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

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

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

More significantly, the historical development of state constitutional provisions that parallel the language of the Declaration demonstrates, or at least strongly suggests, that specific textual provisions of the Constitution were themselves designed to codify the principles of the Declaration and make them enforceable as positive law. The provisions of Article IV (and later of the Fourteenth Amendment) guaranteeing the “privileges and immunities” of citizenship and a “republican” form of government simply cannot be understood apart from the natural law principles of the Declaration from which they were drawn. Although the courts have effectively treated these provisions as nonjusticiable, they are clearly commands of the positive law, and not just some vague, philosopher’s ideal of higher justice such as is recognized in the Ninth Amendment of the U.S. Constitution and parallel state constitutional provisions. But now that I have boldly stated my conclusion, let us wend our way through the state constitutions to see how I arrived at that somewhat controversial destination.
The Declaration in the Original States

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

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

- First, that all men, all human beings,\(^1\) are created equal, a proposition portrayed in the Declaration as self-evidently true, knowable both by human reason and by divine revelation (the “nature and nature’s God” of the Declaration’s opening paragraph);

- Second, that all human beings are endowed by their Creator with certain unalienable rights merely by virtue of the fact that they are equally created by God as human beings and not as lesser animals;

- Third, that among these unalienable rights are the rights of life, liberty, and the pursuit of happiness, which was Thomas Jefferson’s eloquent rephrasing of John Locke’s statement of the fundamental rights in life, liberty, and property that at once elevated and expanded Locke’s conception of rights;
Fourth, that the sole purpose of government is to secure these unalienable rights;

Fifth, that the only just governments are those founded on the consent of the governed, which means that ultimately political power originates from the people; and

Sixth, that whenever government becomes destructive of the ends for which it was formed, namely, the securing of the people’s unalienable rights, the people have the right to alter or abolish the government, replacing it with a new government that they believe will be most likely to secure their rights.

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

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

The Provincial Congress of South Carolina adopted a constitution on March 26, 1776, complaining in the preamble that the British Parliament had imposed taxes “without the consent and against the will of the colonists,” a situation that the Congress claimed (ironically, given later developments) “would at once reduce them from the rank of freemen to a state of the most abject slavery.” New Jersey, too, on the eve of the signing of the Declaration of Independence, adopted a new constitution with a preamble noting that the King’s authority, derived from the people by compact, was now dissolved, thus subscribing both to the principle of consent and the right to alter or abolish government.

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

Section 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Section 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

Section 3. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually securing against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

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

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

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

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

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

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

I. That all men are born equally free and independent, and have certain natural, inherent, and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

* * *

IV. That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.
V. That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or sett (sic) of men, who are a part only of that community; And that the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.

Massachusetts similarly codified the principles of the Declaration in its Constitution of 1776, and when that Constitution was rejected (largely because it was drafted by a convention that had not been elected for the purpose, and thus made without the consent of the people), those principles were carried over to the constitution ultimately adopted in 1780. In the constitution’s preamble, Massachusetts acknowledged that “whenever th[e] great objects [of government] are not obtained, the people have a right to alter the government,” and also asserted that government is grounded in consent: “The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”

Then, in Article I of its own Declaration of Rights, Massachusetts articulated a statement of equality and inalienable rights strikingly similar to the lead sentence of the second paragraph of the Declaration of Independence:

> All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

New Hampshire included similar provisions in a Declaration of Rights when it replaced its original, pre-Declaration constitution with new constitutions in 1784 and 1792:
Article I. All men are born equally free and independent; therefore, all
government of right originates from the people, is founded on consent, and
instituted for the general good.

Article II. All men have certain natural, essential, and inherent rights;
among which are—the enjoying and defending life and liberty—acquiring,
possessing and protecting property—and in a word, of seeking and
obtaining happiness.

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

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

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

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

But Vermont also reiterated these principles in a separate Declaration of Rights, declaring in Section 1:

That all men are born equally free and independent, and have certain, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. . . .

and further declaring in Section 6:

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

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

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

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

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

**The Declaration in the Northwest Territory**

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

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

“The distinguishing feature” of a republican form of government, according to the Supreme Court, “is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves” (Duncan v. McCall, 139 U.S. 449, 461 (1891). In other words, in an extended territory, republican government is the means by which the Declaration’s
principle of consent by the governed is implemented. And because the principle of consent is mandated by the self-evidence of the proposition that all men are created equal, the constitutional guaranty of a republican form of government is analytically incompatible with the existence of slavery. As James Madison, himself a slave-owner, wrote on the eve of the federal constitutional convention of 1787, “Where slavery exists the republican Theory becomes still more fallacious.”

This conclusion, logically compelled by the nature of the matter, was given effect in the Northwest Ordinance, the ordinance adopted by the Continental Congress on July 13, 1787, “for the government of the territory of the United States northwest of the river Ohio” or, in other words, for the territory that had been ceded to the United States by Virginia in 1783. Article VI of that Ordinance provided:

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crime, whereof the party shall have been duly convicted . . . .

