⁹ 1 ANNALS OF CONG. 1247 (1790).

susceptible to breaking apart and reforming into separate rival confederacies, as Hamilton warned in *Federalist* essays 6-8.¹²⁰ Due to the varying political character of the parts of the nation, it was reasonable to expect compromises on slavery or to abandon the Union. The delegates had come to the convention, Gouverneur Morris said, “to form a compact for the good of America But as the compact was to be voluntary, it is in vain for the Eastern States to insist on what the Southn. States will never agree to. It is equally vain for the latter to require what the other States can never admit”¹²¹ To preserve and strengthen the Union, good statesmanship required that they find mutually acceptable terms and that then and thenceforth they regulate their public conduct in view of the varying political character and attendant sensitivity of other statesmen. An antislavery republican would have to be guarded, especially if his state abounded in slaves. The goodwill of political opponents is useful for protecting the efficacy of hidden plans, and secrecy is often necessary in revolutionary ages. Great care, therefore, is needed to distinguish pusillanimity from wise caution, and prudent compromises from evil compromises when assessing statesmanship.

If the Constitution that the delegates framed indeed “provided enormous protections for slavery,”¹²² it is a wonder why slavery is not legal everywhere in America today. It is difficult to fit that account of the Constitution into the general direction of national political development, which was towards a stronger union, republicanism and abolition. Up to the stroke of independence, America was governed by monarchy. Slavery and the importation of slaves from abroad were legal everywhere under that government. Finkelman notes that by the time the Constitution was written, only two states,

¹²⁰ See THE FEDERALIST NOS. 6, 7, 8 (Alexander Hamilton), *supra* note 25, at 48-71.

¹²¹ 1 RECORDS, *supra* note 22, at 593.

¹²² PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 10 (3d ed. 2014).

New Hampshire and Massachusetts, had abolished slavery.¹²³ According to the 1790 census, those two states represented 13% of the total national population.¹²⁴ By 1860, the number of Americans who lived in free states had swelled to 60% of the national population, slaves inclusive.¹²⁵ The 60% then moved against slavery nationally, and destroyed it. These developments all took place under the Constitution of 1787. That is a poor record for an allegedly proslavery constitution.

Those who stood most to gain or lose do not agree that the Constitution was as proslavery as the Neo-Garrisonians say it was. In the South Carolina ratifying convention, the delegates recognized not more than the three traditionally acknowledged places in the Constitution where slavery was indirectly addressed. The slave trade clause was viewed with ambiguity. Rawlin Lowndes objected to the clause that gave Congress the power to legislate against the slave trade after 1808.¹²⁶ It was in the context of answering that objection, that Charles Cotesworth Pinckney said, “[c]onsidering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but, on the whole, I do not think them bad.”¹²⁷ Finkelman says that Pinckney “crowed” about the deal,¹²⁸ but in fact Pinckney was explaining why they could not gain their preferred terms.

¹²³ See *id.* at ix.

¹²⁴ Historical Census Browser, *supra* note 82.

¹²⁵ *Id.*

¹²⁶ See 4 DEBATES, *supra* note 23, at 272-73.

¹²⁷ *Id.* at 286.

¹²⁸ FINKELMAN, *supra* note 122, at 103.

Pinckney did boast that the Constitution denied power to the national government to emancipate slaves,¹²⁹ but in the Virginia ratifying convention, Patrick Henry and George Mason believed that the Constitution granted the power to emancipate.¹³⁰ The Virginians' fear of the emancipatory power of the national government under the Constitution finally forced Madison to say, "[t]here is no power to warrant it [abolition] in that paper [the Constitution]."¹³¹ In the context of that debate, Randolph, siding with Madison, also denied the power. In support of his "proslavery Constitution" thesis, Finkelman quotes parts of Randolph's argument at length,¹³² including his claim, that in the federal Convention, "there was not a member of the Virginia delegation who had the smallest suspicion of the abolition of slavery."¹³³ But Mason, who was also a member of the Virginia delegation in Philadelphia, did not concur with Randolph.

Given the Virginians' uncertainty, it was not intellectually dishonest, as Finkelman says,¹³⁴ for James Wilson to tell the Pennsylvania convention that after a "lapse of a few years . . . Congress will have power to exterminate slavery from within our borders."¹³⁵ Wilson explained that the expected slave trade ban in 1808 would lay "the foundation for banishing slavery out of the country."¹³⁶ After the expected ban, he thought, it would be feasible and constitutional for Congress to act. A 1790 report by a select committee in the House

¹²⁹ See *id.* at 9.

¹³⁰ See 3 DEBATES, *supra* note 23, at 452-53, 455-56, 589-90; see also Robin L. Einhorn, *Patrick Henry's Case Against the Constitution*, 22 J EARLY REPUB 549 (2002).

¹³¹ 3 DEBATES, *supra* note 23, at 622.

¹³² See FINKELMAN, *supra* note 122, at 10.

¹³³ 3 DEBATES, *supra* note 23, at 598.

¹³⁴ See FINKELMAN, *supra* note 122, at 42 & n.77.

¹³⁵ 2 DEBATES, *supra* note 23, at 484.

