Common-Sense Constitutionalism and Abolition in the Early American Republic

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Abstract. In this article, I develop a theory of common-sense constitutionalism that contrasts with both "common good constitutionalism" and public meaning originalism. Unlike those theories of constitutional interpretation, common-sense constitutionalism takes seriously the people's right to self-governance (contra common good constitutionalism) and the importance of their historical engagement with constitutional law (contra originalism). This theory of early constitutional meaning, moreover, is historically discrete: a product of the conditions and premises of the late eighteenth century, and thus not descriptive of constitutional law or interpretation today.

As scholars of popular constitutionalism have shown, early American constitutional law did not derive from constitutional text or judicial mandate alone. Instead, it emerged from competing sources of fundamental law, including natural law, common law, and popular custom. The substance of these authorities depended on the interpretations of a broader public, and the people's interpretive powers came from their "common sense"—a prerational capacity that everyone shared, and that served as the basis for collective deliberation in the public sphere. As a result, early American common sense shaped the key constitutional debates of the period, including revolution, ratification, and abolition—a central constitutional question once the frame of reference expands beyond the writings of a handful of elite Americans.

This article reviews the role of common sense in each of these contests before exploring two prominent forms of common-sense constitutionalism in early abolitionist practice. Freedom suits and antislavery petitions, I argue, demonstrate that a diverse array of early Americans engaged in constitutional interpretation at the state as much as the federal level, before legislative and executive bodies as much as

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judicial ones, and amongst themselves as much as their representatives. While the perspectives of these participants are typically elided in constitutional histories, they indicate that constitutional meaning was continually contested and ultimately indeterminate in the early republican period. Similarly, no one authority or interpretive methodology needs govern constitutional law today: the fact of dissension in the past should instead inspire continued debate in the present.

INTRODUCTION

At some point in the year 1776, Lemuel Haynes added an epigraph to a manuscript in progress. "We hold these truths to be self-Evident, that all men are created Equal, that they are Endowed By their Creator with Ceartain unalienable rights, that among these are Life, Liberty, and the pursuit of happyness. *Congress*."[1] The title of the document was *Liberty Further Extended: Or Free Thoughts on the Illegality of Slave-keeping*.[2] Its argument was, in many ways, conventional. The American Revolution was sold to the people as a war against slavery—*political* slavery, a trope of eighteenth-century discourse.[3] For many white Americans, the depredations of chattel slavery were precisely the conditions they most feared.[4] For antislavery activists (and British critics), by contrast, the continuation of American chattel slavery was unmitigated hypocrisy.[5] "We live in a day wherein *Liberty & freedom* is the subject of many millions Concern," Haynes observed; "men seem to manifest the most sanguine resolution not

1. Ruth Bogin, *"Liberty Further Extended": A 1776 Antislavery Manuscript by Lemuel Haynes*, 40 WM. & MARY Q. 85, 94 (1983). While Haynes's unpublished manuscript is undated, Ruth Bogin believes it was most likely produced in 1776 and was "clearly intended for publication." *Id.* at 89–91.

2. *Id.* at 93.

3. See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 232–34 (1992).

4. See F. Nwabueze Okoye, *Chattel Slavery as the Nightmare of the American Revolutionaries*, 37 WM. & MARY Q. 3 (1980). The editor of the *South Carolina Gazette*, for instance, observed that "we are as real Slaves as those we are permitted to command." Jack P. Greene, *"Slavery or Independence": Some Reflections on the Relationship among Liberty, Black Bondage, and Equality in Revolutionary South Carolina*, 101 S.C. HIST. MAG. 15, 24 (2000). Another contributor posed the question "whether we *are* not put upon a worse Footing than our Slaves." *Id.* In 1774, George Washington claimed that "the Crisis is arrivd when we must assert our Rights, or Submit to every Imposition that can be heap'd upon us; till custom and use, will make us tame, & abject Slaves, as the Blacks we Rule over with such arbitrary Sway." Letter from George Washington to Bryan Fairfax (Aug. 24, 1774) (on file with the National Archives). During the Stamp Act, white sailors in Charleston wore blackface to make the same point. PETER LINEBAUGH & MARCUS REDIKER, THE MANY-HEADED HYDRA 245 (2006).

5. See, e.g., HERBERT APTHEKER, A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 10 (1951); Bailyn, *supra* note 3, at 241–43; Bogin, *supra* note 1, at 104; CHRISTOPHER LESLIE BROWN, MORAL CAPITAL 105–34 (2012); DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823, 273–84 (1999); DOUGLAS R. EGERTON, DEATH OR LIBERTY 119 (2009); PHILIP S. FONER, BLACKS IN THE AMERICAN REVOLUTION 100, 114 (1976); GERALD HORNE, THE COUNTER-REVOLUTION OF 1776 238 (2014); ROBERT G. PARKINSON, THE COMMON CAUSE 471 (2016); ERIC SLAUTER, THE STATE AS A WORK OF ART 196–97 (2009); ELLEN GIBSON WILSON, THE LOYAL BLACKS 2–3 (1976).

to Let their natural rights go without their Lives go with them."[6] Yet, these same men actively abided "*Opression*, nay, much greater opression, than that which Englishmen seem so much to spurn at."[7] This inconsistency suggested that slavery was not only immoral but unconstitutional. Haynes stated his "main proposition" in those terms: an "*African . . . may Justly Chalenge, and has an undeniable right to his Liberty: Consequently, the practice of Slave-keeping, which so much abounds in this Land is illicit*." Illicit, for Haynes, meant opposed to the new nation's fundamental laws, among them the law of nature and the Declaration of Independence.[8]

In this article, I develop a theory of "common-sense constitutionalism" that accounts for Haynes's argument and the broader constitutional field in which it took part. Despite their prevalence, claims like Haynes's, and the people who made them, tend to be excluded from early constitutional histories.[9] "Prior to 1840, White men overwhelmingly dominated America's constitutional conversation," writes Akhil Reed Amar. "White men were the ones whose voices and votes most counted, whose political preferences invariably prevailed."[10] In histories of the American founding that center on prominent white Virginians, abolitionism may be ignored on multiple counts: because the Constitution of 1787 included clauses designed to protect the institution of slavery; because the Supreme Court reinforced those protections across the nineteenth century; and because the Black Americans who argued and acted otherwise are presumed to have been precluded from participation in constitutional discourse, at least until the day Frederick Douglass took to the podium to expound "the meaning of July Fourth."[11]

But just because we do not find Black Americans at constitutional conventions or among the authors of the *Federalist* does not mean they were not active participants in the nation's early constitutional discourse.[12] Law and politics have always been exclusionary domains, but marginalized Americans have also always found ways to participate in them.[13] In the late

6. Bogin, *supra* note 1, at 94–95.

7. *Id.* at 95.

8. *Id*.

9. Haynes was born to a Black father and white mother. Bogin, *supra* note 1, at 85. The revolutionary period saw "a voluminous literature on slavery," writes Gary Nash, and "it was the era when the sentiment for ridding American society of the peculiar institution was the strongest." GARY NASH, RACE AND REVOLUTION 6, 8 (1990).

10. AKHIL REED AMAR, THE WORDS THAT MADE US 697 (2021). Others have found fault with Amar's approach to constitutional history. See, e.g., Gregory Ablavsky, *Akhil Amar's Unusable Past*, 121 MICH. L. REV. 1119 (2023).

11. FREDERICK DOUGLASS, *The Meaning of July Fourth for the Negro*, *in* FREDERICK DOUGLASS 188(Philip Foner & Yuval Taylor eds., 2000).

12. See, e.g., David Waldstreicher, *Racism, Black Voices, Emancipation, and Constitution-Making in Massachusetts, 1778*, 2 J. AM. CONST. HIST. 325, 329–30 (2024).

13. See, e.g., LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE (2009); KELLY M. KENNINGTON, IN THE SHADOW OF DRED SCOTT (2017); KATE MASUR, UNTIL JUSTICE BE DONE (2021); DYLAN C. PENNINGROTH, BEFORE THE MOVEMENT (2023); ANNE TWITTY, BEFORE DRED SCOTT

eighteenth century, moreover, constitutional law was a more capacious domain than we know it to be today, extending beyond the language of constitutional text, the intentions of the representatives who ratified it, and the mandate of the judges who interpreted it.[14] As scholars of "popular constitutionalism" and related fields have shown, early constitutional law derived from varied, sometimes competing, sources of fundamental law, including natural law, the English common law, the law of nations, and customary traditions of negotiation and protest.[15] In each of these domains, "the people" were law's authority, even as that category was left abstract, mythical, or pluralistic.[16] (The "diplomatic constitution," for instance, was formed in the negotiation among diverse peoples, Native and European American.)[17] This rich system of constitutional law did not disappear with the appearance of constitutional text. The framers "drafted the Constitution and Bill of Rights to complement, rather than replace, the customary rights they fought to vindicate against the British—they said so explicitly" in the Tenth Amendment.[18] Nor was the Constitution originally "a conventional species of law—defined by its legal content and underlying legal purpose, susceptible to orthodox legal reasoning, interpretation, and adjudication, and thus the province of legal professionals to decode."[19] In 1787, the Constitution was a different kind of object than it is today, extending beyond the content of constitutional text to the tradition of the "customary constitution," regulated by popular acts of protest and consent.[20]

If the Constitution was in the people's hands, their interpretive authority came from a widely shared epistemological premise: that every person

(2016); LEA VANDERVELDE, REDEMPTION SONGS (2014).

14. As Eric Slauter points out, the *Federalist* papers reveal a "relatively loose commitment to what was known as the 'style' and 'arrangement' (as opposed to the 'detail' or substance) of the text"; whereas Anti-Federalists fretted over the language of the text, Federalists did not show themselves to be "committed textualists" during the ratification debates. Slauter, *supra* note 5, at 24–25. In the mid-nineteenth century, Frederick Douglass pointed out that the framers had obscured their own intentions. FREDERICK DOUGLASS, *The Constitution of the United States: Is It Pro-Slavery or Antislavery?*, *in* FREDERICK DOUGLASS, *supra* note 11, at 381 (Philip Foner & Yuval Taylor eds., 1999) (arguing "that the debates in the convention that framed the Constitution . . . were not published till more than a quarter of a century after the presentation and the adoption of the Constitution").

15. See Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 123 (2023); Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85 (2017); Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J. L. & HUMANITIES 295 (2011); JONATHAN GIENAPP, THE SECOND CREATION (2018); LARRY D. KRAMER, THE PEOPLE THEMSELVES (2004); Farah Peterson, *Our Constitutionalism of Force*, 122 COLUM. L. REV. 1539 (2022).

16. See SOPHIA A. ROSENFELD, COMMON SENSE 165 (2011).

17. See Ablavsky & Allread, *supra* note 15, at 253–62.

18. Peterson, *supra* note 15, at 1601.

19. Gienapp, *supra* note 15, at 7.

20. Kramer, *supra* note 15, at 43. Jud Campbell discusses the importance of reckoning with "constitutional ontology" or metaphysics in this sense. See Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 696–99 (2023); Jud Campbell, *Originalism's Two Tracks*, 104 B.U. L. REV. 1435, 1438–42 (2024). See also Gienapp, *supra* note 15, at 5–9.

possessed certain prerational capacities, or "common sense," that prefigured collective deliberation in the public sphere.[21] In this article, I surface the importance of common sense to constitutional argument in the early American republic. Common sense, I argue, was the lingua franca of constitutional discourse in the period, bridging the claims of elite and marginalized Americans. It underpinned the constitutional theory of the revolutionary years and the creation of early constitutional texts. Because of its universality, it also enabled abolitionists—an emergent, interracial, and regionally distributed group—to urge the end of slavery on a constitutional basis, at the state and national level.[22] Eventually, as federal authorities began to hoard the prerogative of constitutional interpretation, common-sense constitutionalism and the first wave of abolitionist possibility it beckoned fell out of favor.

This historical account of the American founding contrasts with that put forward by proponents of "common good constitutionalism" and originalism alike. In Part I, I contrast these competing constitutional theories with the political and epistemological premises of common sense in the founding era, which included the people's right (contra common good constitutionalism) and capacity (contra originalism) to govern themselves.[23] In Part II, I develop a history of common-sense constitutionalism across three interrelated contexts: revolutionary activism, constitutional ratification, and abolitionist interpretation. In Parts III and IV, I explore two specific forms of common-sense constitutionalism in abolitionist practice: freedom suits and antislavery petitions. These forms of constitutional engagement, I argue, merit as much attention as elite-crafted documents like the *Federalist* papers do. When we include them in our consideration of early constitutional meaning, we discover a field defined not by fixity but by indeterminacy and flux. I close with a discussion of the decline of common sense in constitutional history and the normative lessons it still holds for constitutional interpretation today.

I. COMMON SENSE IN CONTRAST

A. Common Good versus Common Sense

"Common good constitutionalism" is the brainchild of constitutional law

21. According to the Scottish school of common sense, this form of knowledge emerged in daily life and structured reasoned debate. PATRICIA COCHRAN, COMMON SENSE AND LEGAL JUDGMENT 10–11 (2017). Common sense became a political idea, Sophia Rosenfeld argues, when the faith in the people's capacity to understand everyday affairs was joined with a commitment to their right to govern themselves. Rosenfeld, *supra* note 16, at 152.

22. I follow Manisha Sinha in defining abolition as a radical, intersectional movement led by the enslaved themselves. MANISHA SINHA, THE SLAVE'S CAUSE 1 (2016).

23. See Rosenfeld, *supra* note 16, at 152.

scholar Adrian Vermeule.[24] For Vermeule, constitutional law is an outgrowth of the "classical tradition," in which law is understood as "an ordinance of reason for the common good, promulgated by a public authority who has charge of the community."[25] Law, on this account, extends beyond positive law to the law of nations and natural law, both of which set "reasonable boundaries" on what kinds of rules civil authorities can enact.[26] The public authorities responsible for interpreting this law—"including, but by no means limited to, judges"[27]—are tasked with identifying the common good, defined as "the flourishing of a well-ordered political community."[28] While Vermeule insists that this view of law is "the original understanding" in the American constitutional tradition,[29] he advocates for common good constitutionalism on primarily normative grounds. The classical legal tradition, he argues, "holds out the greatest promise for a principled and coherent interpretation of our current constitutional order as well as its history."[30] Unlike originalists, he treats history as secondary to constitutional questions; unlike constitutional progressives, he defines the normative goal of the constitutional order as one of "peace, justice, and abundance" rather than individual liberation.[31]

More "manifesto" than treatise, *Common Good Constitutionalism* has received far more attention than its "surprisingly superficial" treatment of constitutional law and history would seem to invite.[32] The earliest responses to Vermeule's theory suggest that this attention owes in part to the fact that common good constitutionalism is anathema to democratic governance and the early American constitutional tradition.[33]

The antidemocratic qualities of common good constitutionalism are not hard to find. Vermeule conceives of political community in the absence of meaningful difference, deliberation, or dissent. "The common good is

24. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 15 (2022).

25. Vermeule, *id*., at 3.

26. *Id*.

27. Adrian Vermeule, *Beyond Originalism*, ATL., Mar. 31, 2020, https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

28. Vermeule, *supra* note 24, at 7.

29. *Id.* at 2.

30. *Id.* at 5.

31. Vermeule, *supra* note 24, at 15.

32. William Baude & Stephen E. Sachs, *The "Common-Good" Manifesto*, 136 HARV. L. REV. 861, 863 (2023). Vermeule acknowledges that he offers "an overall sketch of a view and a program, with illustrative applications, rather than a comprehensive treatise on the implications of common good constitutionalism in area after area." Vermeule, *supra* note 24, at 25.

