2

Freedom and Federalism

KURT T. LASH

The Declaration of Independence contains two key principles of American liberty: individual freedom and structural federalism. First, every person has an equal right to life, liberty, and the pursuit of happiness. Second, the American people have the right to enjoy these liberties in a union composed of free and independent states. Although we often remember and rightly celebrate the first principle, we also should appreciate how the second has advanced the first. The abolition of chattel slavery, for example, resulted from successful mobilization in the "free and independent states"—a mobilization that would have been thwarted and crushed absent the structural protection of constitutional federalism.

American independence gave birth to federalism, and federalism facilitated a new birth of freedom that culminated in the adoption of the 13th and 14th Amendments. Shallow historical narratives often associate states' rights with the proslavery South. But Madisonian federalism provided a constitutional shelter under which the Declaration's principle of free and equal men could take political root in the antebellum North. The grassroots antislavery movement that emerged in the Northern states successfully resisted Southern efforts to nationalize slavery and ultimately gave birth to the Republican Party—the first major political party in world history devoted to abolishing slavery. When Republicans prevailed in the 1860 presidential election, proslavery Southern Democrats abandoned James Madison's Constitution and demanded the right to secede from the Union. And war came.

Once the Union army had defeated the Confederacy on the battlefield, Republicans adopted two key amendments that advanced freedom while

preserving constitutional federalism. The 13th Amendment secured the Declaration's self-evident truth that no man was born to be the slave of another. The 14th Amendment secured the Declaration's natural rights of life and liberty. Both amendments presumed and relied on the Constitution's federalist structure.

Amendments were necessary *because* moderate Republicans continued to believe in Madisonian federalism and a national government of limited power. Instead of following the preference of radical Republicans like Thaddeus Stevens and Charles Sumner by forcing legislation on defeated "territories," moderate Republicans successfully demanded that constitutional change occur through the federalist mechanism of Article V—ratification by the states. Even the 15th Amendment, which prohibited the denial of voting rights based on color, left the basic mechanics of voting to state control. The content of these amendments maintained the basic divides between national and state law in all matters except those established in the Declaration or enumerated in the Bill of Rights.

Slavery and the Founding

Before the Declaration of Independence, chattel slavery existed throughout North America. Slavery was endemic among the Indigenous peoples of the interior,[1] routinely practiced by the Spanish in the Southwest,[2] and official British policy in the Atlantic colonies.[3]

By the Revolution, however, one finds evidence of a nascent abolitionist movement in the Atlantic colonies. For example, one year before the signing of the Declaration of Independence, Pennsylvanian colonists established the Society for the Relief of Free Negroes Unlawfully Held in Bondage—the first antislavery association in the history of the world.[4] Following their declared separation from Britain, several Northern states began dismantling local laws permitting slavery. In 1777, the people of Vermont adopted a constitution declaring "all men born equally free and independent."[5] Connecticut, Pennsylvania, and Rhode Island also passed

acts calling for the gradual abolition of slavery.[6] By 1787, five Northern states (and states-to-be) had officially moved against slavery.[7]

While Northern states increasingly outlawed slavery, states in the Deep South maintained the institution. This regional divide deepened when Congress passed the 1787 Northwest Ordinance, which declared that "there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted."[8] Originally drafted by Thomas Jefferson,[9] this clause effectively guaranteed that any state carved out of the free Northwest Territory would enter the Union as a free state.[10]

The same summer that Congress passed the Northwest Ordinance, the Philadelphia Convention drafted a new constitution. The original "Articles of Confederation and perpetual Union between the States" failed to sufficiently "provide for the common defense . . . and secure the blessings of liberty."[11] The new constitution advanced these goals by way of a more robust central government but did so in a manner that preserved the basic structure of American federalism—that is, "a Union between the States." As "Publius" wrote in *Federalist* 45, the powers of the national government would be "few and defined," while those left to the states would be "numerous and indefinite."[12]

The few and defined powers of the national government did not include national control of slavery. Although the Constitution made provision for the return of fugitive slaves,[13] the document said nothing about slavery itself—indeed, not even the *word* "slave" appeared in the text. The omission was intentional. As Madison explained during the drafting debates, he "thought it wrong to admit in the Constitution the idea that there could be property in men."[14] Whether to allow or forbid slavery remained a matter presumably reserved to the states, along with a host of additional unenumerated matters, including the regulation of speech and religion.

Critics of the proposed Constitution were unwilling to leave the matter to an unstated presumption and demanded the addition of an express bill of rights like those that accompanied most state constitutions. The

proponents of the Constitution conceded the issue, and they promised to add such a bill to the ratified document. In 1791, the states ratified the first 10 amendments to the Constitution—otherwise known as our Bill of Rights. The Bill of Rights includes provisions securing the natural rights of speech and religion through the First Amendment and guaranteeing the due protection of life and liberty through the Fifth Amendment.