¹³⁶ *Id.* at 452.

of Representatives also recognized that the Congress could emancipate slaves after 1808.¹³⁷ It is no more justifiable to accuse Wilson of intellectual dishonesty than to attribute a “noble lie” to Madison for denying a warrant in the Constitution to abolish slavery. Madison and other leading founders knew that slavery was anti-republican and arguably required the exercise of the guarantee clause in Article IV, Section 4.¹³⁸

The guaranteed extension of the slave trade until 1808 prevented its immediate abolition, a result that other delegates deplored. But had a majority at the federal Convention held its ground, South Carolina and Georgia might have rejected ratification, as they threatened, and formed their own confederacy. Why didn’t the other states let them depart? When questioned in this way by his fellow Virginians who abhorred the trade, Madison told his ratifying convention:

[T]he consequences might be dreadful to them and to us . . .
. If those states should disunite from the other states for not

¹³⁷ VAN CLEVE, *supra* note 3, at 178, 274.

¹³⁸ “The United States shall guarantee to every state in this union a republican form of government...” U.S. CONST. art. IV, § 4, cl. 1. *But see* WILLIAM WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 3-4, 13 (1972). Wiecek argues that the word “republican” was vague and may “have had no meaning at all” to the founding generation. His argument divests the guarantee clause of original, antislavery power. However, his supporting quotations of the founders, especially Adams, are taken out of context, quite badly. Adams, like Madison in *Federalist* 39, was calling attention to the misapplication of the true meaning of the word. *See* 10 *WORKS OF JOHN ADAMS*, *supra* note 33, at 377-78; John Adams, *Correspondence Between John Adams and Mercy Warren*, *supra* note 51, at 352-53. Spooner also alluded to the guarantee as proof that slavery was unconstitutional. *See* LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 123-134 (Bela Marsh 1845). In his review of Spooner’s argument, Wendell Phillips, like Wiecek, misreads the founders’ observations of improper usages of the term “republican,” and incorrectly concludes that they didn’t know what it meant. *See* WENDELL PHILLIPS, *REVIEW OF LYSANDER SPOONER’S ESSAY ON THE UNCONSTITUTIONALITY OF SLAVERY* 72-75 (Andrews & Prentiss 1847). But the best proof that the guarantee was hostile to slavery comes from Calhoun, who feared the antislavery power of the clause. *See* 9 *REG. DEB.* 774 (1833).

indulging them in the temporary continuance of this traffic, they might solicit and obtain aid from foreign powers.¹³⁹

A “No Union with Slave-Importers” policy at the Convention might have secured a smaller, more republican union, and possibly hastened emancipation within that republic. But it would have invited conflict with the other confederacy, war with foreign interference and an uncertain fate for the cause of liberty. The world in 1787 was not friendly to republicanism and the American republic was a vulnerable infant. South Carolina had been a hotbed of Tories during the war and possibly, they would have turned to Britain.¹⁴⁰ During the Missouri crisis John C. Calhoun told John Quincy Adams, that an “offensive and defensive” alliance between South Carolina and Britain was probable in the event that the state left the Union.¹⁴¹

Independent South Carolina and Georgia might have built a slave-owning oligarchic empire, but within the Union, they were checked by the counterweight of other states. South Carolinian Leonidas Spratt, delegate to the Confederate constitutional convention, sketched what they might otherwise have achieved. The contest over slavery in 1861, he said, was a contest between aristocracy and democracy in America, and he avowed his alignment with aristocracy.¹⁴² That contest “began at the beginning, and almost at the start the chances of the game were turned against us. If the foreign slave trade had never been suppressed, slave society must have triumphed.”¹⁴³ The continuance of the slave trade would have spread

¹³⁹ 3 DEBATES, *supra* note 23, at 453-54.

¹⁴⁰ See EDGAR, *supra* note 63, at 239-40.

¹⁴¹ 4 MEMOIRS OF JOHN QUINCY ADAMS 530 (Charles Francis Adams ed., J.B. Lippincott & Co 1874).

¹⁴² Leonidas Spratt, A Protest from South Carolina, Letter from Leonidas Spratt to Hon. John Perkins, a Delegate from Louisiana, *reprinted in* 2 THE REBELLION RECORD 357, 358 (Frank Moore ed., G.P. Putnam 1862).

¹⁴³ *Id.* at 360-61.

slavery and firmly anchored aristocratic government in America, which was a missed opportunity, according to Spratt. He urged the Confederacy to correct that early mistake and reopen the slave trade. Without changing the white population and without extending the size of the Confederate borders, he predicted, the South could hold “forty millions” more slaves.¹⁴⁴

But in the federal Convention the Virginians, particularly, fought against the slave trade. Edmund Randolph said that he would sooner “risk the constitution” than give his consent to unlimited slave importations.¹⁴⁵ Mason opposed it on the general principle that “the Genl. Govt. should have power to prevent the increase of slavery.”¹⁴⁶ Their weight in the convention helped to secure the constitutional power to end the slave trade after 1808 and to prevent a greater danger to republicanism and far more horrific alternative history.¹⁴⁷ The conduct of Mason and Randolph in that debate proves that the clause enumerating slaves in the apportionment of representatives did not automatically guarantee support for proslavery policy. As long as the additional voting power given to the southern states brought many like Mason and Randolph into the national government, national antislavery policy could count on some Southern support. For example, when territorial representatives from Illinois and Indiana petitioned Congress to waive the slavery prohibition in the Northwest Ordinance in 1803, a Virginian blocked the petition in House of Representatives. John Randolph, chairman of the committee that received the petition, wrote in his report that, “the committee

¹⁴⁴ *Id.* at 363.

