Should Article 1 of Chapter I of the Vermont Constitution be Amended to Delete Any Reference to Slavery?

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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 Senate Government Operations Committee this afternoon on the question of whether Article 1 of Chapter I of the Vermont Constitution should be amended, as proposed by Proposal 2, to delete any reference to slavery.

At the outset, let me make clear that I am not opposed to amending the Vermont Constitution. I have supported various amendments in the past and am supporting other amendments that have been introduced this session. I do have reservations, however, about supporting Proposal 2 because, as I attempt to explain below, I think it is based on an anachronistic and inaccurate view of the Vermont framers' intent in adopting Article 1 of Chapter I, the so-called anti-slavery article. I do not think it is fair or accurate to say that that Article represented then, or represents now, only a "partial prohibition" of slavery. I may be wrong about that and, if so, I am willing to be corrected. But that is the basic thrust of my testimony.

II. The Constitutional Significance of Article 1 of Chapter I

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

Article 1. [**All persons born free; their natural rights; slavery prohibited**]

> "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."

This article was the first article in the first Vermont state constitution, the Vermont Constitution of 1777. In its original form, the article established different ages of emancipation from contracts for involuntary servitude for males (age 21) and females (age 18), but this was subsequently changed by amendment to establish the same age for both males and females (age 21).

The first part of the article, up through the word "safety," was borrowed directly from the Pennsylvania Constitution of 1776, which served as the basic model for the first Vermont constitution and supplied the language for many of the provisions adopted by the Vermont framers.

The second part of Article 1 however was original with the Vermont framers and has deep historical significance. The significance lies in the fact that <u>it made the Vermont Constitution of 1777 the first state constitution to ban slavery</u>.

That is how Article 1 was understood by the framers of the first state constitution; that is how it was understood by ordinary Vermonters during that period; that is how it was understood by practicing lawyers and judges in Vermont during that time; and that is how it has been consistently understood by ordinary Vermonters and by legal scholars and historians over the more than 240 years from the date of its initial adoption down to the present.

Before proceeding further, it is important to try to understand how that simple change from the Pennsylvania model - how the addition of the second part of Article 1 - assumed such constitutional significance. After all, the Pennsylvania constitution also provided that "all persons are born equally free and independent," but – this is important – *it left open the question of exactly who was entitled to be considered "persons" under this Article*. Did that include slaves? There were many in America in this time, it is important to remember, who considered "slaves" to be "property," not "persons" entitled to equal respect and dignity.

By adding the second part to Article l, the Vermont framers made clear that, in Vermont, the word "person" included <u>all</u> those employed as servants, whatever the terms of their employment

(whether as servants, slaves, or apprentices), and as "persons" they were entitled to the same respect and dignity as everyone else - they were "born equally free and independent."

That is why, when the Vermont Supreme Court first addressed the question in the case of *Windsor v. Jacob* in 1802, it concluded without the slightest hesitation that "Our State constitution is express, no inhabitant of the State can hold a slave."[1] And that is why the Court went on to rule in that case that any contract purporting to be a bill of sale for a slave was unenforceable in the courts of the state.

III. Proposal 2: The Proposed Amendment

Proposal 2 would amend Article 1 of Chapter 1 by "eliminat[ing] reference to slavery" in that Article. Specifically, it calls for striking the entire second part of Article 1 (everything after the word "safety") leaving the Article in the form it originally took in the Pennsylvania Constitution of 1776. As amended, Article 1 would read as follows:

> Article 1. [**All persons born free; their natural rights**]
>
> "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."

The reason for proposing to amend Article 1 in this way is that, in the sponsors' view, Article 1 effected "only a partial prohibition" of slavery. Despite the intervening adoption of the 13th Amendment to the U.S. Constitution in 1865 which prohibits "slavery and involuntary servitude" nationwide, the Vermont Constitution, according to the bill's sponsors, "continues to contain only a partial prohibition on slavery."[2]

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[1] The official report of the Court's decision in the *Windsor v. Jacobs* sheds helpful light on what lawyers and judges in the state during this period understood to be constitutional meaning and significance of Article 1. We examine particular aspects of that ruling below. The full report of the case is attached in Appendix A.