The Bill of Rights closes with two amendments that expressly declare the federalist nature of the Constitution. The Ninth Amendment prevents the addition of the Bill of Rights from implying unlimited national power.[15] The 10th Amendment then declares that all powers not delegated to the federal government remain where they were before the Constitution's adoption: with the people of the still free and independent states.[16]

When read through the clarifying lens of the Bill of Rights, the new federal Constitution established a remarkable compound government, one neither wholly federal nor wholly national.[17] A federalist experiment untested in world history, its framers hoped to create a national government powerful enough to defend the nation in a dangerous world and rationalize trade between the states while capturing the democratic benefits of local self-government.

The liberty-enhancing idea of separating power between competing branches at the national level is well-known—this is the Madisonian theory of checks and balances.[18] Less appreciated is the related Madisonian theory that liberty is also enhanced by separating the powers of national and state governments. Maintaining these separate spheres of authority ensured both an ongoing competition between federal and state governments for the people's affection and a vigilant and jealous eye on their governmental rival.[19] As Madison wrote in *Federalist* 44, should the national government attempt to escape its constitutional limits, the states stood ready to "sound the alarm to the people"[20] and mobilize local resistance against tyranny.

In fact, one of the country's first serious constitutional disputes involved an attempted overreach by the national government that prompted just

such an alarm. In 1798, Congress passed the Alien and Sedition Acts.[21] Ostensibly meant to quell foreign interference in national politics, the Sedition Act was a bald-faced effort by John Adams's Federalist administration to suppress political speech critical of the national government. As the first federal misinformation law, the act criminalized any speech falsely impugning the actions or character of the national government, with punishment including imprisonment or thousands of dollars in fines.[22] Thankfully, the Constitution preserved the existence of independent states where people remained free to protest unconstitutional legislation. Madison and Jefferson drafted resolutions declaring the acts unconstitutional and had them delivered on the floor of the Virginia and Kentucky legislative assemblies.[23]

According to Madison's "Report on the Virginia Resolutions," published in 1800, the Sedition Act unconstitutionally regulated speech—a matter expressly denied to the federal government and reserved to the states in the First and 10th Amendments of the Bill of Rights.[24] In response to claims that only the national Supreme Court had the authority to determine the constitutionality of congressional acts, Madison noted that the Supreme Court was part of the national government and therefore was as capable of overreaching as any other federal branch.[25] Indeed, the Court would overreach catastrophically only a few decades later in *Dred Scott v. Sandford*.[26]

Madison's arguments in the Virginia Resolutions and the attendant report won the day, if not in federal court, then in the court of public opinion.[27] In the national elections of 1800, the Federalist Party suffered a landslide defeat and was replaced by Madison and Jefferson's new political party: the Democratic-Republicans.[28] As a result, the country entered its first full century broadly committed to the constitutional principles of Madisonian federalism.[29] The liberty to freely and openly dissent from the national government and national policies and do so from the safety of the independent states was now written into the nation's cultural DNA. That liberty would be critical to the successful rise of Northern state-level abolitionism.

Federalism and Abolitionism

One possible outcome of the federalist treatment of slavery under the Constitution was a political balance between pro-freedom and proslavery states. Instead, proslavery states used their disproportionate representation in the federal government to nationalize slavery and suppress pro-freedom state resistance. According to Article IV of the federal Constitution,

> no person held to service or labour in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.[30]

Despite lacking any express grant of federal power for this purpose, in 1793 Congress passed the first Fugitive Slave Act.[31] The act permitted slave owners to pursue their escaped "property" within the boundaries of free states and judicially authorized rendition with nothing more than a signed affidavit.[32]

To protect their free black residents from being wrongly seized and carried into slavery, several Northern states passed "personal freedom laws," which provided due process protections for the accused. For example, Pennsylvania criminalized the removal of any black resident to carry them into slavery and provided a judicial process for persons accused of being a runaway slave.[33] If such laws also protected actual refugees, all the better: Abolitionists insisted that the federal Fugitive Slave Act exceeded Congress's constitutional authority.[34]

In *Prigg v. Pennsylvania*, a nationalist-minded Supreme Court upheld the federal Fugitive Slave Act and invalidated the states' attempt to criminalize its enforcement.[35] Although a blow to state efforts to resist federal law, the *Prigg* decision contained a federalist silver lining. According to Justice Joseph Story, states remained free to prohibit state officials from

assisting in the enforcement of the Fugitive Slave Act.[36] Predictably, free states quickly passed laws prohibiting local officials from assisting in slave renditions. More controversially, state officials often declined to punish residents who (sometimes violently) thwarted the efforts of would-be slave catchers.[37]

Absent the protections of structural federalism, the antebellum abolitionist movement likely would have suffocated under a blanket of proslavery nationalism. Between the founding and the Civil War, proslavery interests dominated the national government. The Constitution's three-fifths clause gave a representational bonus to slaveholding states, increasing their political power in Congress and the Electoral College. The result was an almost unbroken line of slave-owning antebellum presidents and a series of federal actions supporting slavery and suppressing abolitionism.[38]

In addition to the Fugitive Slave Acts of 1793 and 1850, Congress passed gag rules in the 1830s and 1840s prohibiting the receipt of abolitionist petitions.[39] Federal officials also purged the national mail of abolitionist literature.[40] Although the Missouri Compromise of 1820 attempted to balance the future admission of slave and free states, the Kansas-Nebraska Act of 1854 violated the compromise and allowed either state to establish slavery.[41] Finally, in *Dred Scott v. Sandford*, the Supreme Court ruled that the Missouri Compromise was an unconstitutional attempt to limit slavery, denied the right of black Americans to invoke the jurisdiction of national courts, and declared the right of slave owners to carry their property into any national territory.[42]

In short, without federalism providing a safe haven for pro-freedom interests in the Northern states, a proslavery national government could have crushed local abolitionist dissent. Instead, Northern abolitionism expanded and diversified.