¹⁴⁵ 2 RECORDS, *supra* note 22, at 374.

¹⁴⁶ *Id.* at 370.

¹⁴⁷ See also William W. Freehling, *The Founding Fathers and Slavery*, 77 AM HIST 81, 88-90 (1972) (acknowledging the salutary impact of the slave trade ban, reinforcing the view that the twenty-year prohibition of the ban was worth exchanging for the right to ban it later).

deem it highly dangerous and inexpedient to impair a provision wisely calculated to promote the happiness and prosperity of the northwestern country.”¹⁴⁸

Regarding the abolition of slavery itself, the real antislavery power of the Constitution consists less in debatable provisions regarding slavery, and more in its protection of republican government and society. The theory that the Constitution put into practice was that under republican government most of all, human beings can flourish and develop into a powerful political society uncommonly loyal to its government. The protection of liberty produced strength. Under the Constitution, genuine republicanism enjoyed an unprecedented chance in history to grow. Slave state governments ill fit the Constitution and negated its benefits. In proportion to slavery’s prevalence slave societies were weak. Due to its natural advantages protected by the Constitution, republicanism eclipsed aristocracy and slavery, and eventually smoothed out those refractory elements within the Union, as the founders intended.

The form of the national government in the proposed Constitution, Madison explained in *Federalist* 39, was republican and required states to be republican in form.¹⁴⁹ The republicanism of the Constitution was grounded in natural right. Madison and Jefferson recommended the Declaration of Independence first among the “best guides” to the principles of the Constitution.¹⁵⁰ The Constitution and American political institutions, Madison says, were established “on the basis of human rights” and “framed for their preservation.”¹⁵¹

¹⁴⁸ EDWARD COLES, HISTORY OF THE ORDINANCE OF 1787 20-21 (Historical Society of Pennsylvania 1856).

¹⁴⁹ THE FEDERALIST NO. 39 (James Madison), *supra* note 25, at 236-39.

¹⁵⁰ Harry V. Jaffa, *What Were the “Original Intentions” of the Framers of the Constitution of the United States?* 10 U. PUGET SOUND L. REV. 351, 363 (1987).

¹⁵¹ 8 MADISON WRITINGS, *supra* note 26, at 343; 9 MADISON WRITINGS, *supra* note 26, at 429 & n.1.

Finkelman acknowledges that “personal liberty and constitutional government” were “embodied in the Constitution of 1787” and “were surely the great accomplishments of the Revolution.”¹⁵² He thus acknowledges the existence of the means by which the Constitution overcame slavery.

Prosperity followed the security of republican liberty. Wilson explains this theory at length in a Fourth of July oration in 1788, to commemorate the adoption of the Constitution.¹⁵³ History taught that when “the force of liberty pervaded the soil,” society flourished. When men can be confident that “property, liberty, subsistence” are not subject to a tyrant’s caprice, “the industry of every citizen extends beyond himself,” and “the industrious alone constitute a nation’s strength.”¹⁵⁴ Flourishing commerce, agriculture, manufactures, the arts and sciences are “the gifts of liberty.”¹⁵⁵ Later, Madison vindicated the theory, attributing “an unrivaled growth of our faculties and resources” to peace and “the benign influence of our republican institutions.”¹⁵⁶ John Adams attributed “all our happiness and prosperity” to the preservation and security of “that unexampled liberty which this nation now possesses.”¹⁵⁷

In addition, the cords that would bind the American citizen to the Constitution would be adamant. In his lectures on the law, Wilson explains that America innovated the science of government in at least one important respect, that sovereignty was discovered “in

¹⁵² FINKELMAN, *supra* note 122, at 163.

¹⁵³ See 1 COLLECTED WORKS OF JAMES WILSON 285-293 (Kermit L. Hall & Mark D. Hall eds., 2007) [hereinafter WORKS OF JAMES WILSON].

¹⁵⁴ *Id.* at 290.

¹⁵⁵ *Id.* at 289.

¹⁵⁶ 8 MADISON WRITINGS, *supra* note 26, at 47.

¹⁵⁷ 1 WORKS OF JOHN ADAMS, *supra* note 33, at 626-27.

the free and independent man," and "on that broad and deep foundation" American government was laid.¹⁵⁸ In the hands of the sovereign people, a constitution "is as clay in the hands of the potter: they have the right to mould, to preserve, to improve, to refine, and to finish it as they please."¹⁵⁹ The people would be aware that the laws that protect liberty and all its consequent fruits originate in themselves, by natural right. Self-love would reinforce the love of the laws and create a new form of unusually strong patriotism. The character of a new republican man would dawn: "His mind is roused and elevated: his heart is rectified and enlarged: dignity appears in his countenance, and animation in his every gesture and word."¹⁶⁰ Later, Adams confirms this aspect of Wilson's theory, observing that "the preservation of liberty" was "increasing daily in their attachment to a system of government, in proportion to their experience of its utility."¹⁶¹

Increased prosperity and a new patriotism would infuse republican society with power. To those elements of power, the security of liberty added another, population. Because people rationally prefer liberty over despotism, the spread of information abroad about American government would encourage emigration, so that America could become, in Washington's turn of phrase, an "asylum for the poor and persecuted of the earth."¹⁶² While serving in his diplomatic post in France, Franklin himself felt the effects of American popularity among the European people, writing, "[a] multitude of people are continually applying to me personally . . . for information respecting

¹⁵⁸ 1 WORKS OF JAMES WILSON, *supra* note 153, at 445-46.