33. See, e.g., Jack M. Balkin, *Common Good versus Public Good*, BALKINIZATION, Apr. 3, 2020, https://balkin.blogspot.com/2020/04/common-good-versus-public-good.html; Randy E. Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-Originalist Approach to the Constitution*, ATL., Apr. 3, 2020, https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/; Garrett Epps, *Common-Good Constitutionalism Is an Idea as Dangerous as They Come*, ATL., Apr. 3, 2020, https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/.

unitary and indivisible, not an aggregation of individual utilities," he explains. "In its temporal aspect it represents the highest felicity or happiness of the whole political community, which is also the highest good of the individuals comprising that community."[34] Individual well-being is not an end in itself in Vermeule's account, or even a means to an end; it is simply subsumed by the common good.

There is no room, similarly, for individual or collective decision-making about what might constitute the common good. The "substantive vision of the good," for all its moral content, is left not to the political community but to the public authority.[35] Vermeule is more explicit in his article *Beyond Originalism*, published in the early days of the Covid pandemic, that such an authority might legitimately impose a moral vision that runs counter to the express wishes of a political community:

> Just authority in rulers can be exercised for the good of subjects, if necessary even against the subjects' own perceptions of what is best for them—perceptions that may change over time anyway, as the law teaches, habituates, and re-forms them. Subjects will come to thank the ruler whose legal strictures, possibly experienced at first as coercive, encourage subjects to form more authentic desires for the individual and common goods, better habits, and beliefs that better track and promote communal well-being.[36]

In his 2022 book, similarly, Vermeule dismisses exercises of collective deliberation and action as irrelevant to the substance of the common good. "The crucial point is that the common good need not justify itself before the bar of democracy," Vermeule writes, "but the reverse: democracy, like any other regime-form, is valuable only insofar as it contributes to the common good, and not otherwise."[37] Democracy, for Vermeule, is neither constitutive of nor essential to the American constitutional order.

In fact, common good constitutionalism departs in stark fashion from the historical tradition Vermeule cites as auxiliary evidence. The common good, as I argue in this article, cannot be disaggregated from common sense in the early republican period—from popular expressions of "common feeling" and collective exercises of "common consent."[38] In sharp contrast to a theory of the common good imposed by a "public authority" on high, constitutional thought across the late eighteenth century appealed to a common sense that emerged from below, among diverse individuals and the exchanges that defined local communities as they actually existed in the early American republic. This democratic tradition is our inheritance,

34. Vermeule, *supra* note 24, at 7.
35. *Id.* at 37.
36. Vermeule, *supra* note 27.
37. Vermeule, *supra* note 24, at 48.
38. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, 56 (1998).

imperfect and precarious as it may be. It is Vermeule's authoritarian vision, not "American public law," that "suffers from a terrible amnesia" of the early republican period and the constitutional tradition it inaugurated—one that he repudiates at our peril.[39]

B. Original Public Meaning versus Common Sense

Originalists would likely subscribe to some version of this critique of common good constitutionalism.[40] The turn from an originalism based on "original intent" to one derived from "original public meaning" moved precisely in this direction: from the will of the Constitution's framers to the common understanding of a broader public.[41]

For originalists, original public meaning refers to "the objective meaning that would be understood by a reasonable person in the relevant community of discourse."[42] In addition to the Constitution, originalists call on familiar source texts to determine this reasonable interpretation of original public meaning, including the *Federalist* papers, James Madison's *Notes of Debates in the Federal Convention of 1787*, William Blackstone's *Commentaries on the Laws of England*, and Samuel Johnson's *Dictionary of the English Language*.[43] As Justice Antonin Scalia, the Supreme Court's original originalist, explained:

> I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton's and Madison's writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus I give equal weight to Jay's pieces in *The Federalist*, and to Jefferson's writings, even though neither of them was a Framer.[44]

What unites these constitutional authorities, Scalia says, is not their participation in constitutional creation but their status as "intelligent and informed people of the time." Gary Lawson and Guy Seidman take this idea

39. Contra Vermeule, *supra* note 24, at 1.

40. See, e.g., Baude & Sachs, *supra* note 32.

41. See, e.g., Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378–82 (2013).

42. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999). Barnett analogizes the difference between original intent and original meaning to that between a will theory of contract and a consent theory of contract.

43. See, e.g., *id*. at 614–15; Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 S. C. ECON. REV. 115, 121–24, 130 (2004); ANTONIN SCALIA, A MATTER OF INTERPRETATION 130 (2018); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 940 (2009). These texts, Jud Campbell explains, are "epistemic" authorities in constitutional interpretation. See Campbell, *Two Tracks*, *supra* note 20, at 1439 n.10.

44. Scalia, *supra* note 43, at 38.

one step further: for them, the reasonable person responsible for unearthing original public meaning is not any one historical person but the hypothetical construct of one: a "formidable intellectual figure" who is "highly intelligent and educated and capable of making and recognizing subtle connections and inferences" as well as "committed to the enterprise of reason, which can provide a common framework for discussion and argumentation," and "familiar with the peculiar language and conceptual structure of the law."[45] Someone like a lawyer, in other words.

Not all originalists subscribe to this view. Lawrence Solum, for instance, argues that the "intended readership" of the Constitution "consisted of the members of the public in the United States who were able to read English or to understand English if it were read to them," a group that implicitly includes nonliterate Americans.[46] Yet Solum's evidence for this view still depends on the classic originalist authorities: Anti-Federalists like Brutus and Federalists like James Wilson; Supreme Court justices like Chief Justice John Marshall and Justice Joseph Story; Constitutional Convention delegates like George Washington and Benjamin Franklin.[47]

This top-down approach neglects the actual original publics that engaged with constitutional meaning in the early republican period.[48] To pursue a bottom-up search for constitutional meaning is not only an ideological choice (in the same way that a top-down approach is an ideological choice).[49] It is also a historically informed one, driven by the conditions of constitutional meaning-making that obtained at the time: what constitutional law was, how it took shape, and who was responsible for that construction. Historians of the period describe late-eighteenth-century constitutional law as an amorphous domain defined as much by text and institutions as by customary practice and popular protest.[50] As a result, the people—any number of them—were responsible for contesting, conserving, or conceding it over time. As Farah Peterson writes, "in an era when the Constitution was a matter of praxis, the constitutional ideas of the poor no less than the rich must be attended to, especially as they acted out their

45. Guy Seidman & Gary Lawson, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 73 (2017).

46. Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1975 (2021). Solum gives the example of "a farmer in western Massachusetts" who, upon encountering a technical term like "Letters of Marque and Reprisal," could "consult a law dictionary, a lawyer, or a sea captain who could provide the necessary explanation." *Id*. at 1982.

47. See *id*. at 1977–82.

48. AS Saul Cornell argues, "Recovering how the Constitution might have been read by ordinary Americans requires moving beyond the familiar canonical texts consulted by Originalist scholarship." Cornell, *supra* note 15, at 303.

49. To attend to only one side of early constitutional contests, write Gregory Ablavsky and Tanner Allread, would constitute a "silencing." Ablavsky & Allread, *supra* note 15, at 248. See also James W. Fox, Jr., *Counterpublic Originalism and the Exclusion Critique*, 67 ALA. L. REV. 675, 715 (2016) (arguing that originalism's exclusionary view of source texts undermines its democratic legitimacy).

50. See *supra* note 15.

views so obviously, consistently, and repeatedly."[51] Peterson's point is not that poor Americans won the day but that diverse publics took part in contentious debates over constitutional meaning that preceded and were not resolved by the text of the Constitution, decisions from the Supreme Court, or the public writing of prominent white men. We cannot, therefore, understand original public meaning until we examine sources that have been largely excluded from originalist histories.

Originalists assume, finally, that original public meaning is "objective."[52] In their own critique of Vermeule, William Baude and Stephen Sachs insist that "for originalism the truth matters very much. How general a provision really was, and which abstractions it really invoked or ignored, are falsifiable claims about the law of the past."[53] Yet an extensive engagement with "our original *law*" reveals only a continued set of choices.[54] The distributed nature of constitutional law, interpretation, and enforcement in the period made it nearly impossible to "fix" constitutional meaning, then or now.[55] Even constitutional ratification did not represent a real consensus view among the people: ratification was shaped not only by fierce dissent but by mob violence, just as the American Revolution had been.[56] And while print technologies, particularly newspapers, were supposed to provide the material conditions for public deliberation, Trish Loughran has shown that the communications infrastructure of the early republican period was ill-equipped to facilitate truly national exchange.[57] Ratification, like all constitutional discourse in the late eighteenth century, was "a highly local

51. Peterson, *supra* note 15, at 1578.

52. Barnett, *supra* note 42, at 621.

53. Baude & Sachs, *supra* note 32, at 881.

54. Baude and Sachs prefer a broader conception of original law than original public meaning allows, one that includes a "full account of the general common law." See Baude & Sachs, *supra* note 32, at 884. Jonathan Gienapp has developed a thoughtful critique of their approach. "Baude and Sachs tend to derive the law of the Founding from the commentary of a small cadre of legal elites, even though early constitutionalism was the product of a far greater number of voices drawn from a far greater diversity of society," he writes. They also pay insufficient attention to the scope of constitutional disagreement in the era, including over the nature of constitutional law, and the historical ruptures that make it vastly distinct from what it is today. See JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM 232–35 (2024).

55. Compare Gienapp, *supra* note 15, with Solum, *supra* note 46. Jud Campbell considers the implications of constitutional indeterminacy for originalism. See Campbell, *Two Tracks*, supra note 20, at 1499–1500.

56. The Constitutional Convention was itself instigated by Shays' Rebellion and other riots across the new states. Peterson, *supra* note 15, at 1599–1600. But ratification was also shaped by acts of violence, as when, lacking a quorum, a Philadelphia mob "broke open private houses, and dragged two of the [Anti-Federalist Assembly] members through the streets to the State-House, and then guarded the Assembly while they were passing the resolutions for calling the state convention." The Scourge, *Judges*, CARLISLE GAZETTE, Jan. 23, 1788, at 2–3. See 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 55 (Merrill Jensen ed., 1976). After ratification, a riot in Carlisle, Pennsylvania, broke up a Federalist celebration, and Anti-Federalists burned effigies of James Wilson and Chief Justice Thomas McKean. *Id.* at 670.

57. TRISH LOUGHRAN, THE REPUBLIC IN PRINT 23–24 (2007).

affair."[58] Before and after 1787, constitutional interpretation took shape everywhere but the federal seat of government: in local newspapers, courts, legislatures, churches, streets, taverns, and homes, among anyone who put themselves (or were dragged) forward. Within this scattered and contentious postrevolutionary environment, "constitutional stalemate" was a more likely outcome of conflict over fundamental questions than consensus or resolution was.[59]

Reading beyond the *Federalist* (and Anti-Federalist) papers creates a recognition of the constitutional competition that emerged among a wide range of original publics.[60] Their arguments, moreover, must be understood within the broader field of early constitutional discourse. "Too often," as David Waldstreicher writes, "historians and jurists looking for constitutional certainties or verities have looked to quotidian, discursive, or literary sources only for consensual, original public meanings—which is not only fraught with random error, but ironic, because these very sources are the product of contest, of debate."[61] Debate, flux, and indeterminacy were the original public meanings of the early constitutional period. Not one original public meaning, but many.

C. Common-Sense Constitutionalism

In the late eighteenth century, constitutional meaning was debated by diverse publics, distributed across a fractured republic, and left indeterminate until broad popular consensus "ratified" particular interpretations in practice.[62] But it was also premised on a shared assumption: that all people possessed certain prerational capacities that

58. *Id.* at 135.

59. Peterson, *supra* note 15, at 1612.

60. Anti-Federalists are often cited as "paradoxical" founders insofar as they participated in, but lost, the debate over constitutional ratification. See 1 THE COMPLETE ANTI-FEDERALIST 3 (Herbert J. Storing ed., 2008).

61. Waldstreicher, *supra* note 12, at 332. As Jonathan Gienapp writes, "deep constitutional contestation . . . was the defining feature of the period. Because the federal Constitution was constructed during a time of enormous constitutional change and experimentation unleashed by the Revolution, much about it was unprecedented, which raised doubts about the kind of thing the Constitution was." As a result, "the Constitution's constitutive identity was itself open to competing, often radically distinct, readings," and the Constitution "proved a source of persistent debate." Gienapp, *supra* note 54, at 62. See also Cornell, *supra* note 15, at 296 ("New Originalists have assumed the existence of an interpretive consensus when there was none at the Founding."); Fox, *supra* note 49, at 719 ("Once we accept that counterpublics existed *and* that counterpublics are a valid source of meaning, we also accept an understanding that meanings are not fixed."); Jamal Greene, *Originalism's Race Problem*, 88 DENVER U. L. REV. 517, 522 (2011) ("[T]he possibility of indeterminacy, of plurality, within law is precisely the mischief for which originalism is often promoted as an especially effective remedy."); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 557 (2006) ("Returning to the broader view of eighteenth-century common law, the jurisprudence of the common law suggested a conception of its identity as much more flexible and susceptible to change than originalists posit."); Peterson, *supra* note 15, at 1579 ("It does not make sense . . . for a historian to look to the top of the era's hierarchy for an articulation of legal rules, and trust that those voices provide definitive answers to questions that were obviously the subject of sustained community contention.")

62. See Peterson, *supra* note 15, at 1620.

formed the basis of collective deliberation in the public sphere.[63] This "common sense," as it was called, cropped up in the constitutional arguments of elite, ordinary, and marginalized Americans.[64] It appeared in revolutionary discourse and in defense of common-law rights like public speech, petition, and assembly.[65] It was used on both sides of the ratification debates, and to argue for and against the Anglo-American institution of slavery. As Benjamin Rush observed in his "Thoughts on Common Sense" (1791), "The common sense of the planters in Jamaica, is in favour of the commerce and slavery of the Africans.—In Pennsylvania, reason, humanity, and common sense, have universally declared against them."[66] Common sense was an omnipresent authority, Rush implied, and reliably unreliable.

In the early republican period, common sense was ecumenical. Unlike common sense today, it was not tethered to a socially conservative form of folk wisdom.[67] And unlike originalists' "reasonable" approach to original public meaning, it was not determinative of constitutional questions. Instead, in the absence of a mechanism for selecting among competing claims, common sense beckoned not authoritative mandate or unitary resolution but open-ended debate. Precisely for that reason, it offered a popular, cross-cutting form of constitutional engagement for differently situated Americans.

Only with an understanding of this historically specific constitutional environment does the importance of early abolitionist thought and action become clear. Arguments for the abolition of slavery emerged mostly at the state and local level in the revolutionary period. Even when antislavery groups in Philadelphia began to petition Congress in the last decade of the eighteenth century, their efforts were made possible by the physical presence of governmental officials in the city, the nation's capital from 1790

63. See *supra* note 21.

64. See Cochran, *id*., at 5; Rosenfeld, *id*., at 15; PETER WIRZBICKI, FIGHTING FOR THE HIGHER LAW 29 (2021).

65. See ELIZABETH BEAUMONT, *Making Liberty Popular: Revolutionaries and "Common Sense" Constitutionalism: Declaring Independence and Forming New State Republics*, *in* THE CIVIC CONSTITUTION (2014).