Initially, abolitionists viewed the Constitution with deep skepticism and moral condemnation. Antebellum abolitionists like William Lloyd Garrison and Wendell Phillips denounced the Constitution as a "pro-slavery compact," and they called for Northern state separation from an "agreement with hell."[43] Over time, however, a more moderate

wing of the movement emerged that viewed the Constitution in a more positive light. Abolitionists like Lysander Spooner, Joel Tiffany, and Frederick Douglass insisted that the Constitution could and *should* be interpreted as a pro-freedom document.

These "constitutional abolitionists"[44] insisted that the federal document be read through the lens of the Declaration of Independence, the Northwest Ordinance, and the Bill of Rights—documents they insisted represented the founding generation's intent. The Declaration announced every person's right to life, liberty, and the pursuit of happiness. The Northwest Ordinance illustrated the founders' opposition to the spread of slavery. The Fifth Amendment in the Bill of Rights committed the federal government to basic principles of due process. These documents established the pro-freedom context in which the Constitution was drafted and originally understood. According to this view, the omission of the word "slavery" from the Constitution was neither an accident nor a dodge. It represented an understanding that all texts should be read according to the principles of freedom announced in the Declaration.

The link between the Declaration and the Constitution became standard abolitionist political rhetoric. For example, the 1843 Liberty Party Platform declared

> That the fundamental truths of the Declaration of Independence, that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty and the pursuit of happiness, was made the fundamental law of our national government, by that amendment to the Constitution which declares that no person shall be deprived of life, liberty or property without due process of law. . . . [Slavery is] strictly local, and that its existence and continuance rests on no other support than state legislation.[45]

The Free Soil Party platform similarly invoked the Declaration of Independence and the Fifth Amendment's due process clause, along with

the federalist principle that slavery's "existence depends upon the state law alone."[46]

By characterizing slavery as "strictly local"—a matter of federalism—antislavery politicians could claim to respect the states' authority to choose slavery or freedom while opposing the extension of slavery into the territories. As the 1860 Republican Party Platform declared:

> That the maintenance of the principles promulgated in the Declaration of Independence and embodied in the Federal Constitution, "That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness;" . . . and that the Federal Constitution, the Rights of the States, and the Union of the States must and shall be preserved. . . .
>
> That the normal condition of all the territory of the United States is that of freedom: That, as our Republican fathers, when they had abolished slavery in all our national territory, ordained that "no person should be deprived of life, liberty or property without due process of law."[47]

When Abraham Lincoln's election to the presidency triggered threats of secession by Southern slave states, Congress tried to coax continued loyalty to the Union by passing an amendment guaranteeing every state's right to decide the slavery issue for itself.[48] Lincoln himself noted in his inaugural address that he had "no objection" to the proposed amendment since it represented what he already believed to be "implied constitutional law."[49] Although it might seem startling to think Lincoln would acquiesce to an amendment protecting slavery in Southern states, the amendment's language equally protected the right of Northern states to *resist* slavery. It also left unaddressed the federal power to abolish slavery in the territories. No wonder the incoming Republican president had "no objection"! The amendment represented the Republican strategy for geographically limiting and strangling the institution of slavery.

The Southern slave states, of course, recognized that the amendment simply preserved what they believed to be an untenable status quo. One by one, Southern legislatures voted to secede from the Union.[50] Having failed to establish protections for slave owners throughout the United States (a violation of Madisonian federalism), the so-called Confederate States of America now insisted on a unilateral right to exit the Union (another violation of Madisonian federalism).

Secessionism, a radical states' rights theory associated with John C. Calhoun,[51] denied the two key principles of the Declaration. First, since some men could be enslaved, not all men were created equal. Second, by seeking to curb the North's ability to resist slavery's encroachment, secessionists denied the American people the right to live in a union composed of free and independent states.[52]

Had the rebellious state legislatures been satisfied to recall their representatives from Congress, matters might have ultimately found a peaceful political resolution. But when secessionists moved on federal armories and South Carolina fired on Fort Sumter, civil war became inevitable.

A war to end a rebellion, however, is not necessarily a war to end slavery. A quick defeat of the Confederacy, as many in the North expected, would have achieved nothing other than restoring the status quo ante—slavery in the South, freedom in the North, federalism all around. Even as late as 1864, it was still possible that Union voters might replace Lincoln with General George McClellan, who promised to bring a quick end to the war on terms agreeable to the South.[53] Only miraculously timed military victories that summer and fall prevented such an electoral disaster.[54] Lincoln thus began his second term with a popular mandate to *win* the Civil War. He would use that mandate in a manner that permanently grafted the principles of the Declaration into the text of the Constitution.