¹⁵⁹ *Id.* at 712.

¹⁶⁰ 1 WORKS OF JAMES WILSON, *supra* note 153, at 716.

¹⁶¹ 9 WORKS OF JOHN ADAMS, *supra* note 33, at 111.

¹⁶² 11 THE WRITINGS OF GEORGE WASHINGTON 318 (Worthington C. Ford ed., G. P. Putnam's Sons 1891).

the means of transporting themselves, families and fortunes to America."¹⁶³ Later, he connects the effects to the cause, which is acknowledged by the Europeans. American constitutions were "much admired by the politicians here, and it is thought will induce considerable emigrations of substantial people from different parts of Europe to America."¹⁶⁴

The Constitution also provided means within itself to broaden, as well as deepen the power of republican society. In his final annual message to Congress, Madison recognizes the success of the Constitution, "without losing its vital energies, of expanding itself over a spacious territory with the increase and expansion of the community for whose benefit it was established." The community he names is "the American people," in whom he acknowledges "their devotion to true liberty and to the Constitution which is its palladium."¹⁶⁵ Under these influences, the founders envisioned a vast domain of freedom. Adams foresaw "an empire of liberty, and a prospect of two or three hundred millions of freemen, without one noble or one king among them."¹⁶⁶ Madison calculated a population of 192 million by 1929.¹⁶⁷

The founders knew that the constitutional blueprint for a natural rights republic conflicted with the actual political character of some of the constituent parts composing the nation. States government's deviation from or alignment with the principles of the Constitution lay shielded behind the wall of federalism. Therefore, under the

¹⁶³ Benjamin Franklin, Letter from Benjamin Franklin to the President of Congress (April 15, 1783), reprinted in 6 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA 377, 379 (Francis Wharton ed., Government Printing Office 1889).

¹⁶⁴ Benjamin Franklin, Letter from Benjamin Franklin to the President of Congress (December 25, 1783), *id.* at 580, 587.

¹⁶⁵ 8 MADISON WRITINGS, *supra* note 26, at 384.

¹⁶⁶ 9 WORKS OF JOHN ADAMS, *supra* note 33, at 546.

¹⁶⁷ 9 MADISON WRITINGS, *supra* note 26, at 360.

Constitution a state could be free, and in consequence, would grow in wealth, talents and knowledge, broadly diffused, following the experience of New England. Or a state might persist as a slave society, and in consequence slavery's pernicious effects would destroy republican liberty and the fruits of its exercise for all who comprised the ruled classes, black slaves and poor whites. Regarding this latter point, Finkelman acknowledges key supporting evidence. In his review of Michael Kent Curtis's *Free Speech*, he notices that "the protections central to political liberty" lost ground in the antebellum slave states.¹⁶⁸ However, he misses the full implication of what he observes. He mentions that Southerner Hinton Helper was threatened with imprisonment for criticizing slavery,¹⁶⁹ but he does not notice the central claim of Helper's book, that non-slaveholding whites in the slave states were ruled by an oligarchy that owed its power to slavery.¹⁷⁰ Missing this, Finkelman concludes, "[s]outhern whites were willing to give up a portion of their own liberty to suppress the liberty of others."¹⁷¹ His statement assumes that Southern whites democratically governed themselves and that the antebellum South was a "white democracy." The thesis of the threatened man, Helper, directly contradicts this view. The destruction of liberty in the slave states, which Finkelman does notice, was the natural consequence of the oligarchic system, which flouted the form of government in the Constitution. The threats against Helper for publishing his thesis were a stunning confirmation of his thesis.

¹⁶⁸ Paul Finkelman, *Speech, Press and Democracy*, 10 WM. & MARY BILL RTS. J. 813, 813, 818, 821 (2002).

¹⁶⁹ See *id.* at 821.

¹⁷⁰ See HINTON ROWAN HELPER, *THE IMPENDING CRISIS IN THE SOUTH* (A.B. Burdick 1860).

¹⁷¹ Finkelman, *supra* note 168, at 821.

Persisting slavery had warped southern government to such a degree that by the eve of secession, Ohio Representative James Ashley could see barely any remaining resemblance to the founders' model. The eighteen free states, he observed, were modeled after New England, "founded by her wisdom" and "loyal to the Constitution and Union." In those states, the people had "rights which the government and all classes of citizens are bound to respect." The security of liberty accounted for those states' "unsurpassed development, . . . prosperity and growth." But in the slave states:

[T]he reverse of all this is true. In all these fifteen slave states, a class is dominant that fills all the offices, and controls the legislative, executive and judicial departments of the Government Hence in all the slave States the constitutional rights of an American citizen are not respected, the constitutional guaranty for free speech and a free press is a mockery, free schools and an enlightened Christianity an impossibility The guaranties of the national Constitution, so far as they affect the individual rights of an American citizen, are denied alike to all men who are not of this privileged class or their open allies; and to be an American citizen secures no protection from insult and outrage, unjust imprisonment and terrible punishments, or even death. So complete is this reign of terror, that no man can print, or speak, or preach, or pray, unless he does it in the manner prescribed by this privileged class.¹⁷²

James Wilson's theory also predicted the results that flow from the insecurity of liberty: "In a government, whose maxims are those of oppression . . . there is no encouragement for industry."¹⁷³ History

¹⁷² CONG. GLOBE, 36th Cong., 1st Sess. app. at 365 (1860).

