Should Article 1 of Chapter I of the Vermont Constitution be Amended to Make Clear that Slavery and Indentured Servitude in Any Form Are Prohibited?

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> "Our State constitution is express, no inhabitant of the State can hold a slave; and though the bill of sale may be binding by the *lex loci* of another State or dominion, yet when the master becomes an inhabitant of this State, his bill of sale ceases to operate here."
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> Vermont Supreme Court,
> *Windsor v. Jacob* (1802)

I. Introduction

My name is Peter Teachout. I am a Professor of Law at Vermont Law School where I have been a member of the faculty since 1975. My areas of special interest and expertise are U.S. constitutional law and history and Vermont constitutional law and history. I appreciate the opportunity to testify before the House Government Operations Committee this morning on the question of whether Article 1 of Chapter I of the Vermont Constitution should be amended, as proposed by Proposal 2, to make clear that slavery and indentured servitude in any form are prohibited.

Amending a constitution is an awesome responsibility and should be done in any case only reluctantly and for compelling reasons - constitutional provisions, unlike statutes, are supposed to be permanent expressions of a state's basic values and commitments. It is a particularly awesome responsibility when what is being considered is amending a provision that has the sort of historic significance that Article 1 of Chapter I has. Article 1 holds special significance for Vermonters because it is the source of the anti-slavery provision that made the Vermont Constitution of 1777 the first state constitution in the country to outlaw slavery. It stands as a monument to Vermont's early opposition to slavery and represents a constitutional achievement of which Vermonters ought to be proud.

Proposal 2 would amend Article 1 by replacing much of the original language, language expressing the framers' opposition to slavery and their efforts to curb abuse of indentured servitude contracts in the framers' own terms, with a simpler and more direct statement of Vermont's opposition to slavery and indentured servitude in any form. In doing so, an important

aspect of our constitutional history would be lost – an important window into our constitutional past would be closed.

When Proposal 2 was first introduced, I did not support it: In the first place, the proposal was to eliminate any reference to slavery in Article 1. I was opposed to doing so because, if the reference to slavery were to be eliminated, future generations of Vermonters would lose sight of why Article 1 represented such an important constitutional achievement. Secondly, the proponents' original motivation for amending Article 1 was in my view misplaced. The argument was that Article 1 should be amended because it outlawed only adult slavery - implying that the Vermont framers condoned child slavery. I knew that was not true. In my judgment it reflected a fundamental misunderstanding and a lack of appreciation for what the framers had done. At any rate, that is why I did not support Proposal 2 as it was originally introduced.

But the original proposal has since undergone considerable evolution and my own position has evolved as well. I have come to believe that amendment is called for. Consequently I support the proposed amendment in its current form. I would like to use my testimony today to explain briefly why.

II. The Origins of Article 1 of Chapter I

Article 1 of Chapter I of the Vermont constitution provides as follows:

> "That all persons 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; therefore no 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 arriving to the age of twenty-one years, unless bound by the person's own consent, after arriving to such age, or bound by law for the payment of debts, damages, fines, costs, or the like."

Originally, this article established different ages of emancipation from contracts for involuntary servitude (for males, age 21; females, age 18), but this was subsequently changed by constitutional amendment to establish the same age for both males and females (age 21).

The first half of this article (up through the word "safety") was borrowed directly from the Pennsylvania Constitution of 1776. Yet, interestingly, no one has ever maintained that the Pennsylvania Constitution was the first to prohibit slavery. At that time, it is important to recall, slaves were regarded in many states as "property" not "persons." Since there was no reference to

slaves in the Pennsylvania version of the article, no indication in the text that slaves were considered "persons," there was no basis for finding that slaves were "persons" within the meaning of that article.

In borrowing this article from the Pennsylvania original, however, the Vermont framers made an important change. They added a second part aimed at curtailing abuses of indentured servitude contracts. The second part has additional significance, however, because it explicitly links the word "person" to the word "slave" ("no person . . . brought from over sea, ought to be holden by law, to serve [as a] slave . . . after arriving to the age of [majority]"). This made clear something that was not made clear by the Pennsylvania constitution. It made clear that, for purposes of the Vermont constitution, slaves were considered "persons" entitled to the same rights and liberties as everyone else. It was a deeply significant change and it subsequently formed one basis for the Vermont Supreme Court's declaration in 1803 that, "Our State constitution is express, no inhabitant can hold a slave."

III. Source of Confusion

The framers' decision to include slaves among those eligible to claim protection against abuses of the institution of indentured servitude has proved, however, to be problematic. The problem is that readers unfamiliar with the state's history with respect to slavery have interpreted inclusion of the word "slave" in this part of the article as meaning that Article 1 only prohibited adult slavery. This belief stems from the language of the second part of Article 1 dealing with indentured servitude which provides as follows:

> "therefore no 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 arriving to the age of twenty-one years, unless bound by the person's own consent, after arriving to such age, or bound by law for the payment of debts, damages, fines, costs, or the like."