The Reconstruction Amendments and Jefferson's Declaration

Fearing that a Supreme Court that still had a Democratic majority could eventually threaten the Emancipation Proclamation, neither Lincoln nor congressional Republicans were willing to wait for the end of the Civil War before pursuing the adoption of an abolition amendment. Republicans drafted the 13th Amendment in early 1864 and secured its passage in January 1865—months before Robert E. Lee's surrender at Appomattox.[55] For the amendment's text, Republicans drew from the well of the nation's founding and used Jefferson's language prohibiting slavery in the Northwest Territory. Here are the two texts side by side:

- The Northwest Ordinance: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted."[56]

- The 13th Amendment: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States."[57]

By using the language of the Northwest Ordinance, Republicans bolstered their claim that the amendment shared a lineage with Jefferson's Declaration and their pro-freedom interpretation of the Constitution. It was freedom, not slavery, that defined America.

Although the 13th Amendment abolished the institution, slavery's malignant spirit still roamed the land in the form of Southern Black Codes—laws that denied the equal protection of every person's life, liberty, and property. Abolitionists had long understood the Fifth Amendment's protection of life, liberty, and property as having constitutionalized the basic principles of the Declaration of Independence.[58] The Bill of Rights, however, bound the federal government, not the states.

After much deliberation, Republicans proposed the 14th Amendment. This provision would further expand the Constitution's commitment to

the Declaration's principles. If *all* men were created equal, then every person born on American soil and within its jurisdiction had an equal right to American citizenship. In language casting the *Dred Scott* ruling into eternal obloquy, the 14th Amendment declares that "*all* persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and of the state wherein they reside." Henceforth, no state could enact any code denying resident black citizens the same rights as resident white citizens.[59]

Next, the 14th Amendment asserts that no person, citizen or not, can be deprived of life, liberty, or property without due process of law. In doing so, the amendment applied the Declaration's natural rights claims to the people in the states. If all men held the inalienable right to life, liberty, and happiness, then neither the national government *nor any state* may wrongly deprive any person of their life, liberty, or property. Furthermore, if all men are created equal, then their life, liberty, and property should be equally protected. Therefore, no state may "deny to any person within its jurisdiction the *equal* protection of the laws." (Emphasis added.) This "equal protection of the laws" clause requires states to provide black residents the same protection against mob violence as white residents.[60]

Lincoln once noted that the Declaration of Independence is America's "apple of gold" and the Constitution is "the picture of silver, subsequently framed around it."[61] The 13th and 14th Amendments make Lincoln's simile all the more true. In particular, the language and principles of the Declaration of Independence are everywhere in the 14th Amendment. All persons, having been created equal, have equal rights of state and national citizenship. All persons, created with equal inalienable rights, must be equally free in exercising those rights.

Federalism and Reconstruction

The defeat of the Confederacy was a defeat for Calhoun's radical states' rights theory. Secessionists claimed that the Constitution was merely a

federal compact that any sufficiently aggrieved signatory could unilaterally abrogate. They drew on the theory of nullification outlined in Jefferson's Kentucky Resolutions to justify their separation from the Union. Although they also cited Madison's Virginia Resolutions in support of their views, secessionists ignored—or simply disagreed with—the arguments Madison made as "Publius" in the Federalist Papers that the Constitution was neither wholly national nor wholly federal. Indeed, Calhoun insisted that Publius had been wrong to make such a claim.[62]

To Northern Republicans, the defeat of the Confederacy represented a defeat of constitutional heresy and a victory for Madisonian federalism. Between the founding and the Civil War, the Federalist Papers had emerged as the most broadly respected source on the original understanding of the Constitution.[63] In those essays, Publius assured the states that, in all matters not delegated to the federal government, they remained "free and independent." No state would be forced to join the Union. For example, if North Carolina declined to ratify the proposed Constitution, then it would remain outside the Union as a wholly sovereign and independent state. But once the people of a state voted to ratify the Constitution, from then on, that state and its people became a constituent part of a new Union.

Ratification brought into being a wholly new political invention—one nation composed of two spheres of authority, state and federal. Following ratification, the only constitutional method of settling disputes over slavery or anything else required following Article V's amendment procedures. For Republicans, nothing about the Civil War or the abolition of slavery altered this basic federalist structure. As the Republican Chief Justice Salmon P. Chase explained in the 1869 decision *Texas v. White*, which found that states could not unilaterally secede from the Union, "The Constitution in all its provisions, looks to an indestructible Union, composed of indestructible states."[64] Chase presents the two-edged sword of federalism: Neither could states destroy the Union through secession nor could the Union destroy the states through unabridged nationalism. *Both* sides of federalism remained critically important in the aftermath of the Civil War.