¹⁷³ 1 WORKS OF JAMES WILSON, *supra* note 153, at 288.

taught that “where tyranny reigns,” agriculture, manufacturing and commerce would decline, and “ignorance and vice” would proliferate.¹⁷⁴ The common man would hate his government, because “[h]is country is his prison; its constitution is his curse; and its government is a rod of oppression, held continually over his head.”¹⁷⁵

Not surprisingly, social desolation prevailed in the slave states. In the 1780s, it was reasonable to believe that the South, with more western lands directly to its west than the North, would be more prosperous and populous.¹⁷⁶ But that belief was contingent upon the expected dissipation of slavery, because, as Mason explained in the convention, “[s]lavery discourages arts & manufactures. The poor despise labor when performed by slaves. They prevent the immigration of Whites, who really enrich & strengthen a Country.”¹⁷⁷ By 1833 Madison recognized that the “depressed condition of Virginia” was due to slavery.¹⁷⁸ Indeed, the free southern population did not grow as expected for that reason. High slave density correlated to poor white flight.¹⁷⁹ A few became very rich,¹⁸⁰ and the majority was

¹⁷⁴ *Id.*, at 289.

¹⁷⁵ *Id.*, at 716.

¹⁷⁶ See MARK A. GRABER, *supra* note 3, at 4-5, 126-27.

¹⁷⁷ 2 RECORDS, *supra* note 22, at 370.

¹⁷⁸ 6 MADISON WRITINGS, *supra* note 26, at 500.

¹⁷⁹ See Donald F. Schaefer, *Locational Choice in the Antebellum South*, 49 *J Econ Hist* 145 (1989); see also HENRY WILSON, 2 RISE AND FALL OF THE SLAVE POWER IN AMERICA 62 (James R. Osgood & Company 1874).

¹⁸⁰ See ROBERT W. FOGEL, WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY 84 (1989); JAMES L. HUSTON, CALCULATING THE VALUE OF THE UNION: SLAVERY, PROPERTY RIGHTS, AND THE ECONOMIC ORIGINS OF THE CIVIL WAR 36 (2003); GAVIN WRIGHT, THE POLITICAL ECONOMY OF THE COTTON SOUTH: HOUSEHOLDS, MARKETS, AND WEALTH IN THE NINETEENTH CENTURY 27-31, 35 (1978).

poor,¹⁸¹ uneducated¹⁸² and dominated.¹⁸³ There was a “massive imbalance”¹⁸⁴ between North and South in the destinations of foreign immigrants, who understandably avoided oligarchic tyranny in the slave states and settled in the North.

The effects of slavery robbed the people of an equal chance in the race of life and robbed the state of the wasted human potential, white and black. This applied to the so-called “master class” as well. “Go to your Patent Office,” Ohio Senator Benjamin Wade taunted his overly proud opponents, “and see what are the products of your degraded labor and your refined aristocrat. The latter never invents an-

¹⁸¹ See HUSTON, *supra* note 180, at 91-93. *But see* FOGEL, *supra* note 180, at 83. Modern scholars disagree about the economic condition of those outside the small class that owned most of the land and slaves, some saying that slavery lifted the economic condition of all freemen. The many cotemporaneous accounts of the poverty of non-slaveholders persuade me that slavery generated a low wage underclass of free whites. *See, e.g.,* HELPER, *supra* note 170, at 10, 14-15, 23-24, 104, 206.

¹⁸² *See* CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860* 198 (1983); WILLIAM J. REESE, *AMERICA'S PUBLIC SCHOOLS: FROM THE COMMON SCHOOL TO "NO CHILD LEFT BEHIND"* 14, 26 (2011) (showing the absence of common schools in the antebellum South in contrast to the North). *See* EDGAR WALLACE KNIGHT, *PUBLIC EDUCATION IN THE SOUTH* 210-211 (1922) (discussing the reason for the absence, from the master class's point of view). *See also* CONG. GLOBE, 30th Cong., 1st Sess. app. at 836-37 (famous northern educator, Horace Mann, blaming “the oligarchy who rule the South,” who actively suppressed common school education in order to keep the ruled whites and enslaved blacks in ignorance).

¹⁸³ The percentage of Southerners owning ten or more slaves in the slave states in 1850 and 1860 (even adjusting for age and sex) is considerably less than the percentage of state representatives and senators owning ten or more slaves. One may quickly calculate these percentages by using data from the US Census and Ralph Wooster's study. *See* RALPH WOOSTER, *THE PEOPLE IN POWER: COURTHOUSE AND STATEHOUSE IN THE LOWER SOUTH, 1850-1860* 125-153 (1969); Historical Census Browser, *supra* note 82. *See also* HELPER, *supra* note 170, at 16, 18, 23-24, 51. *But see* WILL MORRISEY, *SELF-GOVERNMENT, THE AMERICAN THEME: PRESIDENTS OF THE FOUNDING AND CIVIL WAR* 143 (2004) (advancing the view that white southerners were less than completely divided between ruled and ruling class).