66. BENJAMIN RUSH, *Thoughts on Common Sense*, *in* ESSAYS, LITERARY, MORAL & PHILOSOPHICAL 249, 251 (1798).

67. See, e.g., PATRICK J. DENEEN, REGIME CHANGE 93 (2023). Jason Blakely has criticized Deneen's ahistorical view of common sense. See Jason Blakely, *The Thin Line Between "Postliberalism" and "Theocracy*," CHRON. HIGHER EDUC., Aug. 2, 2023, https://www.chronicle.com/article/the-thin-line-between-postliberalism-and-theocracy. See also Megan Messerly, *Welcome to Donald Trump's New 'Common Sense' Culture War*, POLITICO, Feb. 3, 2025, https://www.politico.com/news/2025/02/03/donald-trump-culture-war-00201863. That is not to say that common sense did not contribute to racially conservative forces in the early republican period. Michael Omi and Howard Winant use the term "racial 'common sense'" to describe the ways ideas about racial difference become objective truths in distinct historical periods. MICHAEL OMI AND HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 4 (1994).

to 1800.[68]

The constitutional arguments that cropped up at the local level often originated in the legal action and collective organizing of free Black and enslaved Americans, who had little to call on in the early public sphere but their own common sense and the communities that formed around it. Their bids for constitutional redress were not naïve or wishful, or even "a minority position trying to change the status quo."[69] In the context of the revolutionary and postrevolutionary United States, the abolition of slavery was an active possibility in the making—and unmaking. It was only well into the nineteenth century that Supreme Court justices from Joseph Story to Roger Taney put their thumbs on the scales in favor of slavery's continued preservation and against Black political participation.[70]

Common-sense constitutionalism was unique to the late eighteenth century and its particular material and epistemological conditions. Whereas common good constitutionalism and originalism market themselves as interpretive methodologies available in the present, this theory of common-sense constitutionalism remains particular to the past. In Part II, I review a wide range of founding-era texts to surface the relevance of common sense to early constitutional thought, and the openings it created for abolitionist argument, across the late eighteenth century.

II. COMMON SENSE IN EARLY CONSTITUTIONAL HISTORY

A. Common Sense in the Revolution

From the first expressions of revolutionary sentiment in the American colonies, common sense appeared alongside familiar authorities like the laws of God and nature, the common law and custom, and the rights the social contract implied.[71] As early as 1750, Boston minister Jonathan Mayhew insisted that he was "engaged on the side of Liberty, the Bible and Common Sense, in opposition to Tyranny, Priest-Craft and Nonsense."[72]

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68. See Nicholas P. Wood, *A "Class of Citizens: The Earliest Black Petitioners to Congress and Their Quaker Allies*, 74 WM. & MARY Q. 109, 141–42 (2017). Richard Newman, Roy Finkenbine, and Douglass Mooney argue that the 1790s were an intense period of activism for Black Philadelphians for this reason: "Knowing that the national government would meet in Philadelphia until 1800, the city's black community sought to mobilize a federally backed program of emancipation." Richard Newman, Roy Finkenbine & Douglass Mooney, *Philadelphia Emigrationist Petition, Circa 1792: An Introduction*, 64 WM. & MARY Q. 161, 161 (2007).

69. Contra Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413, 417 (2006).

70. Paul Finkelman, *The First Civil Rights Movement: Black Rights in the Age of Revolution and Chief Taney's Originalism in* Dred Scott, 24 J. CONST. L. 676, 677 (2022). See, e.g., Prigg v. Pennsylvania, 41 U.S. 539 (1842); Dred Scott v. Sandford, 60 U.S. 393 (1857). See also Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 6 SUP. CT. REV. 247 (1994).

71. On natural rights and the social contract in the founding era, see Campbell, *supra* note 15, at 87–90.

72. JONATHAN MAYHEW, A DISCOURSE CONCERNING UNLIMITED SUBMISSION AND NON-

As these arguments progressed, common sense came to serve as a bridge between loftier constitutional authorities and the American colonists' claim to interpret them. When the Massachusetts Assembly issued its Resolutions on the Stamp Act in 1765, it posited that there were "certain essential rights of the British constitution of government, which are founded in the law of God and nature, and are the common rights of mankind"; that many of those "essential rights" had been "fully confirmed to them by Magna Charta, and by former and later acts of parliament"; and that "his majesty's subjects in America are, in reason and common sense, entitled to the same extent of liberty with his majesty's subjects in Britain."[73] The Declaration of the Causes and Necessity for Taking Up Arms, adopted by Congress in July 1775, similarly insisted that "a Reverence for our great Creator, Principles of Humanity, and the Dictates of Common Sense, must convince all those who reflect upon the Subject, that Government was instituted to promote the Welfare of Mankind, and ought to be administered for the Attainment of that End."[74] Common sense may have come last in these lists of revolutionary authorities, but it was what enabled "all those who reflect[ed] upon the Subject" to consider and comment on them in public.

Like other authorities in the period, common sense had a specific intellectual history that explained its frequent appearance in the literature of the American Revolution.[75] The Scottish school of common sense was one source of influence, particularly among the educated elite.[76] According to philosophers like Thomas Reid, common sense was an essential building block of reason. "We ascribe to reason two offices," Reid explained. ". . . The first is to judge of things self-evident; the second to draw conclusions that are not self-evident from those that are. The first of these is the province, and the sole province of common sense." As a prerational capacity, common sense was shared by all, a "gift of Heaven" that made "a man capable of managing his own affairs, and answerable for his conduct towards others."[77] Unlike reason, which was derived from common sense, it could not be taught or disproved. It was therefore equally available to the "learned and the unlearned, the Philosopher and the day-labourer."[78] It was also available in argument, a resource to correct "false principles, or . . . an

RESISTANCE TO THE HIGHER POWERS vi (1750). A version of this argument is repeated later in the text: "'tis treason against mankind;—'tis treason against common sense;—'tis treason against God." *Id.* at 39. Mayhew's opening gambit in the Revolution "was read by every Body." Letter from John Adams to Hezekiah Niles (Feb. 13, 1818) (on file with the National Archives).

73. THOMAS HUTCHINSON, THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY, FROM THE YEAR 1750, UNTIL JUNE, 1774, 476–77 (1828).

74. JOHN DICKINSON, A DECLARATION BY THE REPRESENTATIVES OF THE UNITED COLONIES OF NORTH-AMERICA 5 (1775).

75. See Rosenfeld, *supra* note 16, at 140–41.

76. See GARRY WILLS, INVENTING AMERICA (1978); Wirzbicki, *supra* note 64, at 28.

77. THOMAS REID, ESSAYS ON THE INTELLECTUAL POWERS OF MAN 433–34 (Derek R. Brookes & Knud Haakonssen eds., 2002).

78. *Id.* at 461.

error in reasoning."[79] These judgments were made in community, "by an extensive intercourse with men of different ranks, professions, and nations."[80] Reid's common sense was in this way "a *communal* sense,"[81] a tool for collective judgment and thus "the condition of social life."[82]

Common sense became even more closely entangled with revolutionary rhetoric when Thomas Paine published the fiery pamphlet *Common Sense* in early 1776, calling for American independence on the basis of "simple facts, plain arguments, and common sense."[83] Paine clarified that he had "no other preliminaries to settle with the reader, than that he will divest himself of prejudice and prepossession, and suffer his reason and his feelings to determine for themselves; that he will put *on*, or rather that he will not put *off*, the true character of a man, and generously enlarge his views beyond the present day."[84] Paine's readers had only to "not put *off*, the true character of a man" because (per Reid) they were born with it. The acquisition of "prejudice and prepossession" later in life might have distorted their understanding, but they would always retain the inner compass of common sense: "however prejudice may warp our wills, or interest darken our understanding, the simple voice of nature and of reason will say, 'tis right."[85] In Paine's formulation, as in Reid's, common sense pertained to a kind of judgment that could be trusted to guide public affairs.[86]

Paine's innovation, as Sophia Rosenfeld argues, was to build a widely accessible political program out of these ideas.[87] Writing in an unornamented style, he appealed to his readers' basic judgments about "the present state of American affairs" in order to insist on the necessity of self-governance and political independence. No longer would common sense simply tell the people what was. By "generously enlarg[ing their] views beyond the present day," they could decide what should be, and together bring it into being.[88]

According to Benjamin Rush, the influence of *Common Sense* was "sudden and extensive upon the American mind. It was read by public men, repeated in clubs, spouted in Schools, and in one instance, delivered from

79. *Id.* at 434.

80. *Id.* at 530.

81. Wills, *supra* note 76, at 188.

82. Cochran, *supra* note 21, at 82.

83. THOMAS PAINE, COMMON SENSE 31 (1776). The Philadelphia physician Benjamin Rush was the one to suggest Paine's title. BENJAMIN RUSH, THE AUTOBIOGRAPHY OF BENJAMIN RUSH 114 (1970). See Rosenfeld, *supra* note 16, at 136–58.

84. Paine, *id*., at 31.

85. *Id.* at 11.

86. See Cochran, *supra* note 21, at 48.

87. See Rosenfeld, *supra* note 16, at 138–39; NICOLE EUSTACE, PASSION IS THE GALE 439–40 (2008); Jill Lepore, *A World of Paine*, in REVOLUTIONARY FOUNDERS 87, 89 (Ray Raphael, Alfred F. Young & Gary B. Nash eds., 2012).

88. Paine, *supra* note 83, at 90.

the pulpit instead of a sermon by a clergyman in Connecticut."[89] The circulation of the physical text, given communications technology and infrastructure in the period, was almost certainly less extensive than Paine himself claimed.[90] But the idea that independence was "common sense" became a rallying cry for radical action across the colonies. A North Carolina delegate to Congress apparently "heard nothing praised in the Course of his Journey, but Common Sense and Independence."[91] George Washington observed in April 1776, "by private Letters which I have lately received from Virginia, I find common sense is working a powerful change there in the Minds of many Men."[92] Samuel Adams similarly found that "Common sense prevails among the people."[93] Even John Adams, who thought Paine's ideas were derivative, later acknowledged that, but for "the pen of the author of *Common Sense*, the sword of Washington would have been raised in vain."[94]

The Declaration of Independence was equally premised on the logic of common sense. "We hold these truths to be self-evident" began as an epistemological claim that culminated in a justification for popular revolution: "the Right of the People to alter or to abolish" an oppressive system of government and establish a new one, "laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."[95] The people were the best authorities to determine the content of their natural rights and the extent of their deprivation. Their perception of the best form of government to succeed an overthrown one was equally paramount.

The Declaration was itself a reflection of the people's common sense in this regard. As Thomas Jefferson later described the document he drafted, its "object" was "not to find out new principles, or new arguments, never

89. Rush, *supra* note 83, at 114–15. Robert Ferguson estimates that "perhaps a fifth of the population" of the American colonies "either read *Common Sense* or had it read to them." ROBERT A. FERGUSON, READING THE EARLY REPUBLIC 84–85 (2004).

90. See Loughran, *supra* note 57, at 33–103.

91. Letter from John Adams to James Warren (Apr. 20, 1776) (on file with the National Archives).

92. Letter from George Washington to Joseph Reed (Apr. 1, 1776) (on file with the National Archives).

93. Rosenfeld, *supra* note 16, at 137.

94. Lepore, *supra* note 87, at 89. See PAUL COLLINS, THE TROUBLE WITH TOM 22 (2010). John Adams thought the popularity of Paine's argument owed to its familiarity: "The third part of Common Sense which relates wholly to the Question of Independence, was clearly written and contained a tollerable Summary of the Arguments which I had been repeating again and again in Congress for nine months. But I am bold to say there is not a Fact nor a Reason stated in it, which had not been frequently urged in Congress." John Adams, 1 Autobiography 23 (Jan.–Apr. 1776) (unpublished manuscript) (on file with the Massachusetts Historical Society). Joseph Hawley of Massachusetts was more charitable on Paine's familiarity: "Every sentiment has sunk into my well prepared heart." ERIC FONER, TOM PAINE AND REVOLUTIONARY AMERICA 86 (2005). Other responses were more negative. See Rosenfeld, *supra* note 16, at 155–57.

95. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). See DANIELLE ALLEN, OUR DECLARATION 137 (2014); Dan Edelstein, *Natural Constitutionalism and American Rights*, *in* ON THE SPIRIT OF RIGHTS 143, 143 (2019); Wills, *supra* note 76, at 181–92.

before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject; [in] terms so plain and firm, as to command their assent, and to justify ourselves in the independent stand we [were] compelled to take."[96] For that reason, the Declaration's arguments were largely conventional:

> Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. [A]ll it[]s authority rests then on the harmonising sentiments of the day, whether expressed in convers[atio]ns in letters, printed essays or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney Etc."[97]

Like Reid, Jefferson emphasized collective thought ("the American mind") and feeling ("the harmonising sentiments of the day") as proper authorities, particularly as expressed in social exchange ("convers[atio]ns in letters") and public discourse ("printed essays").[98] Like Paine, he thought these shared judgments were sufficient to justify revolution, especially once "the common sense of the subject" had been formulated as such.

Many scholars of the Declaration take Jefferson's statement seriously.[99] Describing the document as an "exemplary piece of democratic writing," Danielle Allen emphasizes that Jefferson was "not *the* author of the Declaration of Independence."[100] In addition to the Committee of Five, the rest of Congress, and the printers and calligrapher responsible for reproducing it in various forms, "the authorship of the document belongs to all those who participated in the conversations leading up to the decision to declare independence and to all those who wrangled over the consensual statement of justification."[101] Pauline Maier, similarly, surfaces "the other 'declarations of Independence'" that circulated in the months prior to July 1776 in statutes, proclamations, congressional instructions, and a host of other documents adopted by local groups like the New York Mechanics in Union, a Pennsylvania militia company, and a South Carolina grand jury.[102]

Like Paine's pamphlet, the Declaration was designed to echo the common sense of these diverse communities back to them. John Dunlap produced the first printed copy that night, and Congress ordered that "copies of the

96. Letter from Thomas Jefferson to Henry Lee (May 8, 1825) (on file with the National Archives).

97. *Id.*

98. See Wills, *supra* note 76, at 181–92 (analyzing Jefferson's debt to Reid).

99. See, e.g., Amar, *supra* note 10, at 126–27; Jacques Derrida, *Declarations of Independence*, 15 NEW POL. SCI. 7, 8–9 (1986); PAULINE MAIER, AMERICAN SCRIPTURE xvii (1997); Bernadette Meyler, *Between the States and the Signers: The Politics of the Declaration of Independence Before the Civil War*, 89 S. CAL. L. REV. 541, 544–45 (2016); Wills, *supra* note 76, at 190–91.

100. Allen, *supra* note 95, at 47.

101. *Id.* at 81.

102. Maier, *supra* note 99, at 48.

declaration be sent to the several assemblies, conventions and committees, or councils of safety, and to the several commanding officers of the continental troops; that it be proclaimed in each of the United States, and at the head of the army."[103] George Washington complied, informing John Hancock that "the measure seemed to have their most hearty assent, [t]he expressions and behavior both of Officers and men testifying their warmest approbation of It."[104] Other public readings reached less distinguished audiences. "On the memorable 4th of July, 1776," Philadelphian Charles Biddle recalled, "I was in the Old State-House yard when the Declaration of Independence was read. There were very few respectable people present."[105] Read aloud, the Declaration found crossover appeal among elite and ordinary Americans.

Ordinary people, Black and white, similarly experienced the American Revolution as a "radical political education" because they participated in it.[106] A diverse array of Americans took part in the "out-of-doors" crowd actions that precipitated the Revolution,[107] and they served as nurses, guides, messengers, spies, laborers, sailors, and soldiers in the war that finished it.[108] In these ways and more, they found themselves interpreting and defending their fundamental rights in practice. The years of constitutional ratification, from the first exercises in state constitution-making to the conventions that ratified the federal Constitution, only continued this lesson.[109]

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103. 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, 516 (1906).