[2] The purpose section of Proposal 2 reads in part as follows:

> " Sec. 1. HISTORY; PURPOSE
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> "(a) History. While Vermont was the first state to include a prohibition on slavery in its Constitution in 1777, it was only a partial prohibition, applicable to adults reaching a certain age, "unless bound by the person's own consent, after arriving to such age, or bound by law for the payment of debts, damages,

What is meant exactly by "partial prohibition" is not made explicit, but the bill's sponsors seem to believe that, contrary to the long-held understanding, Article 1 banned only "adult slavery," not "child slavery." This conclusion is apparently derived from the fact that the second part of Article 1 provides that servants, slaves, and apprentices can no longer be legally bound by involuntary employment contracts after reaching the age of maturity (originally age 21 for males, age 18 for females). This particular provision, the bill sponsors note accurately, was only "applicable to adults reaching a certain age." The only possible conclusion, consequently, is that Article 1 did not apply to indentured servants or slaves or apprentices before they reached the requisite age of maturity. So the central objection to Article 1 in its current form, as I understand it, the central motivation for striking the entire second part of the Article, stems from the belief that Article 1 prohibits only adult slavery and thus implicitly condones child slavery. That is the "partial prohibition" of slavery which forms the central objection to Article 1 and lies at the heart of the proposal to amend it.

Although this interpretation of Article 1 runs counter to the accepted wisdom, I do not think it should be dismissed out of hand. One could certainly arrive at that conclusion from a surface reading of the language of Article 1 itself. The emancipation from involuntary servitude provided for by the second part of the Article does apply only to those servants who have reached the age of maturity.

But does it necessarily follow from this that the Vermont framers intended to prohibit only adult slavery and not slavery generally? Does it indicate that the Vermont framers condoned child slavery? Does it mean that Vermonters generally during this time period so understood the meaning and import of Article 1?

IV. Did the Framers of Article 1 Intend to Prohibit Only Adult Slavery?

This is the crucial question: Did the framers of Article 1 intend to effect only a "partial prohibition" of slavery, as the proponents of Proposal 2 contend, prohibiting adult slavery but condoning child slavery? Or was their intent, as it has been traditionally understood, to ban slavery generally in Vermont? In seeking answers to these questions, it is helpful to consult four basic sources of evidence:

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fines, costs, or the like." The 13th Amendment to the U.S. Constitution, ratified in 1865, prohibited slavery within the United States "except as a punishment for crime whereof the party shall have been duly convicted[.]" Despite subsequent revisions to it, the Vermont Constitution continues to contain only a partial prohibition on slavery."

A. A Contemporary Vermont Supreme Court Ruling: *Windsor v. Jacob* (1802)

The first source of evidence is the Vermont Supreme Court's ruling in *Windsor v. Jacob* (1802) introduced above. In that case, the only case in which the Vermont Supreme Court 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 Vermont Supreme Court did not make - or in any way hint at - 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."

I reproduce the Court's opinion in its entirety in Appendix A, so you are free to read it on your own to see if the distinction between adult and child slavery is ever invoked or suggested anywhere in the opinion. In fact no such distinction is made. And it is significant that no such distinction was made because it suggests that to the Vermont Supreme Court that distinction was irrelevant. Article 1, in the Court's view, prohibited slavery generally, not just adult slavery.[3]

If you go to the official reports, you can also examine the arguments made by counsel for the plaintiff and defendant in the *Windsor v. Jacob* case. You will note that, here too, neither lawyer makes any distinction between adult and child slavery.[4] The reason they do not make that distinction is because is not the way lawyers or judges thought or talked about Article 1 back then. For them, such a distinction was irrelevant because the prevailing understanding at the time was that Article 1 banned slavery generally. In short, neither the justices who heard the case, nor the lawyers who argued it, viewed Article 1 as only a "partial prohibition" of slavery.

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

[4] 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."

It is also relevant to point out that, when the Court rules in the Windsor case that the "bill of sale" for a slave was not enforceable in the courts of the state, the Court does not say, when the master of an adult slave becomes an inhabitant of the state, the bill of sale ceases to operate. The Court says that when the master of a slave becomes an inhabitant, the bill of sale ceases to operate. In this context again the Court makes no distinction between adult and child slavery.

B. Evidence That Vermont Courts Admitted or Enforced a Bill of Sale of a Child Slave?

It could be argued that since the slave involved in *Windsor v. Jacob* was an adult (old, sick, and penniless), the Vermont Supreme Court did not have to address the question of whether buying and selling child slaves was or was not prohibited by the Vermont constitution. That is true, although even then it is likely the Court would at least have mentioned that distinction if in fact it was a significant one.

Still, if we want to know whether Article 1 was understood to allow child slavery in Vermont during the pre-Civil War period, we can examine other court decisions to see if there are any reports of cases in which Vermont courts were asked to admit into evidence and enforce the bill of sale for a child slave. One would think that, if the Vermont constitution did not prohibit child slavery, if the buying and selling of child slaves was perfectly legal, we ought to be able to find at least one such case. But as far as I have been able to discover, no such case exists.