¹⁸⁴ Ira Berlin & Herbert G. Gutman, *Natives and Immigrants, Free Men and Slaves*, 88 *AM. HIST. REV.* 1175, 1176 (1983).

anything, unless it is a new way of stuffing a chicken or mixing liquor.”¹⁸⁵ Although slavery amply provided wealth and power to a few, slave society could not compete with republican society. The constitutional provisions for easily admitting new states on equal footing with the old states enlarged the field of competition and created the preconditions for republicanism’s dominance.

From the earliest days of their national careers, both Madison and Adams contemplated means to achieve uniformity of law, sentiments and interests throughout the Union on republican principles. Again and again, the concept of national “uniformity” appears in their writings. In 1775 Adams hoped that the war would bring the colonies with a high density in slaves into a tighter union with New England, with the result that slave colonies would reshape their political character closer to New England’s republican model.¹⁸⁶ Looking back in 1818, he reflected that the colonies had been “all distinct, unconnected, and independent of each other.”¹⁸⁷ But a “radical change in the principles, opinions, sentiments, and affections of the people” reversed the course of their separate development and “was the real American Revolution.” Their rapid development toward common principles quickly brought the colonies closer together. After receiving a copy of the Constitution in Europe, Adams first commented upon its capacity to promote uniformity. Adams writes that the Constitution “appears to be admirably calculated to cement all America in affection and interest.”¹⁸⁸ He acknowledges that compromise was necessary but is pleased that the Constitution respects “the great principles necessary to order, liberty, and safety.” Union required compromise, but the Constitution would insure that the once-distinct parts would develop in conformity to liberty.

¹⁸⁵ CONG. GLOBE, 35th Cong., 1st Sess. 1113 (1858).

¹⁸⁶ See 9 WORKS OF JOHN ADAMS, *supra* note 33, at 367.

¹⁸⁷ 10 *id.*, at 283.

¹⁸⁸ *Id.* at 467.

In the federal Convention Madison unsuccessfully sought a “negative on the laws of the States . . . to secure individuals against encroachments on their rights” and to prevent abuses against republicanism.¹⁸⁹ Having lost the battle for the negative, Madison later warned that within the states, republican citizens themselves had “to establish the efficacy of popular charters, in defending liberty against power.” Only they could stop “the partizans of anti-republican contrivances”¹⁹⁰ within their respective states. However, Madison did understand how republicanism could peacefully reform aristocracy and slavery, nationally, through constitutional means. Although federalism prevented a consolidation of the states and protected local differences, if “uniformity is found to prevail in the interests and sentiments of the several states, . . . the more likely they will be to concur amicably”¹⁹¹ on national legislation. The faster growth of republican society in the multiplying free states could produce a national majority, approximating a uniformity, on antislavery republican principles. As they grew, they could peacefully gain control of the government and adopt national policies advancing republicanism and extinguishing slavery. In a reported interview with an Englishman, Washington best condensed these desiderata and hints at the consequences of failure, saying, “I can clearly foresee that nothing but the rooting out of slavery can perpetuate the existence of our union, by consolidating it in a common bond of principle.”¹⁹² The “fundamental principle” he specified was “that liberty is the inalienable right of every man.”¹⁹³ Washington also foresaw that success depended upon the extension of New England political culture. New

¹⁸⁹ 5 MADISON WRITINGS, *supra* note 26, at 27.

¹⁹⁰ 6 *id.* at 85.

¹⁹¹ *Id.* at 68.

¹⁹² JOHN BERNARD, RETROSPECTIONS OF AMERICA, 1797-1811 91 (Bayle Bernard et al ed., Harper & Brothers 1887).

¹⁹³ *Id.*

Englanders, Washington said, were “the stamina of the Union and its greatest benefactors. They are continually spreading themselves, too, to settle and enlighten less favored quarters.”¹⁹⁴

Of course, the founders miscalculated. The growth of slavery after the national ban on the slave trade was unexpected. The most significant unexpected event that nearly doomed republicanism was the rise of a new generation of southern rulers who rejected the principles of the American Revolution. In 1785 Jefferson memorialized his belief that the generations following the Revolution would achieve emancipation in Virginia and reform the state constitution. He predicts, “[i]t is to them I look, the rising generation, and not to the one now in power, for these great reformatations.”¹⁹⁵ But by 1800 he noticed a surprising change among Virginia leaders and the change did not bode well for republicanism in Virginia. “The times are certainly such as to justify anxiety on the subject of political principles,”¹⁹⁶ he worries. Virginia statesmen were insisting upon “restraining the elective franchise to property,”¹⁹⁷ which obviously meant land and slaves. He confesses, “I have . . . wondered at the change of political principles which has taken place in many in this state”¹⁹⁸ When he looked outside Virginia, he paid particular attention to recreant educators: “I am still more alarmed to see, in the other states, the general political dispositions of those to whom is confided the education of the rising generation.”¹⁹⁹ Eventually, those educators raised a generation that none of the founders anticipated. The new Southern statesmen rallied to a new philosophical defense of aristocracy and slavery, exported from South Carolina. Madison

¹⁹⁴ *Id.* at 90.