Under this provision servants serving in any capacity – whether as "servant, slave or apprentice" - were eligible to invoke the maximum-age protections established there upon reaching the age of maturity. The problem is that some readers have drawn from this the conclusion that the framers meant to prohibit only adult slavery. That does not necessarily follow from the structure of Article 1, but that is the inference some readers have drawn from the reference to "slave" in the second half of the article dealing with indentured servitude.

Additional support for the view that Article 1 effected only a "partial prohibition of slavery" is supplied by evidence indicating that during this period – even after adoption of the first state constitution – some residents brought slaves purchased elsewhere back into the state and kept them as household servants.

It is that view of Article 1 in any case that supplied the momentum for the original proposal to amend Article 1 by striking any reference to slavery.

IV. Did the Vermont Framers Intend to Prohibit Only Adult Slavery?

But that brings us to the crucial question: In adopting Article 1, did the Vermont framers intend to prohibit only adult slavery? Did they want as a matter of constitutional law to distinguish between adult and child slavery?

To answer these questions, it is helpful to seek illumination from three primary sources of historical evidence: (1) Vermont Supreme Court decisions interpreting Article 1 during that period; (2) other state court decisions enforcing "bills of sale" for child slaves; and (3) evidence that slaves purchased elsewhere and brought back into the state during this period were child slaves. What evidence is there, in any of these three contexts, that the distinction between adult and child slaves was relevant or significant to early generations of Vermonters?

A. *Windsor v. Jacob* (1802): What the Vermont Supreme Court Said

The first source of evidence we have about how Vermonters during this period understood Article 1 is the Vermont Supreme Court's decision in *Windsor v. Jacob* (1802). In that case, the only case in which the Vermont Supreme Court ever directly addressed the question, the Court declared that the Vermont constitution "express[ly]" banned slavery and therefore any bill of sale purporting to represent the purchase or sale of a slave could not be recognized by, or enforced in, the courts of the state. In the words of Associate Justice Tyler:

> "Our State constitution is express, no inhabitant of the State can hold a slave; and though the bill of sale may be binding by the *lex loci* of another State or dominion, yet when the master becomes an inhabitant of this State, his bill of sale ceases to operate here." (emphasis supplied).

Significantly, in so ruling the Court did not make a constitutional distinction between adult and child slavery. The Court did not say "no inhabitant of the State can hold an adult slave." The Court said, "no inhabitant of the State can hold a slave."

In Appendix A below, I reproduce the Court's opinion in its entirety so you can see for yourself if the Court makes any mention of the distinction between adult and child slavery in its opinion. In fact, as you will see, no such distinction is made. And it is significant that no such

distinction is made because it suggests that the distinction was irrelevant. In the Court's view, Article 1 clearly prohibited slavery generally not just adult slavery.[1]

The official reports of the case reveal that the lawyers arguing the case also made no distinction between adult and child slavery.[2] The reason they did not is because it is not the way lawyers or judges thought or talked about Article 1 during this period in the state's history. Such a distinction was irrelevant because the prevailing view was that Article 1 banned slavery generally. In short, neither the justices who decided the case, nor the lawyers who argued it, viewed Article 1 as effecting only a "partial prohibition" of slavery.

B. Evidence That Vermont Courts Admitted into Evidence or Enforced Bills of Sale of Child Slaves

If we want to discover whether child slavery was constitutionally sanctioned in the state prior to the Civil War, another thing to look for are cases where Vermont courts were asked to admit into evidence or enforce the bill of sale for a child slave. If the buying and selling of child slaves was perfectly legal in the state during this time, we should expect to find at least one such case. One can find plenty of court decisions during this period where Vermont courts were asked to enforce contracts for the purchase and sale of horses or other goods and to enforce various forms of employment contracts. But I have been unable to discover a single case in which Vermont courts were asked to enforce the bill of sale of a child slave. That too is significant. Although it is possible there may be some other explanation for the absence of any such case, the most likely explanation is that everyone understood that the Vermont constitution prohibited slavery generally, not just adult slavery. The courts of the state were not available to enforce contracts for the purchase or sale of child slaves any more than they were available to enforce contracts for the purchase or sale of adult slaves. Here again the evidence indicates that the distinction between child and adult slavery is not one that Vermonters of that period would recognize.

C. Actual Practice.

A third source of evidence is contemporary practice. We know that, even after adoption of the first state constitution, there were instances where Vermonters purchased slaves elsewhere and brought them back into the state and kept them as servants. Levi Allen, the brother of Ethan

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[1] Associate Justice Tyler puts it this way: "[O]ur own State constitution . . . does not admit the idea of slavery in any of its inhabitants." (emphasis supplied).