Radical Republicans would have happily jettisoned American federalism and imposed their will on the defeated South. The state-suicide theory of radicals like Sumner and Stevens envisioned a new "southern territory" under the full regulatory control of Congress.[65] If they had prevailed, no additional amendments would have been necessary. Congress could have banned slavery, passed a civil rights code, and enfranchised black Americans in the Southern states, all without having to undertake the arduous effort of convincing three-quarters of both Northern and Southern states to amend the Constitution. However, while legislation could secure black rights in the short term, passing constitutional amendments protected these rights in the long term.[66]

The fact that most of the country rejected radical Republican nationalism, choosing instead to pursue amendments in accordance with Article V's requirements, also illustrates how deeply entwined federalism and freedom had become between the founding and the Civil War. Throughout the debates of the Reconstruction Congress, we find moderate Republicans insisting that the country remained a federalist union of states. Freedom in the South had to be secured before the readmission of Southern congressmen, but that freedom had to be secured by way of *state*-ratified amendments.

John Bingham, the primary author of Section 1 of the 14th Amendment, notably refused to support the 1866 Civil Rights Act because Congress had no enumerated power to enforce equal rights of life, liberty, and property. Bingham agreed with the goals of civil rights legislation, but he insisted that pursuing those goals required a new amendment. Until that happened, constitutional federalism prohibited the very legislation Congress was trying to pass.

In his speech proposing a 14th Amendment, Bingham quoted Madison's *Federalist* 45: "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." This Madisonian principle, Bingham declared, was written into "the very text of the Constitution

itself" in the 10th Amendment.[67] What was needed was an amendment legally obligating the states to respect the federal Bill of Rights—something they had a moral obligation to do anyway.[68] Over and over again, Bingham insisted the proposed amendment would leave intact the original federalist arrangement between the states and national government. He sought enforcement of the Bill of Rights at the state level—and nothing more.[69]

Although Congress passed the 14th Amendment, for a time it remained unclear whether enough states would vote for its ratification. Midway through the ratification process, a restless Stevens tried to convince his colleagues to abandon the amendment process and simply pass a statute accomplishing the same result.[70] Once again, it was Bingham who stood up for the principle of limited national power and the independence of the states from federal control:

> Sir, I am not to be thus driven into a violation of the letter and spirit of the Constitution of the country. Under it the rights of the States are as sacred as those of the nation; its express provision is that—
>
> > "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." . . .
>
> The equality of the States and the equality of men in the rights of person before the law is what the Constitution enjoins and the people demand.[71]

Bingham's repeated citations of Madison and the 10th Amendment were not at all unusual. One can find similar examples throughout the debates over the three Reconstruction amendments. Republicans of all stripes cited the Federalist Papers as authoritative statements of the nature of the postbellum Constitution. The same members who excoriated Calhoun's

radical states' rights theories also cited Publius's federalist theories as the basis for a functioning constitutional system.

In the end, Bingham convinced his colleagues to stay the course and allow the people in the states to decide whether to ratify the amendment. Instead of radical Republican efforts to erase the states, Bingham and his colleagues passed the Reconstruction Acts of 1867, which allowed both black and white voters in the Southern states to vote on new constitutions and new state governments—state governments that would hold new votes on ratifying the 14th Amendment. Calhoun and slavery were dead, but freedom and federalism remained very much alive.

Freedom and Federalism Today

The principles of freedom and federalism articulated by the Declaration of Independence have informed American constitutional liberty for 250 years. The 13th Amendment constitutionalized the Declaration's assertion of human equality by abolishing slavery and empowering Congress to prohibit its "badges and incidents"—power enforced by federal statutes prohibiting racial discrimination in contracts and real estate purchases.[72] The 14th Amendment requires states to equally protect every person's life, liberty, and property and guarantees equal civil rights to every American citizen. The Supreme Court enforced these provisions through cases on education access like *Brown v. Board of Education* and *Students for Fair Admissions v. Harvard*.[73] In the mid-20th century, the Supreme Court also belatedly realized Bingham's vision of a national Bill of Rights by interpreting the due process clause of the 14th Amendment as having incorporated much of the first eight amendments. The Declaration's vision of individual freedom, in other words, is now a foundational aspect of American law.

So too is structural federalism. In the 1990s, the Supreme Court reinvigorated what had been a moribund 10th Amendment. In cases like *New York v. United States* and *United States v. Lopez*, the Supreme Court

drew on the 10th Amendment to impose limits on the power Congress could derive from the Constitution's commerce clause.[74] In his majority opinion for *Bond v. United States*,[75] Justice Anthony Kennedy cited several Supreme Court cases to conclude that the 10th Amendment's restrictions exist not for the protection of the states, but for the protection of individual Americans. As Kennedy wrote:

> The federal system rests on what might at first seem a counterintuitive insight, that "freedom is enhanced by the creation of two governments, not one." *Alden* v. *Maine*, 527 U. S. 706, 758 (1999). The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived. . . .
>
> . . . "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *New York* v. *United States*, 505 U. S. 144, 181 (1992) (quoting *Coleman* v. *Thompson*, 501 U. S. 722, 759 (1991) (Blackmun, J., dissenting)).[76]