There are plenty of court decisions during this period in which Vermont courts were asked to enforce or refuse 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, but the most likely explanation is that everyone understood that the Vermont constitution prohibited slavery generally, not just adult slavery. They understood that 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 distinction between child and adult slavery is not one that Vermonters of that period would have recognized.

C. The Complications of Actual Practice.

It should not surprise us to discover that constitutional commitments are not always perfectly realized in actual human practice. There is ample historical evidence that, despite the constitutional prohibition of slavery in Article 1, some Vermonters during this period brought slaves into the state and kept them as servants. The Allens themselves were believed to have

done so. In census records, we see that certain households kept "servants" and, while we can speculate about numbers, it is impossible to know which or exactly how many of these "servants" had been acquired and were kept as slaves, which and how many had been obtained under indentured servant contracts, and which and how many were genuinely and voluntarily in the employ of households. The evidence suggests that the practice of keeping slaves as servants was exceptional rather than a widely accepted practice in Vermont. But it happened and it complicates – and ought to complicate – any inclination we might have to want to view Vermont during this period as an idealized slave-free republic.

But the interesting thing for our purposes is that the evidence we do have of particular instances where slaves were kept as servants does not lend support to the view that the majority of slaves so held were child slaves. Many of the known instances in fact involved keeping adult slaves as servants. 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.

D. Relevance of the Discovery of a Bill of Sale for a Child Slave

The question here is fairly simple: From a constitutional or legal standpoint, would it make any difference if one were to discover in Vermont state or town archives the recorded copy of a bill of sale for a child slave? Would that indicate that child slavery was legally condoned in the state during this period? Or would it depend on whether the bill of sale was legally enforceable in the courts of the state?

The answer is also simple: The discovery of such a bill of sale in no way supports the view that child slavery was constitutionally or legally condoned in Vermont during this time period. People enter into contracts all the time in which one party or the other agrees to do something illegal under state law or contrary to fundamental state policy, and the mere existence of those contracts in no way indicates that the state accepts or condones the underlying activity.[5]

For example, I could agree in writing to pay you $2,000 for a pound of high grade Canadian marijuana, but if you delivered the product and then hauled me into court to force me to pay what I owed, the court would refuse to enforce the contract because (at least at the moment) the underlying transaction is illegal under state and federal law. In some states, surrogate mother contracts are legally enforceable; in some states, they are not. If we were to enter into a rental contract in which you agreed to pay me $800 a month for rental property that failed to meet the most basic safety and habitability standards, it is doubtful that a court would

[5] See the discussion of the unenforceability of contracts in violation of state law or in conflict with state policy during the nineteenth century in Zephyr Teachout, "The Unenforceable Corrupt Contract: Corruption and Nineteenth Century Contract Law," Fordham Law Review (2011).

enforce that rental agreement if I were to produce it in court. It would be the same thing if I agreed to rent you the property in return for $50 a month plus your agreement to provide certain sexual favors every other Tuesday night. It could be a signed, sealed, notarized contract stored in the town records, but the courts would refuse to enforce it. Contracts in violation of state law or policy, in short, are not admissible or enforceable in court.

It is a simple point but an important one: the discovery of a bill of sale for a child slave in Vermont in no way indicates that child slavery was condoned under the state constitution. It might prove to be a helpful document in facilitating the sale of the slave elsewhere, say in Canada where at the time slavery was not prohibited, but it would be useless as a legal document in Vermont since the courts would refuse to admit and enforce it. The *Windsor v. Jacob* case is an example.

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In short, there is no evidence that, in adopting Article 1, the framers of the first Vermont constitution intended to ban only adult slavery. There is no evidence that the framers intended to condone child slavery. There is no evidence indicating they intended the prohibition of slavery expressed in Article 1 to be only a "partial prohibition." In contrast, the evidence uniformly supports the view that, in adopting Article 1, the framers intended to ban slavery generally in the state. That is the way Article 1 was understood by early Vermonters and that is the way it has been consistently 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 Only a "Partial Prohibition" of Slavery, What was the Purpose?

But if the framers' purpose in adopting Article 1 was not to effect only a "partial prohibition" of slavery, if slaves – whether adult or child slaves - could not be legally held as slaves in the state, what was the reason for mentioning "slaves" in the second part of the Article, the part which provides that all those employed as servants in the state (indentured servants, slaves, and apprentices) could no longer be bound to service as servants after reaching the age of majority by contracts not of their own making?