¹⁹⁵ JEFFERSON WRITINGS, *supra* note 21, at 800.

¹⁹⁶ JEFFERSON, *supra* note 15, at 171.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 172.

¹⁹⁹ *Id.*

lived long enough to witness this revolution and to take alarm, in 1833. These men opposed “the republican rule of majorities,” he writes, and were beyond “the pale of the republican faith.” He numbers them among “avowed disciples of aristocracy, oligarchy or monarchy.”²⁰⁰ The aristocratic revolution threatened to obstruct the inevitable political majority of republicanism in the free states, and threatened to make slavery and their form of rule permanent and expansive.

No better case demonstrates the fall of southern republicanism than the contrast between George Mason and his grandson James Mason. In the Virginia legislature in 1773, slaveholder George Mason delivered what is arguably the strongest recorded philippic against slavery of the revolutionary era, though modern monographs have rarely reproduced the text. The thesis that Mason and his generation of Virginia republicans concealed proslavery and aristocratic principles strains credulity when reading this public speech against slavery:

Mean and sordid, but extremely short-sighted and foolish, is that self-interest which, in political questions, opposeth itself to the public good: a wise man can no other way so effectually consult the permanent welfare of his own family and posterity as by securing the just rights and privileges of that society to which they belong.

Perhaps the constitution may by degrees work itself clear by its own innate strength, the virtue and resolution of the community; as hath often been the case in our mother country. This last is the natural remedy, if not counteracted by that slow poison which is daily contaminating the minds and

²⁰⁰ 9 MADISON WRITINGS, *supra* note 26, at 526.

morals of our people. Every gentleman here is born a petty tyrant. Practiced in arts of despotism and cruelty, we become callous to the dictates of humanity, and all the finer feelings of the soul. Taught to regard a part of our own species in the most abject and contemptible degree below us, we lose that idea of the dignity of a man which the hand of nature hath planted in us for great and useful purposes. Habituated from our infancy to trample upon the rights of human nature, every generous, every liberal sentiment, if not extinguished, is enfeebled in our minds; and in such an infernal school are to be educated our future legislators and rulers. The laws of impartial Providence may, even by such means as these, avenge upon our posterity the injury done to a set of wretches whom our injustice hath debased to a level with the brute creation. These remarks were extorted by a kind of irresistible, perhaps an enthusiastic impulse; and the author of them, conscious of his own good intentions, cares not whom they please or offend.²⁰¹

The circumstance of the prophecy in Mason's denunciation of slavery rivals the drama of Biblical prophecy. By permitting the sin of slavery to continue, Virginia republicans were in fact, punished by "impartial Providence" through the apostasy of their offspring. Eighty-seven years later on the floor of the United States Senate, James Doolittle of Wisconsin confronted his Southern colleagues in colloquy. He reminds them, "[y]our fathers always admitted slavery to be an evil . . . ; you did not take the ground that slavery was a

²⁰¹ George Mason, Antislavery speech to the Virginia legislature (1773), *reprinted in* GEORGE BANCROFT, 3 HISTORY OF UNITED STATES OF AMERICA, FROM THE DISCOVERY OF THE CONTINENT 413-14 (D. Appleton & Company Author's Last Rev. 1896).

blessing and in accordance with natural right.”²⁰² Doolittle paraphrases what he recently had heard Senator Hunter from Virginia say:

[W]e in Virginia have changed our ground; we do not stand where we stood anciently; we do not stand where our fathers stood upon this slavery question; as much as to say, we do not believe in what Washington believed and Jefferson believed and Madison believed and Monroe believed, and all the leading men of Virginia, for the first fifty years of our existence under the Constitution, believed; we have changed our opinions in Virginia, and instead of now admitting that slavery is an evil, to be restricted and discouraged, and which we may hope and pray may be some day entirely removed from the Republic, we now take the ground that it is a blessing, to be fostered, encouraged, and extended, as a benefit to the black man and a benefit to the white.²⁰³

Like Peter denying Jesus and in doing so, fulfilling the prophecy of Jesus that Peter would deny him, Senator James Mason of Virginia denied his grandfather, his grandfather’s principles and fulfilled his grandfather’s prophecy. “Habituated from infancy to trample upon the rights of human nature,” Mason flatly embraces slavery and agrees with Doolittle, saying, “the opinion once entertained, certainly in my own State, by able and distinguished men and patriots, that the condition of African slavery was one more to be deplored than to be fostered, has undergone a change,” and that the new sentiment was that slavery “is a blessing to both races.”²⁰⁴ Virginia republicanism had fallen into darkness.

²⁰² CONG. GLOBE, 36 Cong., 1st Sess. app. at 98 (1860).

²⁰³ *Id.* at 98-99.

²⁰⁴ *Id.* at 99.

In 1858 Senator Henry Wilson recalled that in the founding era, South Carolina statesmen had led the proslavery cause, but “they were disavowed by the leading men of the South.” Eventually South Carolina “impressed her ideas and imposed her policy on the South” and “won her sister slaveholding states to her ideas.” In his dangerous times, Wilson continued, “the social and political ideas of the fathers are proscribed” among the leading men in the South, but the ideas of South Carolina had “attained a complete ascendancy.” Southern republicans had “been driven into retirement.” The rising North-South conflict was therefore not “between the North and the South” per se. It was “between the rights of man and the privileges of an aristocratic, oligarchic class.”²⁰⁵ Evangelical southern oligarchy spread from South Carolina, converted slave state leaders, and together the inter-state oligarchic class led their states afoul of the American constitutional order long before secession.