Kennedy's opinion echoes Bingham's praise of federalism during the drafting of the 14th Amendment. It also echoes the liberty principle of structural federalism embedded in the Declaration, the Constitution, and the 14th Amendment. The 10th Amendment merely declared what was already the framers' understanding of the Constitution before the adoption of the Bill of Rights. As Publius explained, the Constitution retained the Declaration's free and independent states as constituent parts of its dual federalist structure.[77] Similarly, the 14th Amendment's drafters insisted that the privileges and immunities of American citizenship included those listed in *all 10* amendments of the Bill of Rights.[78]

The 10th Amendment ultimately played a key role in advancing American liberty. Madison would have predicted as much—separation of

powers and federalism represent a "double security" for the protection of individual rights.[79] In the 19th century, structural federalism permitted and assisted the rise of Northern abolitionism. However, states' rights became a byword for injustice during the 1950s when racist, segregated states engaged in "massive resistance" against the Supreme Court's order to desegregate public schools.[80] But these modern efforts of interposition and nullification echoed Calhounian radicalism, not Madisonian federalism. Nullification theory, as Madison explained long ago, violates the dual federalist agreement, which the states themselves ratified in 1787.[81] Violation and obstruction of federal law are not the correspondence among the states envisioned by Madison in his Virginia Resolutions but instead involve the same unilateral rejection of the people's Constitution attempted by secessionists.

Madisonian federalism envisions local *political* dissent and the opportunity to build local and regional political coalitions. These political activities by free and independent states deepen political engagement across the country and facilitate the creation of new democratic majorities. Constitutional text represents those issues that the people have debated and collectively chosen to entrench as fundamental law. But not every subject has been constitutionalized. Indeed, not even all the most important subjects have been constitutionalized. The country remains divided over issues involving preborn human life, the significance of biological sex, the care of the environment, the scope of parental rights, and many other areas either absent from or unclearly covered by the Constitution.

The national diktats handed down through judicial rulings in cases like *Dred Scott v. Sandford* and *Roe v. Wade* attempt to artificially end public debate. It is no response, or at least an inadequate response, to insist that all critical matters of individual liberty should *not* be left to public debate. That is exactly where such matters must *begin*. The Declaration reminds us that we are a people, and the only "just" laws enacted by our government are those that have been *consented* to by the people. The American people have consented to a government neither wholly national nor wholly federal and under which the most essential aspects of human freedom are

first discussed in homes, churches, town squares, legislative chambers, and—ultimately—the halls of Congress.

To date, the American people have proved themselves worthy of their Declaration. The movement to abolish slavery emerged alongside the movement for American independence. The people's vote achieved the aims of abolitionism in 1865. The people also included the rights of life, liberty, and the pursuit of happiness in their original Bill of Rights, and they expanded access to those rights when they voted to ratify the 14th Amendment in 1868.

The same federalist structure that facilitated the democratic advance of liberty in the past continues to do so today. The dynamic tension between freedom and federalism lives on in debates over immigration, sanctuary cities, abortion, biological sex, climate change, and a host of other issues relating to personal and political freedom. Here's to the next 250 years of American liberty.

Notes

1. G. Edward White, *Law in American History*, vol. 1, *From the Colonial Years Through the Civil War* (Oxford University Press, 2012), 397. See also Pekka Hämäläinen, *The Comanche Empire* (Yale University Press, 2009); and William S. Kiser, *Borderlands of Slavery: The Struggle over Captivity and Peonage in the American Southwest* (University of Pennsylvania Press, 2021), 1.

2. Kiser, *Borderlands of Slavery*.

3. See, for example, "Virginia Slave Code (1705)," in *The Reconstruction Amendments: The Essential Documents*, ed. Kurt T. Lash, vol. 1 (University of Chicago Press, 2021). See also Sean Wilentz, *No Property in Man: Slavery and Antislavery at the Nation's Founding* (Harvard University Press, 2018), 27.

4. Wilentz, *No Property in Man*, 25. This organization continued after the Revolution and eventually elected Benjamin Franklin as its president. See Edward Needles, *An Historical Memoir of the Pennsylvania Society: For Promoting the Abolition of Slavery; The Relief of Free Negroes Unlawfully Held in Bondage, and for Improving the Condition of the African Race* (Merrihew & Thompson, 1848), 29.

5. See "1777 Constitution of Vermont," in *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, ed. Francis Newton Thorpe, vol. 5, *New Jersey—Philippine Islands* (Government Printing Office, 1909), 3739.

6. Wilentz, *No Property in Man*, 5.

7. Wilentz, *No Property in Man*, 5. Vermont officially became a state in 1791.

8. See "The Northwest Ordinance (July 13, 1787)," in Lash, *The Reconstruction Amendments,* 1:10.

9. Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, 3rd ed. (Routledge, 2014), 34.

10. The territory eventually became the states of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

11. US Const. pmbl.

12. *Federalist*, no. 45 (James Madison). "Publius" was the common pseudonym used by the papers' three authors, James Madison, Alexander Hamilton, and John Jay.

13. US Const. art. IV.

14. "Debates in the Philadelphia Constitutional Convention (June, July, Aug. 1787)," in Lash, *The Reconstruction Amendments*, 1:184.