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

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

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

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

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

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

The people of Ohio (and subsequently the people of each of the other Northwest Territory states) complied with that mandate by incorporating into Article VIII, Section 2 of their new constitution the requirement that “[t]here shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted.” This provision was necessary, according to the Ohio constitution, in order “That the general, great, and essential principles of liberty and free government may be recognized, and forever unalterably established.” Section 1 of the same Article contained the litany of principles drawn from the Declaration of Independence: the equality of all men; the doctrine of inalienable rights, including the rights to life, liberty, property, and the pursuit of happiness; the requirement of consent; and the right to alter or abolish governments when necessary to effect the legitimate ends of government. Moreover, section 1 expressly tied these principles to the idea of “republican” government:

That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety; and every free republican government being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties and securing their independence; to effect these ends, they have at all times a complete power to alter, reform, or abolish their government, whenever they may deem it necessary. (emphasis added)
Equal footing, then, did not allow new states to avail themselves of the slavery compromises in the Constitution at the expense of the republican principle. Those compromises were to be cabined to the original states.

This conclusion is actually compelled not just by the theory of the Declaration, but by the explicit terms of both the Northwest Ordinance and the Constitution itself. The Northwest Ordinance’s anti-slavery article, Article VI, contains a proviso clause, elided over above:

\[\text{[P]rovided always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.}\]

As the emphasized words make clear, the obligation to return fugitive slaves expressly extended only to slaves escaping from the “original states.” Article I, section 9 of the United States Constitution contains a similar limitation: “The migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808” (emphasis added). Thus, the Northwest Ordinance was a large step toward full vindication of the Declaration’s principles, and the fact that the anti-slavery provisions were deemed in that document to be required by the principles upon which the nation was founded and also mandated by the requirement of republican government mandated by the Virginia Act of Cession bolsters the contention that those principles were themselves codified as positive law in the U.S. Constitution’s Republican Guaranty clause.
The force and full import of the Northwest Ordinance was not long in coming, particularly in the South. When North Carolina ceded its western lands—present-day Tennessee—to the United States in 1789, it did so on condition that Congress would govern the area “in a manner similar to that which they support in the government west of the Ohio,” protecting “the inhabitants against any enemies” and never barring or depriving them “of any privileges which the people in that territory west of the Ohio enjoy” (Act of April 2, 1790). Unlike the Virginia cession of several years earlier, though, the North Carolina cession contained a proviso: “Provided always, That no regulations made or to be made by Congress shall tend to emancipate slaves.” Congress accepted North Carolina’s conditions, and promptly provided by law for territorial government in the areas south of the Ohio River that followed the Northwest Ordinance “except so far as is otherwise provided in the conditions expressed” in the North Carolina cession—in other words, except for the prohibition on slavery (Act of May 26, 1790, §2). 7

The North Carolina cession condition was repeated by South Carolina and Georgia, when those states ceded land that would eventually become the states of Alabama and Mississippi. The Georgia cession, for example, specifically required that the Northwest Ordinance “shall, in all its parts, extend to the territory contained in the present act of cession, that article only excepted which forbids slavery.” Following the South Carolina cession, Congress authorized the President to establish a territorial government for the Mississippi Territory, “in all respects similar to that now exercised in
the territory northwest of the Ohio, excepting and excluding the last article of the [Northwest Ordinance]” (Act of April 7, 1798, §3, emphasis added).  

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

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

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

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

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

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

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

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

I take no notice of an unhappy species of population abounding in some of the States, who during the calm of regular government are sunk below the level of men; but who in the tempestuous scenes of civil violence may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves.

In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms and tearing a State to pieces, than the representatives of confederate States not heated by the local flame? To the impartiality of Judges they would unite the affection of friends.
As I said, the passage is a model of studied ambiguity. Madison leads his readers to believe, without actually saying, that a slave insurrection would allow a state to call on the national government for assistance, but he also subtly suggests that “justice,” and hence the stronger republican claim, would lie with those who emerged from slavery, a condition in which they were treated “below the level of men,” into the “human character,” which is to say, into a position of natural equality, entitled to the same inalienable rights and requirement that they be governed only by their consent as were the people who formed the existing government. In any event, the passage clearly shows Madison applying the Republican Guaranty clause to the slavery question.

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

If the above analysis is correct—that the founders codified the Declaration’s principles in the Republican Guaranty clause, but that those principles had limited operation in the original states because of the Constitution’s compromises with slavery—we should expect to see the conflict between the Republican Guaranty principle and the slavery compromise come to a head as slave-holding states that were not carved from original states began seeking admission to the Union. That came about in short order, once the United States purchased the Louisiana Territory from France in 1803. Because this was new territory rather than territory ceded to the national government by existing states, it was not entitled to the pro-slavery contractual presumption, derived from the various deeds of cession by existing states, from which Kentucky, Tennessee, Mississippi...
and Alabama had benefited. Instead, its claim to admission was governed by the terms of the treaty between the United States and France, which provided:

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States (Treaty of April 30, 1803).