[2] Marsh, counsel for the defendant, argued that "no person can be held in slavery in this State" (emphasis suppled); Hubbard, counsel for the plaintiff, argued that "[a]s an inhabitant of the state, in obedience to the constitution, [the defendant] considered that he could not hold her as a slave."

and Ira, is alleged to have done so. State census records during this period reveal that certain households kept "servants" but it is impossible to know which or exactly how many of these "servants" had been acquired or were kept as slaves, which and how many had been obtained under indentured servant contracts, and which and how many were genuinely and voluntarily employed as paid servants. It is clear in any event that, notwithstanding the constitutional prohibition, in some instances slaves were brought into the state and kept as servants. It was an exceptional rather than widely accepted practice, but it happened.

The interesting thing is that the evidence we have of instances where slaves were kept as servants does not indicate that the slaves involved were exclusively or even primarily child slaves. In many cases, they were – or appear to have been - adult slaves. So even here, in this gray unsanctioned area of *de facto* practice, the practice itself appears to have been indifferent to the distinction between adult and child slavery.

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In short, the available historical evidence does not support the view that the framers of the first Vermont constitution intended to ban only adult slavery. It does not support the view that they intended the prohibition of slavery in Article 1 be only a "partial prohibition." In fact the opposite is true: the available evidence supports the view that in adopting Article 1 the framers intended to ban slavery generally.

That is the way the Vermont Supreme Court understood it. That is the way courts and lawyers in the state understood it. That is the way Article 1 was understood by ordinary Vermonters during this period. And that is the way it has been understood and interpreted from the earliest days in the state's history down to the present.

V. If the Framers' Purpose in Adopting Article 1 Was Not to Effect a "Partial Prohibition of Slavery," What was the Purpose?

But if, in adopting Article 1, the framers' intent was to ban slavery generally, why did they, in the second part of the article, expressly list slaves as among those eligible to claim protection against abuses of the institution of indentured servitude? Why was that necessary?

One possible explanation is that the framers knew that practice does not always correspond with constitutional aspiration. They realized that, notwithstanding the constitutional prohibition, some residents of the state might purchase slaves elsewhere and bring them back to Vermont to keep as household servants. That was the reality. Including slaves in the list of servants protected against abuse of the institution of indentured servitude would at least serve to make clear to those who might have been brought back to the state as slaves that they could not continue to be held as servants without their own agreement after reaching majority.

The likely motivation for including slaves in the second part of Article 1, in short, was not to authorize or endorse child slavery, but to make clear that no "person" serving another person as a servant in any capacity could be "holden by law" to continue to serve in that capacity after arriving at the age of maturity "unless bound by the person's own consent." It made clear that slaves who had been brought into the state as servants were entitled to same rights and liberties – to the same respect and dignity - as any other servant.[3]

It is important to appreciate that, in drafting Article 1, the framers were confronted with a dilemma. If they failed to include "slaves" among those eligible for protection against abuses of of indentured servitude, how would that be interpreted? Would it mean that slaves purchased elsewhere and brought back to the state were not entitled to claim manumission upon reaching the age of majority on the same terms as all other servants and apprentices? Inserting the word "slave" between "servant" and "apprentice" made clear, in other words, that slaves were entitled to the same legal treatment as all other servants. It made clear they could no longer be bound by law to continue to work as servants upon reaching maturity without their own consent. It served in this respect as a kind of "double-safe" in a state where as a matter of reality, despite the constitutional prohibition, slaves were in some instances brought into the state and kept as household servants.

VI. Conclusion

Article 1 of Chapter I stands as a monument to Vermont's historic opposition to slavery in any form. Available historical evidence does not support the view that the framers of Vermont's first constitution intended to prohibit only adult slavery. It does not support the view

[3] During this period almost half the labor population in this country consisted of "indentured servants." Laborers on this side of the Atlantic were in short supply. It was a common practice therefore for shipowners to underwrite the passage of young workers from England and Europe in return for a legal document authorizing the shipowner to "sell" the indentured servant to a "master" upon arrival in America in return for recompense of the costs of voyage plus an added measure of profit. The terms of indentured servitude ran normally from five to seven years. The master was expected to provide basics – food, lodging, clothing, and other amenities – but was not required or expected to provide the servant with any monetary compensation. In many respects, the situation of the indentured servant was not much different from that of the slave. Neither was free to leave the employment, neither was free to marry, during the term of servitude without the master's permission. The key difference was that, by definition, slaves were legally bound to service for as long as they lived, or until manumitted, whereas indentured servants were bound for service for finite number of years, normally for from two to seven years. By establishing a maximum age beyond which a slave could no longer be bound to serve a master without his or her own consent, the second part of Article 1 in effect transformed the underlying relationship from that of master-slave to one of indentured servitude.

that they intended Article 1 as only a "partial prohibition" of slavery. Nor is there any evidence to suggest that ordinary Vermonters during this period viewed Article 1 that way.