104. Letter from George Washington to John Hancock (Jul. 10, 1776) (on file with the National Archives).

105. CHARLES BIDDLE, AUTOBIOGRAPHY OF CHARLES BIDDLE 86 (1883). Deborah Norris Logan, then a teenager, remembered hearing the Declaration read "from the State House steps" before the speaker "proceeded down the street, (I understood) to read it at the Court House," reiterating that "the first audience was neither very numerous, nor composed of the most respectable class of citizens." Chris Coelho, *The First Public Reading of the Declaration of Independence, July 4, 1776*, J. AM. REVOLUTION, Jul. 1, 2021, https://allthingsliberty.com/2021/07/the-first-public-reading-of-the-declaration-of-independence-july-4-1776/.

106. Peterson, *supra* note 15, at 1594. An extensive literature documents Black participation in the American Revolution. See HERBERT APTHEKER, THE NEGRO IN THE AMERICAN REVOLUTION (1940); Egerton, *supra* note 5; Foner, *supra* note 5; JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM 125–43 (1948); SYLVIA R. FREY, WATER FROM THE ROCK (1991); JAMES O. HORTON & LOIS E. HORTON, IN HOPE OF LIBERTY (1997); SIDNEY KAPLAN & EMMA NOGRADY KAPLAN, THE BLACK PRESENCE IN THE ERA OF THE AMERICAN REVOLUTION (1989); BENJAMIN QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION (1961); Nash, *supra* note 9; WILLIAM COOPER NELL, THE COLORED PATRIOTS OF THE AMERICAN REVOLUTION (1855); Wilson, *supra* note 5.

107. See Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883 (2006); Edwards, *supra* note 13, at 74–78; Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 WM. & MARY Q. 4 (1970); Wood, supra note 38, at 319–28. Such crowd actions were often interracial affairs. See, e.g., Egerton, *supra* note 5, at 46, 51; Franklin, *supra* note 106, at 70; Kaplan & Kaplan, *supra* note 106, at 8.

108. Quarles, *supra* note 106, at 93–94; Foner, *supra* note 5, at 65; Frey, *supra* note 106, at 92.

109. See, e.g., OSCAR HANDLIN & MARY FLUG HANDLIN, THE POPULAR SOURCES OF POLITICAL AUTHORITY (1966).

B. Common Sense in Ratification

Historians of ratification have long emphasized popular participation in the process. "Debate over the Constitution raged in newspapers, taverns, coffeehouses, and over dinner tables as well as in the Confederation Congress, state legislatures, and state ratifying conventions," writes Pauline Maier. "People who never left their home towns and were little known except to their neighbors studied the document, knew it well, and on some memorable occasions made their views known."[110] Common sense, for that reason, was frequently cited as the ticket of entry in these debates. When the people of Dalton, Massachusetts, were refused a delegate to the state convention because their town was too small, they protested that "the Idea of any other Qualification than a Competency of Understanding and common Sense in Order to be intitled to a Voice in that Business [was] absurd."[111] Ratification was a question that required only one "Qualification," the people of Dalton insisted: the common sense they should be presumed to possess.

Common sense was invoked on both sides of the ratification debates. Anti-Federalists and defenders of the "people's constitution" frequently relied on the authority of common sense over legal expertise or social station.[112] But proponents of the "lawyer's constitution" also called on common sense when it suited them.[113] Alexander Hamilton opened *Federalist* No. 31 (on the power of taxation) with a discussion of "certain primary truths, or first principles, upon which all subsequent reasonings must depend." Following Reid, he presumed that those first principles "contain[ed] an internal evidence, which, antecedent to all reflection or combination, commands the assent of the mind." These "maxims," in turn, produced certain "direct inferences" that were "so obvious in themselves,

110. PAULINE MAIER, RATIFICATION ix (2010).

111. *Id.* at 144.

112. Cornell, *supra* note 15. Examples of this rhetoric abound. See, e.g., 28 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 120 (John P. Kaminski et al. eds., 2017) ("Administration has always been best managed, and the public liberty best secured, when plain honesty and common sense alone governed the public affairs."); Foner, *supra* note 94, at 129 ("Honesty, common Sense, and a plain understanding, when unbiassed by sinister Motives, are fully equal to the Task."); Respublica v. Oswald, 1 U.S. 319, 335 (1788) ("That it was a mistaken judgment, every man, he alleged, who possessed a competent share of common sense, and understood the rules of grammar, was able to determine on a bare perusal of the bill of rights and constitution."); Rosenfeld, *supra* note 16, at 170 ("There is no room . . . for an Upper House with lordly powers to direct and control the Commons, whom they will *hardly* allow to have common sense."); Storing, *supra* note 60, at 47 ("I think every idea of policy, *every principle of common sense*, forbids a measure so pregnant with *political perdition!*").

113. Cornell, *supra* note 15. Robert Ferguson suggests that the Constitution occupied a middle ground between the people's constitution and the lawyer's constitution: "Every word belongs to the realm of common understanding in eighteenth-century American experience; many of these words are taken directly from the constitutions of the states and the Articles of Confederation in a reaffirmation of Whig and republican principle." At the same time, "it was first and foremost a triumph of expression by lawyers who dominated the Federal Convention as conscious and accomplished men of letters." ROBERT FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 59–60 (1984).

and so agreeable to the natural and unsophisticated dictates of common sense, that they challenge the assent of a sound and unbiassed mind, with a degree of force and conviction almost equally irresistible." Among those direct inferences from common sense were "the necessity of a general power of taxation in the government of the Union."[114] Common sense, for Hamilton, was a baseline measure for the constitutional extent of congressional powers.

In matters of state, James Madison and other proponents of the Constitution were quick to point out, the people could be led astray by self-interest, prejudice, and demagogues, so it was the work of political representatives to "refine and enlarge the public views."[115] But if public opinion was "the real sovereign" in any free system of government, as Madison contended in 1791, common sense remained an indispensable form of concourse between ordinary Americans and their political representatives.[116] Under the new Constitution, moreover, Hamilton thought judicial interpretation would be guided by common sense. "The rules of legal interpretation, are rules of common sense, adopted by the courts in the construction of the laws," Hamilton wrote in *Federalist* No 83. "The true test, therefore, of a just application of them, is its conformity to the source from which they are derived."[117] An application that opposed "the rules of common sense," Hamilton implied, would be unconstitutional.

For James Wilson, in particular, a leading legal thinker and Supreme Court justice, common sense was the "bedrock" of representative democracy, the common law, and judicial decision-making.[118] As he argued at the Constitutional Convention, "Govt. ought to possess not only 1st. the *force* but 2ndly. the *mind or sense* of the people at large."[119] In his popular *Lectures on Law* (1790–92), Wilson drew extensively on Reid, describing common sense as "a first principle, which we are required and determined, by the very constitution of our nature and faculties, to believe."[120] Common

114. ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY, THE FEDERALIST 237 (Benjamin Fletcher Wright ed., 1961). See Cornell, *supra* note 15, at 314.

115. *Id.* at 134. See James T. Kloppenberg, *To Promote the General Welfare: Why Madison Matters*, 2019 SUP. CT. REV. 355 (2020). One Connecticut Federalist concluded, "Since we are in general very unequal to the task of forming a judgment upon the Constitution, every man of common sense and suitable candor will cheerfully refer the matter to the approaching state Convention and peaceably acquiesce in their result, rather than by noisy and bitter exclamations work himself and others into a ferment." 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 534 (Merrill Jensen ed., 1978). See also Rosenfeld, *supra* note 16, at 173–74; Slauter, *supra* note 5, at 32.

116. James Madison, *Public Opinion*, NAT'L GAZETTE, Dec. 19, 1791, at 59.

117. Hamilton et al., *supra* note 114, at 519. Saul Cornell argues that Hamilton's "glib dismissal of the problem of interpretation was disingenuous at best, and perhaps deliberately deceptive." Cornell, *supra* note 15, at 313. Yet Hamilton's view of the judiciary squares with his description of common sense in *Federalist* No. 31. See *supra* note 114 and accompanying text.

118. See Rosenfeld, *supra* note 16, at 176.

119. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 132 (Max Farrand ed., 1911).

120. JAMES WILSON, 1 THE WORKS OF THE HONOURABLE JAMES WILSON 244 (Bird Wilson ed., 1804). Reid's influence was also apparent in public discussions of the Pennsylvania Constitution of

sense, in turn, shaped the common law, which reflected not so much judicial mandate as ongoing custom and consent, a manifestation of "the publick mind."[121] As another proponent of the common law explained, "Common Law is but another name for common sense, tested and systematically arranged by long experience."[122] The common law, like common sense, was at once controlling and malleable, "capable of change, of modification, of adapting itself to new situations and varying times."[123] That adaptability was its virtue.

Common sense also inflected the legal system in practice. Into the late eighteenth century, juries were often responsible for determining questions of both fact and law, and their common sense was their primary authority.[124] Jurors were qualified to represent "the Voice of the People," wrote a young John Adams, because the "great Principles of the Constitution, are intimately known, they are sensibly felt by every Briton—it is scarcely extravagant to say, they are drawn in and imbibed with the Nurses Milk and first Air." Such constitutional common sense equipped juries to overturn even judicial instructions: if "the Judges should give their Opinions to the Jury, against one of these fundamental Principles," Adams concluded, "Every Man of any feeling or Conscience" would reject them. "It is not only his right but his Duty in that Case to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court."[125]

In the early years after independence, judges themselves often bore a closer resemblance to the jurors they instructed than the British barristers whose laws they inherited. State judiciaries, as a result, were frequently guided by a "jurisprudence of 'common sense.'"[126] John Dudley in New Hampshire may have been the most active proponent of judgment by "common sense and common honesty." As he reportedly instructed one jury,

> They would govern us by the common law of England. Trust me, gentlemen, common sense is a much safer guide for us,—the common

1776; as a contributor to the *Pennsylvania Packet* explained, the new government derived its authority from "every individual inhabitant of this colony who *has a will and understanding of his own* capable to manage his affairs." Rosenfeld, *supra* note 16, at 158.

121. Stephen A. Conrad, *James Wilson's "Assimilation of the Common-Law Mind*," 84 NW. U. L. REV. 186, 211 (1990). See also Ethan Foster, *James Wilson and the Common Sense Theory of the Common Law*, AD FONTES (Apr. 18, 2019), https://adfontesjournal.com/archives/james-wilson-and-the-common-sense-theory-of-the-common-law/. This view is not uncommon. See Cochran, *supra* note 21, at 30.

122. Meyler, *supra* note 61, at 578.

123. *Id*.

124. Kramer, *supra* note 15, at 28–29; WILLIAM EDWARD NELSON, AMERICANIZATION OF THE COMMON LAW 20–30 (1994).

125. JOHN ADAMS, DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 5 (L.H. Butterfield ed., 1964).

126. *John Reid, From Common Sense to Common Law to Charles Doe: The Evolution of Pleading in New Hampshire*, 1 N.H. BAR J. 27, 27 (1959).

> sense of Raymond, Epping, Exeter and the other towns which sent us here to try this case between two of our neighbors. A clear head and an honest heart are worth more than all the laws of all the lawyers.[127]

Law, for Dudley, was a local affair, and common sense, not legal expertise, was the sole qualification necessary to adjudicate it. Across the late eighteenth century, abolitionists followed that idea to its logical conclusion.

C. Common Sense in Abolition

For Lemuel Haynes, author of *Liberty Further Extended*, law began with natural law—"the very Laws of nature." Natural law was not so much taught as intuited, experienced on an intimate level (much like Adams's "Nurses milk and first air").[128] Love of liberty, for instance, was "an innate principle, which is unmovebly placed in the human Species," such that "to see a man aspire after it, is not Enigmatical, seeing he acts no ways incompatible with his own Nature." The "prerogative" to intermeddle with natural rights like liberty, Haynes said, was God's alone: "as it proceed from the Supreme Legislature of the univers, so it is he which hath a sole right to take away."[129] Any laws that were "Derogatory to those Edicts that are passed in the Court of Heaven" were, of consequence, "*void*."[130] The English common law reflected this principle: "To affirm, that an Englishman has a right to his Liberty, is a truth which has Been so clearly Evinced, Especially of Late, that to spend time in illustrating this, would be But Superfluous tautology." But it was not only Englishmen who experienced an inborn desire for freedom. Thus, Haynes thought it "not hyperbolical to affirm, that Even an affrican, has Equally as good a right to his Liberty in common with Englishmen."[131] The practice of slavery was therefore "*illicit*" on any sound accounting.[132]

Haynes was a mixed-race indentured servant who in 1776 had little formal education.[133] Yet his argument reflected the common-sense thinking of others in his generation. As he wrote at the outset of his unpublished pamphlet, "it hath pleas'd the majesty of Heaven to Exhibet his will to men, and Endow them With an intulect Which is susceptible of speculation."[134]

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127. WILLIAM PLUMER, JR., LIFE OF WILLIAM PLUMER 154 (A.P. Peabody ed., 1856). According to William Plumer, Jr., this quotation is paraphrased: "I have made the judge speak good English, which he did not often do." *Id.* at 155.

128. See *supra* note 125.

129. *Id.* at 94. Self-defense was also authorized by natural law: in a crossed-out passage, Haynes explained that the enslaved "had as good a right to rise in Defence of their own Natural rights and Libertyes as a man would have to repel the assaults of an hyghway robber." *Id.* at 98. See also Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 253 (2017).

130. Bogin, *supra* note 1, at 95.

131. *Id.* at 94.

132. *Id.* at 95.

133. Haynes pursued clerical training in the late 1770s. *Id.* at 85–86.

134. *Id*. at 94.

In the religious terms of his upbringing, Haynes identified the "two offices" of reason in common-sense philosophy.[135] The first was God's will—incontrovertible truth, or inborn common sense.[136] The second was reason—in Haynes's terms, "an intulect Which is susceptible of speculation." If this intellect was endowed by God, it was commonly shared; it could be no special gift of privilege or education. But being "susceptible of speculation," it was also capable of error: "man, in consequence of the fall is Liable to digressions."[137] Haynes's reasoning was designed to counteract the false logic that perpetuated "*the practise of Slave-keeping*" by calling on principles that could not be disputed.[138] His argument, as a result, intervened within Reid's community of "extensive intercourse" among "men of different ranks, professions, and nations."[139]

It was fitting that Haynes began with the "self-evident" truths of the Declaration.[140] His theory of government largely mapped onto its own. "As there should be Some rule whereby to govern the conduct of men; so it is the Deuty, and intrest of a community, to form a system of *Law*, that is calculated to promote the commercial intrest of Each other," Haynes wrote, "and so Long as it produses so Blessed an Effect, it should be maintained. But when, instead of contributing to the well Being of the community, it proves banefull to its subjects over whome it Extends, then it is hygh time to call it into question."[141] It was the community that established a "system of *Law*" to govern it, and it was equally the community that was responsible for calling it into question when it proved "banefull" rather than beneficial.

It is reasonable to assume that the signers of the Declaration had no intention of including the people they enslaved in their statement "that all men are created equal."[142] But abolitionists who read the Declaration almost

135. Haynes was raised in the home of Congregational deacon David Rose in Middle Granville, Massachusetts. *Id*. at 85.

136. As Haynes elaborated in a Fourth of July address on the twenty-fifth anniversary of the Declaration, "Our beneficent creator has furnished us with moral and natural endowments, and they according to common sense, are our own. . . ." LEMUEL HAYNES, THE NATURE AND IMPORTANCE OF TRUE REPUBLICANISM 8 (1801).