15. See US Const. amend. IX ("The enumeration in the constitution of certain rights shall not be construed to deny or disparage other rights retained by the people.").

16. See US Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

17. *Federalist*, no. 39 (James Madison).

18. See generally *Federalist*, no. 51 (James Madison).

19. See *Federalist*, no. 46 (James Madison).

20. *Federalist*, no. 44 (James Madison).

21. See "The Alien and Sedition Acts (July 6, July 14, 1798)," in Lash, *The Reconstruction Amendments*, 1:36.

22. "The Alien and Sedition Acts (July 6, July 14, 1798)," in Lash, *The Reconstruction Amendments*.

23. See "The Kentucky Resolutions of 1798 (Nov. 10, 1798)," in Lash, *The Reconstruction Amendments*, 1:37; and "The Virginia Resolutions (Dec. 24, 1798)," in Lash, *The Reconstruction Amendments*, 1:38.

24. See "James Madison, Report on the Virginia Resolutions," in Lash, *The Reconstruction Amendments*, 1:41, 51.

25. "James Madison, Report on the Virginia Resolutions (Jan. 7, 1800)," in Lash, *The Reconstruction Amendments*, 1:42.

26. See Dred Scott v. Sandford, 60 US 393 (1857).

27. See Jack N. Rakove, ed., *James Madison: Writings* (Library of America, 1999), 608.

28. See Ralph Ketcham, *James Madison: A Biography* (University of Virginia Press, 1990), 406.

29. Madison's "Report of 1800" and the Federalist Papers dominated American political rhetoric in the early 19th century. See Kurt T. Lash, "James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment," *George Washington Law Review* 74, no. 165 (2006); and Kurt T. Lash, "The Federalist and the Fourteenth Amendment—Publius in Antebellum Public Debate, 1788–1860," *Brigham*

Young University Law Review 48, no. 6 (2023): 1831. Meanwhile, the first American constitutional treatise, St. George Tucker's *View of the Constitution of the United States*, expressly relied on the Federalist Papers, the Virginia Resolutions, and Madison's Report. See, for example, "St. George Tucker, *A View of the Constitution* (1803)," in Lash, *The Reconstruction Amendments*, 1:63–64, 74–75.

30. US Const. art. IV, § 2, cl. 3.

31. "Fugitive Slave Act (Feb. 12, 1793)," in Lash, *The Reconstruction Amendments*, 1:188.

32. "Fugitive Slave Act (Feb. 12, 1793)," in Lash, *The Reconstruction Amendments*.

33. See Prigg v. Pennsylvania, 41 US 550 (1842), which references "an Act to give effect to the provisions of the constitution of the United States relative to fugitives from labor, for the protection of free people of color, and to prevent Kidnapping."

34. See Wilentz, *No Property in Man*, 226.

35. *Prigg*, 41 US at 539.

36. *Prigg*, 41 US at 542.

37. For examples of this resistance and its religious motivation, see Stephanie H. Barclay and Kurt T. Lash, "A Crust of Bread: Religious Resistance and the Fourteenth Amendment," *Vanderbilt Law Review* 71, no. 4 (2025): 1203–64.

38. Ten of the first 12 presidents owned slaves (John Adams and John Quincy Adams being the exceptions), and every president before Lincoln enforced the Fugitive Slave Acts.

39. See "US House of Representatives, the 'Gag' Rules, (May 26, 1836)," in Lash, *The Reconstruction Amendments*, 1:216.

40. See "Letter of Postmaster General Amos Kendall Regarding the Delivery of Anti-Slavery Literature, *Richmond Whig* (Aug. 11, 1835)," in Lash, *The Reconstruction Amendments*, 1:210.

41. See 10 Stat. 277 (1854).

42. *Dred Scott*, 60 US at 393.

43. See, for example, "Wendell Phillips, *The Constitution: A Pro-Slavery Compact* (1844)," in Lash, *The Reconstruction Amendments*, 1:227; and "'No Union with Slaveholders,' *Liberator* (July 7, 1854)," in Lash, *The Reconstruction Amendments*, 1:259.

44. See Randy E. Barnett, "Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment," *Journal of Legal Analysis* 3, no. 1 (2011): 165.

45. "Liberty Party Platform (Aug. 30, 1843)," in Lash, *The Reconstruction Amendments*, 1:225.

46. "Free Soil Party Platform (Aug. 9–10, 1848)," in Lash, *The Reconstruction Amendments*, 1:236.

47. "Republican Party Platform (May 17, 1860)," in Lash, *The Reconstruction Amendments*, 1:320.

48. See "US Congress, the 'Corwin Amendment' (Mar. 2, 1861)," in Lash, *The Reconstruction Amendments*, 1:343.

49. "Abraham Lincoln, First Inaugural Address (Mar. 4, 1861)," in Lash, *The Reconstruction Amendments*, 1:347.

50. See, for example, "South Carolina, Declaration of the Causes Which Justify Secession (Dec. 24, 1860)," in Lash, *The Reconstruction Amendments*, 1:327.

51. See, for example, "John C. Calhoun, *A Discourse on the Constitution* (I)(1851)," in Lash, *The Reconstruction Amendments*, 1:144.