But that leaves the crucial question: Should Article 1 should be left as is or should it be amended? The problem is that, because of the way Article 1 was written, intelligent people are likely to continue to come away from reading the article convinced that the Vermont constitution only prohibits adult slavery.

Although I did not support Proposal 2 as originally introduced, I have come to believe that it probably makes sense to amend Article 1 – but not for the reasons originally given. I have come to believe that Article 1 should be amended because, as long as it remains unchanged, it will continue to be a source of confusion and uncertainty over what the Article says and does not say about slavery and about the framers' intent.

Constitutions are not the special possession of scholars or historians, they are possessions of the ordinary people of a state. They need to make sense to ordinary people. For that reason, and not for the reason originally advanced, I now support amending Article 1 by striking everything after the word "safety" in the first part of the Article and substituting the phrase: "therefore slavery and indentured servitude in any form are prohibited." The language of the proposed amendment is clean and clear; it does the work that needs to be done efficiently; and it is faithful to the framers' original intent.

Appendix A

SELECTMEN of **Windsor**
v.
STEPHEN **JACOB**, Esquire.
Aug. Term, 1802.

No inhabitant of this State can hold a slave, and though a bill of sale transferring a person as a slave may be valid by the *lex loci* of another State or dominion, yet when the master *becomes an inhabitant* of this State, his bill of sale ceases to operate here,

TYLER, Assistant Judge.[d]

The plaintiffs, as **selectmen**, and overseers of the poor of the town of ***Windsor***, have declared in two general counts, and have displayed their cause of action in their specification, and rest it upon the implied liability the defendant ****199** is under to defray the expenses incurred by the sickness, and for the support of a blind aged person, who they allege is the defendant's slave, purchased by a regular bill of sale. In support of the declaration, this bill of sale is offered, and an exception is taken to its being read as evidence to the Jury. The question must turn upon the validity or operative force of this instrument *within this State.* If the bill of sale could by our constitution operate to bind the woman in slavery when brought by the defendant to inhabit within this State, then it ought to be admitted in evidence; and the law will raise a liability in the slave-holder to maintain her through all the vicissitudes of life; but if otherwise it is void.

Our State constitution is express, no inhabitant of the State can hold a slave; and though the bill of sale may be binding by the *lex loci* of another State or dominion, yet when the master becomes an inhabitant of this State, his bill of sale ceases to operate here.

With respect to what has been observed upon the constitution and laws of the Union, I will observe that whoever views attentively the constitution of the *United States*, while he admires the wisdom which framed it, will perceive, that in order to unite the interests of a numerous people inhabiting a broad extent of territory, and possessing from education and habits, different modes of thinking upon important subjects, it was necessary to make numerous provisions in favour of local prejudices, and so to construct the constitution, and so to enact the laws made under it, that the rights or the supposed rights of all should be secured throughout the whole national domain. In compliance with the spirit of this constitution, ****200** upon our admission to the Federal Union, the statute laws of this State were revised, and a penal act,[*] which was supposed to militate against the third member of the 2d section of the 4th article of the constitution of the *United States*, was repealed; and if cases shall happen in which our local sentiments and feelings may be violated, yet I trust the good people of *Vermont* will on all such

occasions submit with cheerfulness to the national constitution and laws, which, if we may in some particular wish more congenial to our modes of thinking, yet we must be sensible are productive of numerous and rich blessings to us as individuals, and to the State as an integral of the Union.

***5** The question under consideration is not affected by the constitution or laws of the *United States.* It depends solely upon the construction of our own State constitution, as operative upon the inhabitants of the State; which, as it does not admit of the idea of slavery in any of its inhabitants, the contract which considers a person inhabiting the State territory as such must be void. I am therefore against admitting the bill of sale in evidence.

Chief Judge.

I concur fully in opinion with the Assistant Judge. I shall always respect the constitution and laws of the Union; and though it may sometimes be a reluctant, yet I shall always render a prompt obedience to them, fully sensible, that while ****201** I reverence a constitution and laws which favour the opinions and prejudices of the citizens of other sections of the Union, the same constitution and laws contain also provisions which favour our peculiar opinions and prejudices, and which may possibly be equally irreconcilable with the sentiments of the inhabitants of other States, as the very idea of slavery is to us. But when the question of slavery involves solely the interests of the inhabitants of this State, I shall cheerfully carry into effect the enlightened principles of our State constitution.

The bill of sale cannot be read in evidence to the Jury.