137. Bogin, *supra* note 1, at 94.

138. Bogin, *supra* note 1, at 95.

139. See *supra* note 80 and accompanying text.

140. Hannah Spahn argues that Haynes' "abridgement" of the Declaration's self-evident truths revised Jefferson's reliance on public opinion: "For [Haynes], the abstraction of natural rights did not have to be mediated by communal emotion and opinion. Instead, it was a 'principle' that was universally accessible to both reason and the sense of sight." HANNAH SPAHN, BLACK REASON, WHITE FEELING 96 (2024). The remainder of Haynes' manuscript, however, concluding with a "humble Address to such as are Concearned in the practise" of slavery, indicates that Haynes also sought to sway "communal emotion and opinion." Bogin, *supra* note 1, at 93. Popular opinion was crucial to constitutional argument in the period; as Larry Kramer concludes, "Between its diverse sources, fluid nature, and the absence of any centralized forum for resolving conflict, fundamental law tended to be 'whatever could be plausibly argued and forcibly maintained.'" Kramer, *supra* note 15, at 14 (citing John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 N.Y.U. L. REV. 1043, 1087 (1974).

141. Bogin, *supra* note 1, at 96.

142. See, e.g., Davis, *supra* note 5, at 256; Greene, *supra* note 61, at 518–19; Nikole Hannah-Jones,

immediately interpreted its second paragraph as an antislavery authority.[143] Soldier Joseph Mun petitioned the state of Connecticut that he was "in Common with others entitled to Freedom and the unalienable rights of Humanity."[144] Anthony Benezet's *Short Observations on Slavery* (1781) began with the Declaration's self-evident truths.[145] David Cooper urged that the Declaration was "clear, full, and conclusive" on the question of abolition.[146] Pseudonymous writers like "Philanthropos" and "Juvenis" made similar claims.[147] As far south as North Carolina, an attorney argued that his client's re-enslavement violated the principle that "all Men possess certain natural & unalienable rights to life Liberty & property."[148] By the time Federalists and Anti-Federalists were beginning to debate the Constitution, Samuel Hopkins was still using the words of the Declaration to inveigh against the slave trade.[149] In 1792, fifty-five Black Philadelphians

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America Wasn't a Democracy, Until Black Americans Made It One, N.Y. TIMES, Aug. 14, 2019, https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html; Horne, *supra* note 5; IBRAM X. KENDI, STAMPED FROM THE BEGINNING 79–160 (2016). Garry Wills argues that Jefferson did think white and Black Americans were equally possessed of moral sense. Wills, *supra* note 76, at 227–28, 306. See also Robert Pierce Forbes, *"The Cause of This Blackness": The Early American Republic and the Construction of Race*, 13 AM. NINETEENTH CENTURY HIST. 65, 81 (2012).

143. The consensus among scholars of the period is that the Declaration was initially received as a statement of independence rather than a declaration of rights. See, e.g., DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE 101 (2007); Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis*, 32 U. RICHMOND L. REV. 107, 144–47, 162 (1998); Philip F. Detweiler, *The Changing Reputation of the Declaration of Independence: The First Fifty Years*, 19 WM. & MARY Q 557, 557–58, 571 (1962); Maier, *supra* note 99, at 154–208; David Thelen, *Reception of the Declaration of Independence*, *in* THE DECLARATION OF INDEPENDENCE 191, 195 (Scott Douglas Gerber ed., 2002). These arguments neglect immediate abolitionist engagement with the Declaration. See Slauter, *supra* note 5, at 207–09; ALEXANDER TSESIS, FOR LIBERTY AND EQUALITY 51–55 (2012).

144. Petition of Joseph Mun (May 2, 1780) (on file with the Connecticut State Library).

145. ANTHONY BENEZET, SHORT OBSERVATIONS ON SLAVERY 1 (1781).

146. DAVID COOPER, A SERIOUS ADDRESS TO THE RULERS OF AMERICA ON THE INCONSISTENCY OF THEIR CONDUCT RESPECTING SLAVERY 13 (1783). Jacob Green similarly cited the Declaration in an antislavery sermon delivered in New Jersey. JACOB GREEN, A SERMON DELIVERED AT HANOVER 13 (1778). A contributor to the *New Jersey Gazette* wrote, "We say 'all men are equally entitled to liberty and the pursuit of happiness;' but are we willing to grant this liberty to all men?" *To the Publick*, N.J. Gazette, Sept. 20, 1780, at 2.

147. In 1785, "Philanthropos" called on the Declaration's second paragraph to vindicate a lost gradual abolition bill in New York. Philanthropos, *A Serious Address to the Whig Slave Holders, in the State of New York*, N.Y. PACKET, Mar. 31, 1785, at 5. "Juvenis" cited "the repeated declarations of our Congress, and the Constitutions of the different States; all of which, in the most positive manner assert, that all men are possessed of certain natural, inherent rights, of which they cannot be divested, but by the most arbitrary and unjustifiable measures." JUVENIS, OBSERVATIONS ON THE SLAVERY OF THE NEGROES 7–8 (1785).

148. Jeffrey J. Crow, *Slave Rebelliousness and Social Conflict in North Carolina, 1775 to 1802*, 37 WM. & MARY Q. 79, 91–92 (1980). A group of Quakers in the state petitioned the legislature to remove restrictions on manumission on similar grounds: "Several Acts of the General Assembly now exist in this State prohibiting the freedom of Slaves, which we conceive are Inconsistent with those Truths respecting the Unalienable Rights of Mankind asserted in the Declaration of Independence of the united States of America." Mia Bay, *The Revolution in Black and White*, 43 J. EARLY REPUBLIC 619, 628 (2023).

149. Samuel Hopkins, *The Slave Trade and Slavery*, *in* 2 THE WORKS OF SAMUEL HOPKINS 613, 617 (1854). One year later, a legislative committee in Pennsylvania pointed to the Declaration in

signed a petition to Congress arguing that they "with other men have an Unalinaulble Right to life Liberty & the pursiut of happiness."[150] Few of these writers felt the need to extrapolate from the Declaration's self-evident truths—their application to slavery was too obvious for argument. The second paragraph's abolitionist implications were, like Hamilton's "direct inferences" from unassailable maxims, nearly "irresistible."[151]

Many abolitionists viewed the Declaration as a constitutional utterance, a legal speech act constitutive of a new political community.[152] For David Cooper, the Declaration was authoritative not only because its "solemn *truths*, uttered at such an awful crisis," were self-evident, but also because it was "declared and recorded as the sense of America" at the moment of its political creation.[153] For Samuel Hopkins, Black Americans "were really as much included in these assertions as ourselves," both figuratively, as part of the body politic, and in fact, as active members of the political community.[154]

These assertions were not only posited but actively tested during constitutional ratification at the state and federal level. The Massachusetts Constitution of 1778 contained a measure, Article 5, that excluded "negroes, mulattoes, or Indians" from the franchise.[155] A number of towns expressly rejected this provision. The town of Westminster, for instance, noted that Article 5 "deprives a part of the humane Race of their Natural Rights . . . Which in our opinion no power on Earth has a Just Right to Doe."

"requesting that this evil be done away from the land." 1 STATUTES ON SLAVERY 34 (Paul Finkelman ed., 1988).

150. Newman et al., *supra* note 68, at 165. For unknown reasons, the 1792 petition was never submitted. *Id.* at 161.

151. See *supra* note 114 and accompanying text.

152. See J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962). Constitutional law scholars debate the extent to which the Declaration of Independence should be understood as constitutional law. See, e.g., Alexander Tsesis, *Symposium: The Declaration of Independence as Introduction to the Constitution*, 89 S. CAL. L. REV. 369 (2016) (introducing a symposium on the question). Historians also part ways. Pauline Maier describes the Declaration "as a constitutional document, that is, one that concerned the fundamental authority of government." Maier, *supra* note 99, at 126. Jefferson himself referred to the Declaration as "the Great Charter of our Independence." Letter from Thomas Jefferson to Joseph Coolidge (Nov. 18, 1825) (on file with the National Archives). Garry Wills, by contrast, writes, "The language of a mutual pledge at the end, and the insertion of Lee's resolution of independence, gave the document some appearance of a charter; yet it could not be a formal compact of government, since the colonies had withheld the power to make such a pledge from their delegates." Wills, *supra* note 76, at 334. Certainly, there are constitutional dimensions to each of the Declaration's component parts: its declaration of legal independence from England, its declaration of rights, and its common-law list of grievances at the center. See Armitage, *supra* note 143, at 14–15. Dan Edelstein situates the Declaration within the tradition of "natural constitutionalism" in this regard. Edelstein, *supra* note 95, at 167–88.

153. Cooper, *supra* note 146, at 12–13. Hannah Arendt locates a similar combination of communal decision and universal truth in the Declaration. HANNAH ARENDT, ON REVOLUTION 184 (1990).

154. Hopkins, *supra* note 149. It is worth noting that, as of 1789, some form of Black suffrage was available in New Hampshire, Massachusetts, Rhode Island, Pennsylvania, New York, New Jersey, Maryland, Delaware, and North Carolina. VAN GOSSE, THE FIRST RECONSTRUCTION 7 (2021). See also ALEXANDER KEYSSAR, THE RIGHT TO VOTE 44–45 (2009) (describing subsequent acts of Black disenfranchisement).

155. Handlin & Handlin, *supra* note 109, at 192–93.

In addition to protesting Article 5, the town requested that a "bill of Rights be Set forth, and the Constitution formed theirfrom: That so the Lowest Capacity may be able to Determine his Natural Rights, and judge of the acquiteableness of the Constitution thereby."[156] A declaration of rights, by this logic, would allow those of "the Lowest Capacity" to judge the Constitution by reference to their natural rights, the domain of common sense. In the end, the Massachusetts Constitution of 1778 was overwhelmingly rejected. When the new state constitution was ratified in 1780, Article 5 was expunged and a "Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts" was added as Article I.[157]

The federal Constitution, beginning with the words "We the People," also invited debate over who was included in the constitutional community.[158] Proslavery opponents of the Constitution feared that its open-ended language beckoned abolition. "Have they not power to provide for the general defence and welfare?" Patrick Henry observed of Article I, Section 8, at the Virginia Ratifying Convention. "May they not think that these call for the abolition of slavery? May they not pronounce all slaves free, and will they not be warranted by that power?" Henry thought that result would be authorized by the text: "This is no ambiguous implication or logical deduction. The paper speaks to that point: they have the power in clear, unequivocal terms, and will clearly and certainly exercise it." It was the building consensus against the institution, not the text alone, that he was sure would produce constitutional abolition. "Slavery is detested," he warned:

> We feel its fatal effects—we deplore it with all the pity of humanity. Let all these considerations, at some future period, press with full force on the minds of Congress. Let that urbanity, which I trust will distinguish America, and the necessity of national defence,—let all these things operate on their minds; they will search that paper, and see if they have power of manumission.[159]

As the public mind continued to turn against slavery, it would surely find in the Constitution powers to substantiate that antislavery common sense.

Federalists responded with assurances to the contrary. Edmund Randolph claimed that congressional power was limited by the text of the clause and the common sense required to interpret it: "No man who reads it can say it is general, as the honorable gentleman represents it. You must violate every

156. *Id.* at 312. See Gienapp, *supra* note 54, at 95 ("[E]numeration [in state declarations of rights] served an important pedagogical purpose, reminding citizens, lest they forget, of their fundamental rights.").

157. *Id.* at 442–43. See GARY B. NASH, THE UNKNOWN AMERICAN REVOLUTION 296–97 (2006); Parkinson, *supra* note 5, at 269.

158. U.S. CONST. pmbl.

159. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 590 (Jonathan Elliot ed., 1836).

rule of construction and common sense, if you sever it from the power of raising money, and annex it to anything else, in order to make it that formidable power which it is represented to be."[160] Madison similarly insisted, "There is no power to warrant it, in that paper."[161] But still he felt compelled to address the broader question of community consensus: "Can any one believe that the American councils will come into a measure which will strip them of their property, and discourage and alienate the affections of five thirteenths of the Union? Why was nothing of this sort aimed at before? I believe such an idea never entered into any American breast."[162] Madison's disavowal of antislavery constitutionalism in "any American breast" was disingenuous: he had heard it among other delegates at the Constitutional Convention.[163] Even he had "thought it wrong to admit in the Constitution the idea that there could be property in men," excluding any explicit mention of slavery in the text.[164]

The product of constitutional ratification, as a result, was a Constitution with a handful of clauses designed to protect slavery yet "full of ambiguities."[165] Common-sense interpretations of the constitutionality of slavery could cut either way. As a matter of governance, moreover, it was not yet clear who was responsible for resolving that constitutional ambiguity, as the example of freedom suits in Massachusetts suggests.

III. FREEDOM SUITS: COMMON SENSE IN LEGAL ACTION

A. Freedom Suits in the Revolution

In the early 1760s, juries in Massachusetts began to display a consistent partiality for enslaved litigants.[166] As John Adams recalled, "I never knew

160. *Id.* at 599–600.

161. Madison nevertheless recognized that "parchment barriers" posed little defense against "overbearing majorities." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) (on file with the National Archives).

162. Eliot, *supra* note 159, at 622.

163. See, e.g., THE RECORDS OF THE FEDERAL CONVENTION, Vol. 1, at 588 (Max Farrand ed., 1911); THE RECORDS OF THE FEDERAL CONVENTION, Vol. 2, at 220–23, 364, 370–74, 415–17 (Max Farrand ed., 1911); WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, 62–83 (1977). Richard Primus notes the Convention delegates' "deep disagreement" about slavery, "even as all of them were willing to tolerate its continued existence." See Richard Primus, *Sins and Omissions: Slavery and the Bill of Rights*, 2 J. AM. CONST. HIST. 793, 829 (2024).

164. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 415, 417 (Max Farrand ed., 1911). As Luther Martin told the Maryland legislature, the delegates "anxiously sought to avoid the admission of expressions which might be odious in the ears of Americans, although they were willing to admit into their system those *things* which the *expressions* signified." 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 210 (Max Farrand ed., 1911).

165. Wiecek, *supra* note 163, at 79. After ratification, Jonathan Gienapp writes, American publics were met with "a profoundly uncertain Constitution." Gienapp, *supra* note 15, at 4. These ambiguities became fodder for abolitionist constitutionalism in the mid-nineteenth century, yet these antislavery arguments had roots in the late eighteenth century. See *infra* Part III.

166. See Emily Blanck, *Seventeen Eighty-Three: The Turning Point in the Law of Slavery and*

a Jury by a *Verdict* to determine a Negro to be a Slave—They always found them free."[167] Jeremy Belknap's *Queries Respecting Slavery in Massachusetts* (1795) connected these verdicts with "public opinion" against slavery, "which began to be established about the time of the stamp-act."[168] In the revolutionary years, in particular, the state saw a rise in both antislavery sentiment and a new kind of argument put forward by enslaved claimants.

Traditionally, the common law afforded enslaved people and indentured servants the right to contest their bondage. These freedom suits were analogous to habeas corpus actions.[169] As early as 1655, for instance, Elizabeth Key successfully sued for freedom in Virginia as the Christian daughter of a free Englishman.[170] After the state codified the principle of *partus sequitur ventrem* (the child's status follows the mother's), enslaved Virginians won their freedom in court when they could demonstrate a maternal line of white or Native ancestry.[171] In 1770, Thomas Jefferson argued the case of Samuel Howell, whose white grandmother was enslaved under a law that punished interracial mixing. In the absence of legal language that established bondage in the third generation, Jefferson argued (unsuccessfully) that Howell should be returned to a state of freedom: "Under the law of nature, all men are born free."[172] In other cases, breach of contract offered litigants the basis to contest their bondage if they had been promised future manumission.[173] As Henry Richardson writes, "Few if any of these suits challenged the legitimacy of slavery *per se*; rather, they asserted the . . . right to be free as an individual for having met stated lawful conditions."[174] In the postrevolutionary period, many southern states codified procedures for freedom suits as a prophylactic measure to forestall abolitionist agitation.[175]

Freedom in Massachusetts, 75 NEW ENG. Q. 24, 27–28 (2002); ROBERT M. COVER, JUSTICE ACCUSED 46 (1975); Chernoh M. Sesay, *The Revolutionary Black Roots of Slavery's Abolition in Massachusetts*, 87 NEW ENG. Q. 99, 107–08 (2014).