Yet despite these unexpected events that strengthened slavery, power had shifted in favor of liberty by 1860. In 1787 the power imbalance favored slavery and even Massachusetts herself was barely a few years removed from abolition. From 1787 forward, New England republicanism developed, replicated itself and prospered. Vibrant middling communities swept westward and covered every state where slavery did not take root. Due to the protection of liberty under the Constitution, republicanism became formidable, and finally free state people converged on a political party in its name. By 1859 a founder of that party, Maine Representative Israel Washburn, could publicly challenge slavery and oligarchy, whereas John Adams never could in his lifetime. The Republican Party, Washburn said, “was brought into the world to oppose the slave power in its efforts to overthrow our republican institutions, to maintain the fundamental ideas of the Government, to resist an oligarchy, to stay the spread

²⁰⁵ CONG. GLOBE, 35th Cong., 1st Sess. app. at 170 (1858).

of slavery [and] to restore the 'action of the Government to the principles of Washington and Jefferson.'" He asked, was that party "not strong enough and well-founded enough to succeed?"²⁰⁶ The sons of America's thriving republican domain proved that it was. They filled out Union legions and overpowered the combined strength of South Carolina, apostate Virginia and all the insurrectionary slave states. They achieved what was impossible in 1787 due to the founders' statesmanship in 1787.

Union under a republican Constitution prepared the outcome, which was foreseen. Referring to Montesquieu in *Federalist 43*, Madison wrote, "[a]mong the advantages of a confederate republic," one is that if "abuses creep into one part, they are reformed by those that remain sound."²⁰⁷ When the Civil War was underway, Madison's words were remembered. This quotation from *Federalist 43* adorned the frontispiece of the widely circulated *A Reply to Mr. Charles Ingersoll's "Letter to a Friend in a Slave State"*²⁰⁸ by Republican Representative M. Russell Thayer from Pennsylvania. New England and the states made in her image reformed the worst abuse of American republicanism since the nation's founding. Slavery was dead. Bolstered by the free states, the national government was finally strong enough to fulfill its duty in the guarantee clause. The slave states were forced to come into closer alignment with the regime model of a natural rights republic.

Certainly, the Constitution of 1787 was less than purely antislavery and less than purely proslavery if we judge it by its text alone. It did not abolish slavery. It did not explicitly affirm the right to hold slaves, either. We know what a truly proslavery looks like because the Confederacy framed one. That constitution mentions slaves,

²⁰⁶ CONG. GLOBE, 35th Cong., 2d Sess. 300 (1859).

²⁰⁷ THE FEDERALIST NO. 43 (James Madison), *supra* note 25, at 274.

²⁰⁸ MARTIN R. THAYER, A REPLY TO MR. CHARLES INGERSOLL'S "LETTER TO A FRIEND IN A SLAVE STATE" (John Campbell 1862).

slavery or slaveholding ten times and positively affirms the right of property in slaves in all present and future states and territories in that nation.²⁰⁹ If the framers in 1787 wanted a proslavery constitution, why didn't they draft one like that? Had they done so, American republicanism would have expired in its infancy, and slavery and aristocracy would have been universal.

The reason why the Neo-Garrisonians, like their namesake, mistake the nature of the Constitution is not hard to ascertain. Slavery expanded after 1787. After the founding generation faded away, principled proslavery oligarchs gradually took control of the whole South and laid claim to the founders' revered legacy. Their jurists and statesmen self-servingly concocted a plausible but false reinterpretation of the founding, masqueraded as the product of "strict constructionism." They imaginatively remade the Constitution into the one that the Confederacy actually did make. Failing to see the holes in the proslavery narrative or the political motives behind the falsehoods, some friends in the camp of slavery's enemies bought the revisionism. The long arm of those oligarchs still meddles with our constitutional history and our jurisprudence.

The lamented Harry V. Jaffa once wrote that "the securities given to slavery in the Constitution represent concessions for the sake of the stronger Union and are ultimately in the interest of the antislavery cause itself."²¹⁰ This is not easy to accept because we tend to notice only that slavery consistently grew after 1787. But slavery-repellent republicanism grew faster and grew more powerful after 1787,

²⁰⁹ CONF. CONST. of 1861 art. I, § 2, cl. 3; CONF. CONST. of 1861 art. I, § 9, cl. 1-2, 4; CONF. CONST. of 1861 art. IV, § 2, cl. 1, 3; CONF. CONST. of 1861 art. IV, § 3, cl. 3. My references are to the text of the Constitution of the Confederate States found in the compiled records of the Confederacy published with the permission of the U.S. Congress. See 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE CONFEDERACY 37-54 (James D. Richardson ed., 1905).

²¹⁰ Harry V. Jaffa, *supra* note 150, at 377.

from humble and illegal origins. American slavery originated in the policy of a powerful foreign empire, American republicanism, in providential rebellion. By means of the Constitution, wise statesmanship turned the scales and established political conditions that assured the ultimate, though costly triumph of republican liberty.