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

Predictably, the first challenge came when the southern portion of the Louisiana Territory, the Orleans district, sought admission in 1811. Section 3 of the Louisiana Enabling Act authorized the people of that district—present-day Louisiana—to adopt a constitution and to form a state government, “*Provided, The constitution to be formed, in virtue of the authority herein given, shall be republican, and consistent with the constitution of the United States; that it shall contain the fundamental principles of civil and religious liberty.*” Section 4 provided that “the said state shall be admitted into the Union upon the same footing with the original states.”

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

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

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

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

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

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

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

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

On February 13, 1819, Representative Tallmadge renewed the effort he had begun during the debate over admission of Illinois with the following amendment to the Missouri Enabling Act:

> And provided, That the further introduction of slavery or involuntary servitude be prohibited, except for the punishment of crimes, whereof the party shall have been fully convicted; and that all children born within the said state, after the admission thereof into the Union, shall be free at the age of twenty-five years (33 Annals 1166, 1170).

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

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

It has been questioned by some, whether a constitution can be said to be republican, which does not exclude slavery. But we must understand the phrase, “republican form of government,” as the people understood it when they adopted the Constitution. . . . It would be perfidious toward them to put on the Constitution a different construction from that which induced them to adopt it. The people of each of the States who adopted the Constitution, except Massachusetts, owned slaves; yet they certainly considered their own constitutions to be republican.

* * *

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

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

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

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

The Declaration and the Civil War

The shift away from the Declaration’s principles continued as new states below the Missouri compromise line were admitted to the Union. Texas, Arkansas, and Florida drafted constitutions between 1836 and 1839 protecting slavery and advocating an altered version of the equality principle similar to the language first adopted by Kentucky in 1792. These state constitutions include a similarly subtle shift in the language of inalienable rights, a shift that further allowed some in the South ultimately to make the argument that the right to own property in other human beings was one of the fundamental rights recognized by the Declaration of Independence and hence protected by the Constitution. Where the Declaration of Independence—and the Declarations of Rights in Virginia, Pennsylvania, Massachusetts, and New Hampshire—spoke of the
inalienable rights with which *all* men were endowed, the Arkansas Declaration of Rights in 1836 and the Florida Declaration of Rights in 1839 limited the claim of inalienable rights to the same class of people that were under the equality umbrella, namely, those forming the social compact. Thus was the inalienable right to property interpreted in a way that allowed some—those who had formed the social compact—to actually make claim to ownership of property in other human beings without creating a conflict with those other individuals’ own inalienable right to liberty. And in this misapplication of the Declaration’s principles, the only legitimate purpose of government was to protect that property interest in human chattels, and the South was able with straight face to make the argument that it could alter or abolish its connection to the existing government, by secession, because that government, in pursing policies designed to vindicate the inalienable rights of all men, was actually failing to protect the new inalienable rights as defined by the South. No wonder Abraham Lincoln noted that a house divided against itself on such terms could not stand.

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

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

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

This principle was altered in several of the southern state antebellum constitutions, which recognized a right in the people to alter their government whenever they thought it expedient, not just when it ceased to protect inalienable rights. The Mississippi and Alabama constitutions of 1817 and 1819, for example, held that the people “have at all times an inalienable and indefeasible right to alter, reform, or abolish their form of government, in such manner as they may think expedient.” The Missouri Constitution of 1820 similarly provided, in Article XIII, “that the people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their constitution and form of government whenever it may be necessary to their safety and happiness.”
This change if formulation, though subtle, was extremely significant, for it enabled the South to claim a “right” to secede from the Union that existed wholly apart from the purpose for which, in the Declaration’s formulation, the right existed. Thus, in its 1860 Declaration of Secession, South Carolina claimed that the Declaration of Independence recognized the right of the people to abolish their government whenever it became “destructive of the ends for which it was established,” but South Carolina studiously avoided any mention of the Declaration’s description of just what those ends were. In the South Carolina formulation, any ends would do; in the Declaration’s formulation, only legitimate ends, grounded in human nature and hence unalienable, would support a claim of revolutionary right.

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

Post-War Admissions and Conclusion

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

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

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

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

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

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

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

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

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

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

10 Both constitutions also recognized the right of the people to alter or abolish their government, not when it becomes destructive of the inalienable rights that it was established to protect, but whenever the people think it “expedient.”
This point was made explicitly during debate over the Oregon Constitution of 1857. Oregon adopted language that paralleled the language first adopted a half century earlier by Kentucky, and opponents argued that the language “ignores all natural, unalienable rights inherited by man from his great Father. It acknowledges no rights outside of conventional compacts. The great fact enunciated by our forefathers, that ‘all men enjoyed the unalienable right to life, liberty and the pursuit of happiness,’ and that ‘governments are instituted among men to secure these rights,’ is purposely lost sight of by this Constitution.” Editorial, “The Constitution,” Oregon Argus A1 (Oct. 10, 1857), quoted in Claudia Burton & Andrew Grade, “A Legislative History of the Oregon Constitution of 1857—Part I (Articles I & II),” 37 Willamette L. Rev. 469, 490 (Summer 2001).

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

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

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