52. See, for example, "South Carolina, Declaration of the Causes Which Justify Secession (Dec. 24, 1860)," in Lash, *The Reconstruction Amendments*, 1:328. The protection of slavery through provisions like the fugitive slave clause "was so material to the compact, that without it the compact would not have been made."

53. See James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (Oxford University Press, 1988), 771.

54. The fall of Atlanta to Union forces in early September 1864 was particularly important. For a discussion of the battle for Atlanta and its political significance, see McPherson, *Battle Cry of Freedom*, 774.

55. For a general discussion of the amendment's drafting and passage, see Kurt T. Lash, "Introduction to Part 2A," in *The Reconstruction Amendments*, 1:373.

56. "The Northwest Ordinance (July 13, 1787)," in Lash, *The Reconstruction Amendments*, 1:10.

57. US Const. amend. XIII (1865); and "The Northwest Ordinance (July 13, 1787)," in Lash, *The Reconstruction Amendments*, 1:10.

58. See, for example, "Liberty Party Platform (Aug. 30, 1843)," in Lash, *The Reconstruction Amendments*, 1:225. "*RESOLVED*, That the fundamental truths of the Declaration of Independence, that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, and the pursuit of happiness, was made the fundamental law of our national government, by that amendment of the constitution which declares that no person shall be deprived of life, liberty, or property, without due process of law."

59. See Kurt T. Lash, "The State Citizenship Clause," *University of Pennsylvania Journal of Constitutional Law* 25, no. 5 (2023): 1097, 1147, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1863&context=jcl.

60. US National Archives, "14th Amendment to the U.S. Constitution: Civil Rights (1868)," https://www.archives.gov/milestone-documents/14th-amendment.

61. Abraham Lincoln, "Fragment on the Constitution and the Union," ca. January 1861, in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler, vol. 4, *1860–1861* (Rutgers University Press, 1953), 169.

62. See "John C. Calhoun, *A Discourse on the Constitution* (I) (1851)," in Lash, *The Reconstruction Amendments*, 1:142. Madison himself rejected the idea of state secession and its only slightly less radical sibling, state nullification. See "James Madison to Daniel Webster (Mar. 15, 1833)," in Lash, *The Reconstruction Amendments*, 1:115.

63. See Lash, "The Federalist and the Fourteenth Amendment."

64. Texas v. White, 74 US 700, 725 (1869).

65. See Cong. Globe, 37th Cong., 2nd Sess. 737 (1862). According to Sumner: "Any votes of secession or other act by which any State may undertake to put an end to the

supremacy of the Constitution within its territory is inoperative and void against the Constitution, and when sustained by force it becomes a practical *abdication* by the State of all rights under the Constitution, while the treason which it involves still further works an instant *forfeiture* of all those functions and powers essential to the continued existence of the State as a body politic, so that from that time forward the territory falls under the exclusive jurisdiction of Congress as other territory, and the State being, according to the language of the law, *felo-de-se*, ceases to exist."

66. In the opening days of the 38th Congress, for example, Representative Lovejoy proposed "a bill to give effect to the Declaration of Independence" and the Fifth Amendment's due process clause, which would abolish slavery throughout the United States. See "US House of Representatives, Proposed Abolition Amendments (Ashley Wilson) and Abolition Bill (Lovejoy) (Dec. 14, 1863)," in Lash, *The Reconstruction Amendments*, 1:385.

67. John A. Bingham, *One Country, One Constitution, and One People* [. . .] (Congressional Globe Office, 1866), 7.

68. Bingham, *One Country, One Constitution, and One People*.

69. Bingham, *One Country, One Constitution, and One People*.

70. Cong. Globe, 39th Cong., 2nd Sess. 250–51 (1867).

71. Cong. Globe, 39th Cong., 2nd Sess. 504 (1867).

72. Civil Rights Cases, 109 US 3, 20–21 (1883).

73. See Brown v. Board of Education of Topeka, 347 US 483 (1954); Parents Involved in Community Schools v. Seattle School District No. 1, 551 US 701 (2007); and Students for Fair Admissions v. University of North Carolina, 600 US ___ (2023).

74. New York v. United States, 505 US 144 (1992); and United States v. Lopez, 514 US 549 (1995).

75. Bond v. United States, 564 US 211 (2011).

76. *Bond*, 564 US at 8–9.

77. *Federalist*, no. 45 (Madison).

78. Kurt T. Lash, "Becoming the 'Bill of Rights': The First Ten Amendments from Founding to Reconstruction," *Virginia Law Review* 110, no. 2 (2024): 474–75. For an explanation of how the 14th Amendment incorporates all of the Bill of Rights, including the 10th Amendment, see Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* (Cambridge University Press, 2014).

79. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people." *Federalist*, no. 51 (Madison).

80. James Hershman, "Massive Resistance," *Encyclopedia Virginia*, December 7, 2020, https://encyclopediavirginia.org/entries/massive-resistance/.

81. James Madison, "Notes on Nullification, December 1834," Founders Online, https://founders.archives.gov/documents/Madison/99-02-02-3190.