I have suggested one possible explanation above: the framers wanted to make clear that in Vermont "slaves" were considered "persons" entitled to the same respect and dignity that everyone else was, and that by listing slaves as "persons" under the second part of Article 1, they made clear that slaves in Vermont were considered "persons" born "equally free and independent" under the first part of the Article. This was something the Pennsylvania Constitution did not do.

Another possible explanation is that, as noted above, despite the constitutional prohibition of slavery in any form, the reality was that in practice sometimes slaves purchased elsewhere were brought into the state and kept as servants. Slaves in some respects were like people in abusive relationships. It is easy enough to say, "just leave, you are free to go," but for those who find themselves in that circumstance it is not always easy to do since they have become so dependent upon their master or abuser. Adding "slave" to the list of categories of servants covered by the second part of Article 2, of those categories of servants who could no longer be bound by law to continue as servants without their own consent, made clear to any slaves in the state who might find themselves in that position that they could not continue to be held as slaves after reaching majority without their own agreement.

I suspect, however, the primary reason for listing slaves as among those servants eligible for manumission from contracts of servitude upon reaching the age of majority had less to do with slaves themselves than with the more general practice in Vermont at the time of employing indentured servants.

The reason for including slaves in the second part of Article 1 was not to endorse child slavery, I think most historians would agree, 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 his or her master after arriving at the age of maturity "unless bound by the person's own consent." Slaves (if any should have been brought into the state in that capacity) were entitled to same respect and dignity in this respect as any other person employed as a servant.

It is important to remember during this period that almost half the labor population in this country consisted of "indentured servants," although the numbers were admittedly higher in the south than in the north. 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" on this side of the Atlantic 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. During that time, the master was expected to provide basics – food, lodging, clothing, and other amenities – but was not expected or required to provide the servant with any monetary compensation. So you can see that, in terms of basic support and freedom, the situation of the indentured servant was not that 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.

So by providing, as Article 1 does, that in Vermont the term of involuntary service (whatever the nature of the underlying relationship) could not extend beyond the age of maturity, Article 1 eliminated the legal possibility of maintaining slaves (involuntary servants for life) in Vermont. Put another way, however the servant might have been acquired, whatever the terms of original acquisition, the relationship automatically became in Vermont, once the servant entered the state, a relationship of "involuntary servitude" - not "slavery" – since it had a finite end.

Since the main purpose and intended effect of Article 1 was to ban slavery in any form, the framers could have – as a purely technical matter –decided to leave the word "slave" out of the second part of the article, since slaves were theoretically no longer slaves upon entering the state, but I think you can appreciate the dilemma that would have put the framers in. Would that mean that *de facto* slaves employed as servants in the state were not entitled to claim manumission upon reaching the age of majority on the same terms as all other servants and apprentices? Including the word "slave" between "servant" and "apprentice" was probably intended as what we would call a "double safe." It made clear that, whatever their legal status under the Vermont constitution, those *de facto* slaves employed as servants in the state 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 serve as servants upon reaching maturity without their own consent.

VI. Conclusion

Article 1 of Chapter I stands as a monument to the Vermont framers' opposition to slavery in any form. There is no historical evidence to support the view that they intended the Article to prohibit only adult slavery and not child slavery. There is no historical evidence to support the view that they intended Article 1 as only a "partial prohibition" of slavery.

If the legislature decides, and the people of the state agree by referendum, to strike the second part of Article 1 it will have no practical effect, since slavery and involuntary servitude are banned nationally by adoption of the 13th Amendment to the U.S. Constitution and have been since 1865. At most, that amendment would have only symbolic significance - but symbolic significance is important. The problem with Proposal 2 is that it is based on an anachronistic and inaccurate view of the framers intent in adopting Article 1. It denigrates the achievement represented by their adoption of Article 1 - making Vermont the first state to abolish slavery in any form - and, to borrow a metaphor from the physical world, defaces the constitutional monument represented by that Article.

I happen to think it is important to recognize the constitutional achievements of earlier generations of Vermonters. When I have come up to the legislature to testify, say, in favor of legislation legalizing same-sex marriage, it was a matter of pride and importance to me that I could view that legislative development as carrying forward the great constitutional traditions of the state, traditions that found their first expression in the adoption of, not just Article 1, but

other provisions in the first state constitution as well that demonstrated the Vermont framers' commitment to the values of liberty and equality. We stand on the shoulders of those who have come before. When we denigrate their constitutional achievements, and do so for reasons that are not solidly grounded in history, they are not made the lesser for it, but we are.

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.