167. Letter from John Adams to Jeremy Belknap (Mar. 21, 1795) (on file with the National Archives). But see Cover, *supra* note 166, at 21.

168. Jeremy Belknap, Queries Respecting Slavery in Massachusetts with Answers 17 (Apr. 1795) (unpublished manuscript) (on file with the Massachusetts Historical Society.)

169. WILLIAM G. THOMAS, A QUESTION OF FREEDOM 7 (2020).

170. See Taunya Lovell Banks, *Dangerous Woman: Elizabeth Key's Freedom Suit—Subjecthood and Racialized Identity in Seventeenth Century Colonial Virginia*, 41 AKRON L. REV. 799 (2008).

171. See Egerton, *supra* note 5, at 46; WOODY HOLTON, FORCED FOUNDERS 142 (1999); Loren Schweninger, *Freedom Suits, African American Women, and the Genealogy of Slavery*, 71 WM. & MARY Q. 35, 42 (2014); Peter Wallerstein, *Indian Foremothers: Race, Sex, Slavery, and Freedom in Early Virginia, in* DEVIL'S LANE 57, 62–68 (Catherine Clinton & Michele Gillespie eds., 1997).

172. See Aaron Schwabach, *Thomas Jefferson as an Unsuccessful Advocate for Freedom in* Howell v. Netherland, 20 T. JEFFERSON L. REV. 129, 135 (1998).

173. See Thomas, *supra* note 169, at 7.

174. HENRY J. RICHARDSON III, THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW 143 (2008).

175. LOREN SCHWENINGER, APPEALING FOR LIBERTY 29–30 (2018). In general, early abolition societies were "intensely litigious," appointing "Counsellors" who brought freedom suits, recorded

The revolutionary years, however, saw an expansion in the scale and scope of freedom suits, beginning with *Somerset's Case*, heard before Lord Mansfield on the King's Bench in 1772.[176] James Somerset was enslaved in Virginia and Massachusetts for twenty years before his enslaver, customs officer Charles Stewart, brought him to England, where he likely made contacts in the free Black community and was baptized.[177] In the fall of 1771, Somerset fled his bondage. When he was recaptured two months later, British abolitionists petitioned for a writ of habeas corpus.[178] As chief justice of the King's Bench, Mansfield was reluctant to hear the case, encouraging Stewart and the Caribbean planters who backed him to drop their claim.[179] "In these particulars, it may be matter of weighty consideration, what provisions are made or set by law," Mansfield warned. "Mr. Stewart may end the question, by discharging or giving freedom to the negro."[180] Stewart persisted, however, and Mansfield's decision came down on June 22, 1772. As reported, it read:

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: It's so odious, that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.[181]

The law of nature could never support slavery, Mansfield reasoned, and in the absence of a "positive law" that established slavery in England, Somerset could not be re-enslaved. Upon the pronouncement of the decision in Westminster Hall, the Black men and women in attendance reportedly "came forward, and bowed first to the Judges, then to the bar, with the symptoms of the most extravagant joy."[182]

Mansfield's holding was narrow, pertaining only to the British mainland. It had nothing to say about the slave trade or the colonies, where slavery was codified.[183] Even in England, Mansfield's decision did not abolish

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manumissions, and disseminated legal information. See Wiecek, *supra* note 163, at 86–88.

176. Somerset v. Stewart, Lofft 1, 98 Engl. Rep. 499 (K.B. 1772).

177. Egerton, *supra* note 5, at 51; Ruth Paley, *Somerset, James*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004).

178. Egerton, *supra* note 5, at 51.

179. Wiecek, *supra* note 163, at 29.

180. Somerset, 98 Engl. Rep. at 509.

181. *Id.* at 510.

182. *Extract of a Letter from London, Dated July 2*, N.Y. J., Sept. 3, 1772, at 3. According to the *Virginia Gazette*, similarly, "A great number of Blacks were in Westminster Hall, to hear the Determination of the Cause, and went away greatly pleased." *Extract of a Letter from Cologne, June 12*, VA. GAZETTE, Aug. 27, 1772, at 2. See Egerton, *supra* note 5, at 52.

183. See Daniel J. Hulsebosch, *Nothing but Liberty: "Somerset's Case" and the British Empire*, 24 L. & HIST. REV. 647 (2006); Wiecek, *supra* note 163, at 31, 36–37. See also Davis, *supra* note 5, at 500–

slavery: individuals in bondage still had to find an advocate to bring a habeas suit, a difficult task if they were kidnapped.[184] Nevertheless, *Somerset* did affect the formal rights of roughly 15,000 Black Englanders, prompting new forms of organizing and resistance.[185] "The ambiguities in the decision mattered little to those looking for confirmation of what they already knew to be true," writes Christopher Brown.[186] News quickly reached the American colonies as well, prompting acts of self-emancipation.[187] According to one runaway notice in Virginia, Bacchus was planning to "board a vessel for Great Britain from the knowledge he ha[d] of the late Determination of the Somerset Case."[188] A 27-year-old woman named Amy, who had "a mild soft Way of speaking," and a 40-year-old man named Abel, a 6-foot-tall pilot and violinist, tried to do the same.[189]

In tandem with these individual acts of self-help, American abolitionists made the case that *Somerset* applied to the colonies, invalidating bondage wherever positive law failed to establish it.[190] A "Lover of Constitutional Liberty" in Boston, for instance, argued that "by a late memorable Case determined at the highest Court of Common Law at Home, it was decreed, That *no Person can be held as a Slave, otherwise than by an express Law of the Country he lives in*, and that there is any such Law in the Province of the *Massachusetts-Bay*, I absolutely deny."[191] According to Thomas Hutchinson, the colony's royal governor, these arguments were so convincing that, after *Somerset*, "all the Americans who had bought Blacks, had, as far as I knew, relinquished their property in them, and rather agreed

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184. See Wiecek, *supra* note 163, at 32. Olaudah Equiano, for instance, was unsuccessful in trying to obtain a writ of habeas corpus for John Annis after Annis was kidnapped off the *Anglicania* in 1774. According to Equiano, "alas! my attorney proved unfaithful: he took my money, lost me many months employ, and did not the least good in the cause." Annis was transported to St. Kitt's, where he remained enslaved until his death. OLAUDAH EQUIANO, THE INTERESTING NARRATIVE OF THE LIFE OF OLAUDAH EQUIANO 242–43 (1815).

185. See Justin Buckley Dyer, *After the Revolution: Somerset and the Antislavery Tradition in Anglo-American Constitutional Development*, 71 J. POL. 1422, 1426–27 (2009); Wiecek, *supra* note 163, at 25, 33; Mark S. Weiner, *New Biographical Evidence on* Somerset's Case, 23 SLAVERY & ABOLITION 121, 125 (2002). Richard Newman notes that Sharp received a petition "of 10 blacks who believed they were set free" shortly after Somerset's conclusion. Richard S. Newman, *Liberation Technology: Black Printed Protest in the Age of Franklin*, 8 EARLY AM. STUD. 173, 192 (2010). One group of 200 gathered "to celebrate the Triumph which their Brother Somerset had obtained over Mr. Stuart. Lord Mansfield's Health was echoed round the Room, and the Evening was concluded with a Ball." *London*, June 25, VA. GAZETTE, Sept. 3, 1772, at 1. According to Gerald Horne, "none defined as 'white' were allowed." Horne, *supra* note 5, at 1. Another club began to congregate "every Monday night, for the more effectual Recovery of their Freedom" as soon as Somerset's suit had begun. *London*, February 22, VA. GAZETTE, May 7, 1772, at 1. See Quarles, *supra* note 106, at 37.

186. Brown, *supra* note 5, at 97.

187. Wiecek, *supra* note 163, at 40–41.

188. Gabriel Jones, *Augusta, June 18, 1774*, VA. GAZETTE, June 30, 1774, at 3. See SIMON SCHAMA, ROUGH CROSSINGS 18 (2009).

189. John Austin Finnie, *Run Away from the Subscriber in Surry*, VA. GAZETTE, Sept. 30, 1773, at 3. See Horne, *supra* note 5, at 213.

190. See Cover, *supra* note 166, at 15–16; Wiecek, *supra* note 163, at 20–39.

191. A LOVER OF CONSTITUTIONAL LIBERTY, THE APPENDIX 14 (1773).

to give them wages, or suffered them to go free."[192]

This new constitutional basis for emancipation galvanized freedom suits in Massachusetts.[193] According to Belknap, "A pamphlet contain[in]g the Case of a Negro who had accompanied his Master from the W[est] Indies to Engl[an]d & had there sued for & obtained his freedom, was reprinted here & this encouraged sev[era]l Negroes to sue their Masters for their freedom & for recompense for services after they had attained the age of 21."[194] The people who brought and adjudicated these suits had no trouble following Mansfield's logic. In 1774, a jury in Essex County decided a freedom suit in favor of liberty, "there being no law of the province to hold a man to serve for life."[195] Even the legal brief submitted in *Somerset* became a popular text; the precedent it cited—that "*England was too pure an air for a slave to breathe in*," and "*As soon as a man puts foot on English ground, he is free*"[196]—reappeared in briefs and pamphlets across the colonies. "The air in America is too pure for a slave to breathe in," abolitionists echoed; "the instant a Negro sets his foot in America, he is as free as if he had landed in England."[197]

In addition to *Somerset*, litigants in Massachusetts drew on other familiar constitutional sources to win their freedom in court, including the colony's royal charter and the English common law.[198] According to Belknap, plaintiffs in these suits

> pleaded that the Charter expressly declared all persons born or, residing in the Province to be free as the King[']s Subjects in G[reat]B[ritain]—that by the Laws of Engl[and] no man could be deprived of his liberty but by ye verdict of a Jury[.] That the Laws of the Province respecting an evil existing & attempting to mitigate or regulate it did not authorise it—& on some Occasions it was pleaded that tho' the Parents were in slavery yet that no disability of that kind could descend to Children.[199]

Natural law also featured in arguments to the jury, on the assumption that fundamental principles were sufficient to decide a case of individual

192. Wiecek, *supra* note 163, at 44.

193. *Id.*

194. Belknap, *supra* note 168, at 19.

195. JOHN ALLEN, THE WATCHMAN'S ALARM 28 n.5 (1774).

196. FRANCIS HARGRAVE, AN ARGUMENT IN THE CASE OF JAMES SOMMERSETT, A NEGRO 50, 59 (1772).

197. Levi Lincoln, *Brief of Levi Lincoln in the Slave Case Tried 1781, in* COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY: VOL. III—FIFTH SERIES 439 (Charles Deane, Chandler Robbins & William G. Brooks eds., 1877); RICHARD WELLS, A FEW POLITICAL REFLECTIONS SUBMITTED TO THE CONSIDERATION OF THE BRITISH COLONIES, BY A CITIZEN OF PHILADELPHIA 82 (1774). See Wiecek, *supra* note 163, at 40.

198. See A Lover of Constitutional Liberty, *supra* note 191, at 5, 13–14; Emily Blanck, *The Legal Emancipations of Leander and Caesar: Manumission and the Law in Revolutionary South Carolina and Massachusetts*, 28 SLAVERY & ABOLITION 235, 245-46 (2007).

199. Belknap, *supra* note 168, at 19–20.

freedom.[200] "Is not the laws of nature that all men are equal and free," argued lawyer Levi Lincoln in *Jennison v. Caldwell* (1783). "Is not the laws of nature the laws of God. Is not the law of God, then, against slavery."[201]

The constitutional implications of *Somerset*, decided on the eve of the American Revolution, remained ambiguous.[202] But abolitionists seized on its logic to articulate antislavery arguments in court. Because in Massachusetts these cases were heard before juries, a common-sense reading of slavery's unconstitutionality was readily available and, amidst growing abolitionist sentiment, nearly universally effective.[203] The broader constitutional thought these arguments helped produce, moreover, informed the ratification of the state's first constitution.[204] The Massachusetts Constitution of 1780, in turn, shaped a series landmark cases that participated in the statewide abolition of slavery.

B. Freedom Suits and the State Constitution

In 1778, as noted in Part II.C, the Massachusetts House of Representatives and General Court circulated a draft constitution that was overwhelmingly rejected.[205] Article 5, which contained both racial and class-based exclusions, drew the explicit dissent of most towns that specified the reasons for their dissent.[206] About half that number—nine towns in total—specifically objected to racial exclusion and the broader depredations of slavery.[207] As Belknap noted, "public opinion was so generally & so strongly in favour of the abolition of slavery that in some of the Country towns, votes were passed in Town-meetings that they would have no slaves among them."[208] These views filtered into the process of constitutional ratification.

Equally prominent among popular concerns was the omission of a declaration of rights. According to the town of Lexington, it was "of the highest importance" that those "Rights intended to be retained (at least those

200. See Cover, *supra* note 166, at 47.

201. Lincoln, *supra* note 197, at 442.

202. Proslavery forces fiercely opposed the decision, and newspaper reports of *Somerset* served as revolutionary propaganda for such readers. See ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, SLAVE NATION (2005); PATRICIA BRADLEY, SLAVERY, PROPAGANDA, AND THE AMERICAN REVOLUTION 66–80 (1998).

203. Manisha Sinha notes that only one litigant, Amos Newport, lost a freedom suit, "but his descendants gained their freedom." Sinha, *supra* note 22, at 67. In Virginia, by contrast, freedom suits after 1795 were heard before a magistrate. See Schweninger, *supra* note 175, at 29–30. Jefferson argued *Howell* before a judge. See Schwabach, *supra* note 172, at 137.

204. GEORGE HENRY MOORE, NOTES ON THE HISTORY OF SLAVERY IN MASSACHUSETTS 124–25 (1866). See Wiecek, *supra* note 163, at 43–44.

205. See *supra* note 157.

206. See Waldstreicher, *supra* note 12, at 344–45.

207. See Parkinson, *supra* note 5, at 369–70. These towns were Blandford, Boothbay, Charlemont, Georgetown, Hardwick, Spencer, Sutton, Upton, and Westminster. See Handlin & Handlin, *supra* note 109, at 216, 217, 230, 248–49, 262, 277, 282, 302, 312.

208. Belknap, *supra* note 168, at 20.

that are fundamental to the well-being of Society and the Liberty and safety of Individuals) should be, in the most explicit Terms, declared." This express protection not only set bounds on government action—"that Government, and Persons in Authority, might know their stated Limits and Bounds"—but enabled the people to understand and enforce their own rights: that "the Subjects, and all Members of Such Societies, might know when their Rights and Liberties are infringed or violated; and have some known and established Standard to which they might, with becoming Confidence, appeal, for the Redress of Greivances and Oppressions, whether real or supposed."[209] A declaration of rights was key to self-governance; without it, the people might not be sure that their fundamental rights had been violated nor that those violations would be remedied.

In practice, the Declaration of Rights included in the Massachusetts Constitution of 1780 served this function for enslaved inhabitants of the state. Some understood the Declaration to be self-executing and acted accordingly, with or without the consent of their enslavers. As Belknap wrote, "Many of the blacks taking occasion of the gen[era]l sentiment & the assertion in ye Declaration of Rights asked their freedom & obtained it; others took it without leave."[210] Others still took their claims to court.

Elizabeth Freeman, or "Mum Bett," was among the first to parlay the Declaration of Rights into a legal grant of freedom.[211] Enslaved in the home of Colonel John Ashley, Freeman may have observed the signing of the Sheffield Resolves in 1773, which declared that "mankind in a state of nature are equal, free, and independent of each other, and have a right to the undistorted enjoyment of their lives, their liberty and property."[212] At the end of the decade, she was reportedly "waiting at table" when "she heard gentlemen talking over the Bill of Rights and the new constitution of Massachusetts." As British abolitionist Harriet Martineau reported, the language of the Declaration of Rights resonated with Freeman; "in all they said she never heard but that all people were born free and equal, and she thought long about it, and resolved she would try whether she did not come in among them."[213] Freeman walked into Theodore Sedgwick's law office

209. Handlin & Handlin, *supra* note 109, at 317.

210. Belknap, *supra* note 168, at 20.

211. W. E. B. Du Bois claimed Elizabeth Freeman as a great-grandmother. See Egerton, *supra* note 5, at 170.

212. *Saturday, February 13, Boston*, MASS. SPY, Feb. 18, 1773, at 2.

213. HARRIET MARTINEAU, RETROSPECT OF WESTERN TRAVEL 246 (1838). Catharine Sedgwick, writing for a British publication, emphasized the Declaration of Independence rather than the Massachusetts Declaration of Rights: "It was soon after the close of the revolutionary war, that she chanced at the village 'meeting house,' in Sheffield, to hear the Declaration of Independence read." Catharine Sedgwick, *Slavery in New England*, 34 BENTLEY'S MISCELLANY 421 (William Harrison Ainsworth ed., 1853). Sedgwick's brother told yet a different story of the lawsuit: after Ashley's wife Hannah assaulted her with a hot iron shovel, he said, Freeman "left the house, and neither commands nor entreaties could induce her to return. Her master, Col. Ashley, resorted to the law to regain possession of his slave." HENRY DWIGHT SEDGWICK, THE PRACTICABILITY OF THE ABOLITION OF

the next day, according to his daughter Catharine Sedgwick: "'Sir,' said she, 'I heard that paper read yesterday, that says, "all men are born equal, and that every man has a right to freedom. I am not a dumb *critter*; won't the law give me my freedom?'"[214] *Brom & Bett v. Ashley* was heard before the County Court of Common Pleas in Great Barrington in 1781. The jury determined that Freeman and another plaintiff, Brom, were "not, nor were they at the time of the purchase of the original writ the legal Negro of the said John Ashley during life." As a result, they were entitled to "recover against the said John Ashley the sum of thirty shillings lawful silver Money, Damages, and the Costs of this suit."[215] As Sedgwick concluded, "It was the first practical construction in Massachusetts of the declaration which had been to the black race a constitutional abstraction" up until that point.[216]

Two years later, the Massachusetts Supreme Judicial Court officially ruled on the unconstitutionality of slavery in the case of *Commonwealth v. Jennison* (1783). When Nathaniel Jennison refused to emancipate Quock Walker, who had been promised his freedom at the age of twenty-five, Walker liberated himself.[217] Walker was working for wages for John and Seth Caldwell when Jennison and two other men assaulted him. In the civil suits that followed, Walker sued Jennison for trespass, and Jennison sued the Caldwells for expropriating Walker's labor. Both cases came out in Walker's favor: the Supreme Judicial Court found for Walker in the first because Jennison failed to appear and for the Caldwells in the second, on the basis that Walker was a free man whose labor could not be expropriated.[218]

But it was in the criminal case against Jennison that Chief Justice William Cushing decided "Slavery in Massachusetts was forever abolished."[219] Cushing's logic drew a straight line from antislavery sentiment to the state constitution. Slavery may have been "countenanced by the province Laws formerly," he acknowledged, "but no where is it expressly enacted or established."[220] While it was introduced in the colony as "a usage" in British custom, "a different Idea ha[d] taken place with ye people of America more favorable to ye. natural rights of Mankind, & to that natural innate, desire

SLAVERY 15 (1831). The procedural posture and timing of the suit would seem to support Martineau's account.

214. Sedgwick, *Slavery*, *id.*, at 421.

215. Brom & Bett v. Ashley, *reprinted in* WOMEN AND SLAVERY IN AMERICA 150, 151–52 (Catherine M. Lewis & J. Richard Lewis eds., 2011).

216. Sedgwick, *Slavery*, *supra* note 213, at 421. Theodore Sedgewick's participation in Freeman's suit would not prevent him from defending enslavers in subsequent claims. See Blanck, *supra* note 166, at 39.

217. As Douglas Egerton notes, "Walker did not sue for his freedom, which he simply assumed was the natural right of all Americans living in a post-1776 world." Egerton, *supra* note 5, at 94.

218. Blanck, *supra* note 166, at 25–27.

219. William Cushing, Legal Notes by William Cushing About the Quock Walker Case 99 (1783) (unpublished manuscript) (on file with the Massachusetts Historical Society).

220. *Id.* at 95.

of Liberty."[221] This revolutionary principle produced the Declaration of Rights:

> And upon this Ground, our Constitution of Gov[ernment] by [which] Ye people of this Commonwealth have solemnly bound themselves, Sets out with declaring that all men are born free & equal—& [that] Every subject is intitled to Liberty, & to have it guarded by ye. Laws, as well as Life & property—& in short is totally repugnant to ye. Idea of being born Slaves.[222]

On Cushing's logic, new ideas and customs had produced a constitutional change that precluded slavery's continued existence in the state. "In short," he directed the jury, "without resorting to implication in constructing the constitution, slavery is in my judgment as effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence."[223] The abolition of slavery was no constitutional construction based on subtle leaps of logic. It was one of Hamilton's "direct inferences" from fundamental rights expressly protected in the new constitution.[224]

Cushing and the jury could follow that inference just as clearly as Freeman had. When she was "afterwards asked how she learned the doctrine and facts on which she proceeded," according to Martineau, Freeman replied, "'By keepin' still and mindin' things."[225] When the Declaration of Rights reached her, it worked as the residents of Lexington and Westminster thought it should, enabling her to recognize her natural rights and act on them.[226] She may have been deprived of a formal education along with her freedom, but the courts came to the same common-sense conclusion she did.

C. Common Sense and Constitutional Indeterminacy

Whatever credit Cushing took for the abolition of slavery, *Jennison*, like *Somerset*, created enough legal uncertainty that people were still enslaved in the state into the 1790s.[227] For that reason, as Robert Cover writes, the authority of Cushing's decision has become a "historian's perennial football." Part of the problem is that judicial review did not yet determine

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221. *Id.* at 95–96.

222. *Id.* at 96–97.

223. John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the 'Quock Walker Case*, 5 Am. J. LEG. HIST. 133 (1961).

224. See *supra* note 114 and accompanying text.

225. Martineau, *supra* note 213, at 246.

226. See *supra* note 157 (on Westminster); *supra* note 209 (on Lexington).

227. See Blanck, *supra* note 166, at 30; Foner, *supra* note 5, at 84; Elaine MacEacheren, *Emancipation of Slavery in Massachusetts: A Reexamination 1770–1790*, 55 J. NEGRO HIST. 289, 304 n.4 (1970); Gloria McCahon Whiting, *Emancipation Without the Courts or Constitution: The Case of Revolutionary Massachusetts*, 41 SLAVERY & ABOLITION 458, 461–62 (2020); ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION 115 (1967).

constitutional meaning in the way it would come to do.[228] Instead, the constitutional abolition of slavery in Massachusetts depended on individual uptake across the state, among Black and white, enslaver and enslaved.[229] Belknap himself identified "public opinion" as the "mode by which slavery hath been abolished" in Massachusetts—not judicial decision or constitutional ratification.[230]

As a mechanism of constitutional change, public opinion did not afford the clarity and finality we associate with written judicial opinions. But determinacy was not a feature of late-eighteenth-century constitutional law, defined by ongoing custom and consent.[231] If judges could not produce controlling mandates in this environment, interactions among individuals, ordinary and elite, did create and enforce customs, norms, and rights.

Gloria Whiting has shown through probate records that most enslaved people in Massachusetts won their freedom at the beginning of the Revolutionary War, prior to both state constitutional ratification and *Jennison*. In this sense, "the Constitution codified changes that had already taken place on the ground."[232] At the same time, the Constitution could reflect but not guarantee those changes. Belknap recalled that the Declaration of Rights was "inserted not merely as a moral & political truth but with a particular view to establish the liberation of the Negroes on a general principle; & so it was understood by the people in general, but some doubted."[233] Even one of the framers of the state constitution remained uncertain about the legal status of the man he enslaved. "If my Negro Cato is not free by the Laws of the Land," he wrote in 1781, "it is my will that he shall be so."[234] Individual acts like these enforced a constitutional meaning that was itself in the making, dependent as it was on popular interpretation.

Social pressure also played an important role in the creation of constitutional meaning. According to the *Life of Jeremy Belknap* (1847), the census-taker for the first federal survey in 1790 recorded no enslaved inhabitants of Massachusetts, with an important caveat: "When he inquired for *slaves*, most people answered none,—if any one said that he had one, the marshal would ask him whether he meant to be singular, and would tell

228. Cover argues that the nature of court reporting in the period also ensured that popular understanding, not judicial mandate, governed the Constitution's construction. See Cover, *supra* note 166, at 44.

229. See Blanck, *supra* note 166, at 29; MacEacheren, *supra* note 227, at 303; Whiting, *supra* note 227, at 467.

230. Belknap, *supra* note 168, at 17.

231. A custom "must be undisputed," argued Levi Lincoln. Slavery "has always been disputed in the Gen[era]l C[our]t[] and courts of justice—and else where." Lincoln, *supra* note 197, at 438. See *supra* note 55.

232. Whiting, *supra* note 227, at 459.

233. Belknap, *supra* note 168, at 21.

234. MacEacheren, *supra* note 227, at 300–02. Two towns, Rochester and Braintree, requested in their 1780 returns the addition of an article expressly abolishing slavery in the state, suggesting that they did not understand Article I to do so. See Handlin & Handlin, *supra* note 109, at 707, 769.

him that no other person had given in any. The answer then was, 'If none are given in, I will not be singular.'"[235] As this account suggests, at no point in the eighteenth century did Massachusetts experience abolition as a clean break.[236] Some individuals remained in bondage even if the census failed to reflect their status; others subsisted on "what amounted to continued enslavement in all but name in return for room and board."[237]

On a more fundamental level, constitutional change could not happen in the late eighteenth century by judicial "fiat" or the ratification of constitutional text alone.[238] Just as important were the individual and collective acts of interpretation that extended, enforced, or contested the changing status quo that the state constitution and judicial decision-making also participated in.[239]

Enslaved individuals like Freeman and Walker precipitated this process by enacting their own interpretations of constitutional law, whether by going to court or walking away from bondage. They and others who "deserted from the service of those who had been their owners" met with resistance: "Some of them were seized and remanded to their former servitude."[240] Over time, these confrontations "influenced the course of public opinion," writes T. H. Breen, "shaping it, driving it forward, exposing tensions, crystallizing doubts, so eroding the institution of slavery that, at some critical moment in the history of Massachusetts, emancipation became common sense."[241] That was the only way constitutional abolition could have occurred in the late eighteenth century.

In the next Part, I explore a related form of common-sense constitutionalism: antislavery petitioning. Like freedom suits and abolitionist activism more broadly, antislavery petitions proposed radical constitutional arguments on the basis of the shared discourse of common sense. Even more than freedom suits, petitions also facilitated the assemblage of Black and interracial publics as constitutional actors, the very "people" invoked in constitutional text. As this form of constitutional organizing gained momentum in the last decade of the eighteenth century, it represented a pinnacle of abolitionist common sense.

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235. JANE BELKNAP MARCOU, LIFE OF JEREMY BELKNAP, D.D. 165 (1847).

236. See *supra* note 227.

237. ELISE LEMIRE, BLACK WALDEN 109 (2009).

238. See Cover, *supra* note 166, at 44.

239. As abolition took hold, the state legislature passed a series of restrictive laws, prohibiting interracial marriage in 1786 and excluding Black Americans not born in the state in 1788. See Egerton, *supra* note 5, at 121.

240. Letter from Samuel Dexter to Jeremy Belknap (Feb. 23, 1795) (on file with the Massachusetts Historical Society).

241. T. H. Breen, *Making History: The Force of Public Opinion and the Last Years of Slavery in Revolutionary Massachusetts*, *in* THROUGH A GLASS DARKLY 67, 95 (Ronald Hoffman, Mechal Sobel & Fredrika J. Teute eds., 1997).

IV. ANTISLAVERY PETITIONS: COMMON SENSE IN COLLECTIVE PROTEST

A. Antislavery Petitions in Early American History

Local antislavery petitions, like freedom suits, had a long history in the American colonies. As early as 1688, a group of Philadelphia Quakers crafted "A Paper being here presented by some German Friends Concerning the Lawfulness and Unlawfulness of Buying and keeping Negroes."[242] In 1739, "eighteen Freeholders of New Inverness, in the District of Darien," Georgia, signed a petition to James Oglethorpe, the colony's founder, to protest the introduction of slavery there.[243] Free Black colonists also petitioned against their differential treatment. In 1769, a "group of mulattoes and free blacks" in Virginia successfully petitioned the legislature for relief from a poll tax that applied to Black women but not white women.[244] In some states, freedom suits themselves took the form of petitions addressed to the courts.[245] A malleable form of political communication, petitions offered aggrieved individuals an opportunity to request relief from the authorities that governed them, whether executive, legislative, or judicial.

The right of petition was a matter of fundamental law in the American colonies, firmly established in the British constitution (dating back to the Magna Carta) and Native American institutions.[246] In the Anglo-American context, the right of petition expressly applied to every person. The Massachusetts Body of Liberties (1641) extended the right of petition to "[e]very man whether Inhabitant or fforreiner, free or not free."[247] Blackstone's *Commentaries* described "the right of petitioning the king, or either house of parliament, for the redress of grievances" as "appertaining to every individual."[248] After independence, the state constitutions of

242. Germantown Friends' Protest Against Slavery (Feb. 18, 1688) (on file with the Library of Congress).

243. Harvey H. Jackson, *The Darien Antislavery Petition of 1739 and the Georgia Plan*, 34 WM. & MARY Q. 618, 618–19 (1977).

244. Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1146-47 (2016). Similar protests reached the South Carolina legislature in 1793 and 1794. See Aptheker, *supra* note 5, at 29–31.

245. See Thomas, *supra* note 169, at 7.

246. John Adams defined a "grievance" as "a violation of an essential British right." Wills, *supra* note 76, at 59. The Magna Carta granted barons the right to petition for a redress of grievances, often accompanied by an offer to provide financing for the Crown. See McKinley, *supra* note 244, at 1144. As Maggie Blackhawk and coauthors write, "Indigenous North Americans incorporated petition procedures into their diplomatic and governance institutions (such as condolence rituals and confederacy meetings) centuries before contact with Europeans." Maggie Blackhawk, Daniel Carpenter, Tobias Resch & Benjamin Schneer, *Congressional Representation by Petition: Assessing the Voices of the Voteless in a Comprehensive New Database, 1789–1949*, 46 LEGIS. STUD. Q. 817, 821 (2021).

247. Massachusetts Body of Liberties, *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 70, 72–73 (Donald S. Lutz ed., 1998).

248. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 143 (1871). See Wills, *supra* note 76, at 54.

Pennsylvania (1776), Vermont (1777), and Massachusetts (1780) explicitly reserved the people's right to petition.[249] With the ratification of the Bill of Rights in 1791, the federal Constitution, too, recognized "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[250]

Over their long history, the "humble" prayers of antislavery petitioners typically went unanswered.[251] In response to the Germantown protest of 1688, the Yearly Meeting of Quakers in Philadelphia "adjudged [it] not to be so proper for this Meeting to give a Positive Judgment in the Case, It having so General a Relation to many other Parts, and therefore at present they forbear it."[252] Nearly a century later, the New Hampshire legislature thought a petition for the abolition of slavery was still "not ripe for a determination."[253] The Revolution, for its part, impeded abolitionist petitions as much as it invited them. In Massachusetts, after Samuel Adams acted as an intermediary in support of a Black antislavery petition, the General Assembly passed a bill to ban the slave trade. It never received the signature of the royal governor, however, because Hutchinson "had not had time to consider the other Bills that had been laid before him" before he was ousted from colonial governance.[254] A subsequent petition led to a state bill to abolish slavery altogether, but it was tabled for fear that "it should have A Bad Effect on the Union of the Colonies."[255] John Adams supported the deferral: "We have Causes enough of Jealousy Discord and Division, and this Bill will certainly add to the Number."[256]

The influence of abolitionist petitions, however, was more diffuse than immediate legislative change. In 1775, Black petitions in Worcester, Massachusetts, preceded a county resolution that stated, "we abhor the enslaving of any of the human race, and particularly of the Negroes in this country. And that whenever there shall be a door opened, or opportunity present, for any thing to be done toward the emancipating the Negroes; we will use our influence and endeavour that such a thing may be effected."[257] When Paul and John Cuffe petitioned for the right to vote in Dartmouth, Massachusetts, they met with little responsiveness from the state legislature

249. DANIEL CARPENTER, DEMOCRACY BY PETITION 62 (2021); McKinley, *supra* note 244, at 1145–47.

250. U.S. CONST. amend. I. See CHRISTOPHER MICHAEL BROWN, SEE JUSTICE DONE 30 (2024).

251. Aptheker, *supra* note 5, at 1. See, e.g., Foner, *supra* note 5, at 77–81.

252. Germantown Friends' Protest Against Slavery, *supra* note 242.

253. Isaac W. Hammond, *Slavery in New Hampshire*, 4 GRANITE STATE MAG. 199, 202 (1907). See Zilversmit, *supra* note 227, at 116–17.

254. Moore, *supra* note 204, at 135–37.

255. Letter from James Warren to John Adams (June 22, 1777) (on file with the National Archives).

256. Letter from John Adams to James Warren (July 7, 1777) (on file with the National Archives). Adams' noncommittal attitude toward slavery appears in a later letter to Jefferson: "what we are to see God knows and I leave it to him, and his agents in posterity." Letter from John Adams to Thomas Jefferson (Feb. 3, 1821) (on file with the National Archives).

257. Moore, *supra* note 204, at 145. See Kaplan & Kaplan, *supra* note 106, at 15–16.

or the town selectmen.[258] But as local suffrage expanded in practice in the 1780s, Black residents "of sufficient property" exercised the right to "vote in town-meetings." As Belknap wrote, "Prince Hall, Grand Master of the Black Lodge, constantly votes for Governour and Representatives; so do some others."[259]

When the town of Hardwick rejected the 1778 state constitution, it protested that a "Number of Negroes that are Now slaves have from time to time Humbly Petitioned to the General Court for their Liberty and Freedom and as yet have Not obtained it, But are Still Held in Slavery, which is very Contrary to the Law of god and Liberty that we Profess."[260] Much as freedom suits shaped the abolitionist common sense of revolutionary Massachusetts, antislavery petitioners articulated arguments that seeped into broader constitutional discourse at the state and eventually national level.

B. The Constitutional Thought of Antislavery Petitions

Across the 1770s, Black petitioners in Massachusetts adapted their antislavery arguments to the evolving constitutional claims and conditions of the American Revolution. In 1773, Peter Bestes, Sambo Freeman, Felix Holbrook, and Chester Joie told the state legislature they had a "natural right" to freedom.[261] In 1774, "a Grate Number of Blackes of this Province" built on this foundation, citing "the laws of the Land which doth not justify but condemns Slavery."[262] A month later, the same group submitted a new petition; contesting "mere custom," which "is the tyrant that keeps us in bondage," they argued that "there is no Law whatever for keeping us in Bondage" (echoing *Somerset*) and requested that they "be liberated and made free men of this community, and be entitled to all the privileges and immunities of its free and natural born subjects."[263] In 1777, Prince Hall, founder of the first African Lodge of Freemasonry, restated these arguments in language familiar to readers of the Declaration of Independence.[264]

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258. LAMONT D. THOMAS, RISE TO BE A PEOPLE 10–11 (1986). See ROGER A. BRUNS, AM I NOT A MAN AND A BROTHER 454–56 (1977); Foner, *supra* note 5, at 84–85; Horton & Horton, *supra* note 106, at 70; Kaplan & Kaplan, *supra* note 106, at 153.

259. Jeremy Belknap, *Belknap Papers, Part II, in* COLLECTIONS, *supra* note 197, at 12; Gosse, *supra* note 154, at 171.

260. Handlin & Handlin, *supra* note 109, at 216.

261. Aptheker, supra note 5, at 6–8. The 1773 petitioners also proposed an emigration scheme. See Thomas J. Davis, *Emancipation Rhetoric, Natural Rights, and Revolutionary New England: A Note on Four Black Petitions in Massachusetts, 1773–1777*, 62 NEW ENG. Q 248, 257 (1989).

262. Aptheker, *supra* note 5, at 8–9. See Davis, *id*., at 259–60.

263. Petition for Freedom to Massachusetts Governor Thomas Gage, His Majesty's Council, and the House of Representatives (June 1774) (on file with the Massachusetts Historical Society). Chernoh Sesay notes the resonance of this argument with *Somerset*. Sesay, *supra* note 166, at 124.

264. See CELESTE MICHELLE CONDIT & JOHN LOUIS LUCAITES, CRAFTING EQUALITY 85–86 (1993); Davis, *supra* note 261, at 261. Peter Bestes, one of the signers of the 1773 petition, was also a founder of the African Lodge in Boston. See Sesay, *supra* note 166 at 126.

"[Y]our petitioners apprehend that they have in Common with all other men a Natural and Unaliable Right to that freedom which the Grat Parent of the Unavers hath Bestowed equally on all menkind," the 1777 petition began. The petitioners had been enslaved "in violation of Laws of Nature and off Nations and in defiance of all the tender feelings of humanity." Much like the American colonists, they had "Long and Patiently waited the Evnt of petition after petition By them presented to the Legislative Body of this state" but could not "but with Grief Reflect that their Success hath been but too similar." In fact, they could not "but express their Astonishment that It have Never Bin Considered that Every Principle from which Amarica has Acted in the Cours of their unhappy Difficultes with Great Briton Pleads Stronger than A thousand arguments in favours of your petioners."[265]

These petitions were not restricted to Massachusetts. In 1779, nineteen petitioners in Portsmouth, New Hampshire, cited a similar range of authorities, including the law of nature, the social contract, and common sense:

> That the *God* of nature gave them life and freedom, upon the terms of the most perfect equality with other men; That freedom is an inherent right of the human species, not to be surrendered, but by consent, for the sake of social life; That private or public tyranny and slavery are alike detestable to minds conscious of the equal dignity of human nature.[266]

The New Hampshire petitioners paid particular attention to the authorities used to justify slavery. "Is it from the sacred volume of Christianity?" they asked. "There we believe it is not to be found; but here hath the cruel hand of slavery made us incompetent judges, hence knowledge is hid from our minds." Of "the volumes of laws," similarly, "slaves cannot be judges, but those we are told are founded on reason and justice; it cannot be found there." Slavery had deprived the petitioners of the education necessary to engage with religious or legal texts. Even so, they knew enough of "reason and justice" to understand that the law could not, as a fundamental matter, authorize slavery. That was because they had equal access to "the volumes of nature": "here we can read with others, of this knowledge, slavery cannot wholly deprive us; here we know what we ought to be free agents; here we feel the dignity of human nature; here we feel the passions and desires of men, though checked by the rod of slavery; here feel a just equality; here we know that the God of nature made us free." Of natural law, the petitioners were primary authorities, on the basis of their innate knowledge and natural feeling. Those capacities were not only the foundation of law and religion but overruled any custom to the contrary. Was the authority of

265. Aptheker, *supra* note 5, at 9–10.
266. Hammond, *supra* note 253, at 200.

slaveholders "assumed from custom?" the petitioners asked. "If so let that custom be abolished, which is not founded in nature, reason nor religion."[267]

That same year, petitioners from Stratford and Fairfield, Connecticut, drew on their own common sense to make a similar case for abolition. "[W]e perceive by our own Reflection, that we are endowed with the same Faculties with our masters, and there is nothing that leads us to a Belief, or Suspicion, that we are any more obliged to serve them, than they us," they observed. In fact, "the more we Consider of this matter, the more we are Convinced of our Right (by the Laws of Nature and by the whole Tenor of the Christian Religion, so far as we have been taught) to be free; we have endeavoured rightly to understand what is our Right, and what is our Duty, and can never be convinced that we were made to be Slaves."[268] No one had a better claim to understanding their own rights and responsibilities than they did. "They have a thousand times more discerning and sensibility in this case than their masters, or most others," Samuel Hopkins affirmed.[269] This kind of inborn understanding, not taught in any schools, was for Hopkins the supreme authority on the question of slavery.

Petitions shaped antislavery reform as far south as Virginia. In 1778, an enslaved man named George, who had been promised freedom on the death of his enslaver, petitioned the legislature (with the endorsement of the estate's heirs) that "an act may pass for that purpose."[270] In response, the General Assembly introduced a bill for easing the restrictions imposed on individual acts of manumission. After two subsequent Quaker petitions urged the "great principle, that freedom is the natural rights of all mankind," the legislature finally passed an "act to authorize the manumission of slaves" under certain limited conditions.[271] In 1785, a group of Virginian Methodists acting under the direction of Francis Asbury and Thomas Coke submitted another petition "intreating the General Assembly of *Virginia*, to pass a Law for the immediate or gradual emancipation of all the slaves."[272] As James Madison informed George Washington, "It was rejected without dissent but not without an avowed patronage of its principle by sundry respectable members. A motion was made to throw it under the table, which was treated with as much indignation on one side, as the petition itself was on the other."[273] This treatment presaged the heated debates over slavery, and the ultimate failure to countenance its abolition, at the Constitutional

267. *Id.* at 201.

268. Aptheker, *supra* note 5, at 10–11.

269. SAMUEL HOPKINS, A DIALOGUE CONCERNING THE SLAVERY OF THE AFRICANS 28 (1776).

270. EVA SHEPPARD WOLF, RACE AND LIBERTY IN THE NEW NATION 28 (2006).

271. *Id.* at 32. Paul Finkelman describes the law as possibly "the first 'civil rights act' ever passed by a southern state." Finkelman, *The First Civil Rights Movement, supra* note 70, at 706.

272. ALBERT MATTHEWS, NOTES ON THE PROPOSED ABOLITION OF SLAVERY IN VIRGINIA IN 1785, at 8–9 (1903).

273. Letter from James Madison to George Washington (Nov. 11, 1785) (on file with the National Archives).

Convention in two years' time.[274]

The petitions of the 1770s and 1780s took part in the state-level contest to abolish slavery, but they also requested more than emancipation, introducing claims for repatriation, land grants, and other forms of reparation.[275] In 1787, Hall and 72 others petitioned the General Court to fund an emigration plan. A year later, he led "a great number of blacks, freemen of this Commonwealth," in demanding access to common education, as "we are of the humble opinion that we have the right to enjoy the privileges of free men."[276] That same year, he petitioned the Massachusetts legislature to intercede in the kidnapping of "Three of our Brethren free citizens of the Town of Boston," along with others "that have Entred onboard of vessles as seamen *and* have ben sold for slaves." Ninety white ministers submitted their own supporting petition, urging "a total abolition of that nefarious traffic which, to the disgrace of civilized nations, professing Christianity, has too long been permitted." These efforts resulted in the return of the three kidnapped men and the passage of "An Act to prevent the Slave-Trade, and for granting Relief to the Families of such unhappy Persons as may be kidnapped or decoyed away from this Commonwealth," authorizing suits for damages.[277] A subsequent petition led by the Reverends Levi Hart and Jonathan Edwards in Connecticut resulted in the total abolition of New England's slave trade.[278]

Abolitionist petitioners won substantial gains in the 1770s and 1780s, making use of the many sources of constitutional law in the period, beginning with natural law. For the petitioners and their interlocutors, natural law was not a hypothetical domain: it underpinned just laws and institutions. Their own inborn common sense enabled them to interpret that law and to weigh in on legal matters. "May it pleas your Honours," wrote the 1788 petitioners, "we are not uncensebel that the good Laws of this State forbedes all such base axons."[279] Interracial alliances formed in support of these arguments, a sign that a broader public not only accepted enslaved petitioners' epistemological authority but saw petitions as a promising avenue of popular constitutional change.[280]

274. See *supra* note 163.

275. See, e.g., Aptheker, *supra* note 5, at 8; Petition for Freedom, *supra* note 264.

276. Aptheker, *supra* note 5, at 19. See Kaplan & Kaplan, *supra* note 106, at 207–09; Sinha, *supra* note 22, at 134.

277. W.E.B. DU BOIS, THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA, 1638–1870, at 231 (1904).

278. Foner, *supra* note 5, at 86–89.

279. Aptheker, *supra* note 5, at 20.

280. Black petitioners in Philadelphia understood the right of petition as a first-order right, one that served to protect and enforce other rights. See Kaplan & Kaplan, *supra* note 106, at 31.

C. Constitutional Text and Late-Century Petitions

In the summer of 1787, as the delegates to the Constitutional Convention met in Philadelphia to construct a new constitutional order, another local institution emerged alongside it: the Free African Society, founded by Absalom Jones and Richard Allen.[281] A few years later, Jones and Allen formed the city's first two Black churches, the African Episcopal Church of St. Thomas and the Mother Bethel African Methodist Episcopal Church, respectively. Like Hall's African Lodge No. 1 in Boston, these institutions facilitated new forms of mutual aid and political organizing among Black collectives and their white allies.[282] In Philadelphia, in particular, new collectives and coalitions emerged in close proximity to the seat of national government.[283] As a result, the 1790s, despite the compromises of the Constitutional Convention, held major abolitionist potential. Where antislavery petitions to Congress in 1783 and 1785 made few inroads, the efforts of the first national Convention of Delegates from the Abolition Societies, which met in Philadelphia in 1794, resulted in the Slave Trade Act of 1794.[284]

Petitions were pivotal to these late-century efforts because petitions occupied a central place in early American lawmaking.[285] Petitions gave ordinary Americans an active and assured voice in their own governance, far more than voting did. The House of Representatives mandated that petitions be read by the Speaker and considered "in the order they were read."[286] Congress, for that reason, gave antislavery petitions a full hearing up until the "gag rule" automatically tabled them from 1836 to 1844.[287] (Ironically, the gag rule "led to much more petitioning, not less," writes Daniel Carpenter, precipitating an increase from 159 petitions over a two-year period to 5,000.[288])

In the 1790s, abolitionist petitions engaged directly with a newly empowered Congress and the constitutional text that created it. These acts of popular constitutional interpretation began with the Preamble and its open-ended invocation of "We the People." In 1790, Benjamin Franklin,

281. See Egerton, *supra* note 5, at 247.

282. See, e.g., Newman et al., *supra* note 68, at 161.

283. See *supra* note 68 and accompanying text.

284. Wiecek, *supra* note 163, at 58, 85–86. Broader support for restricting the slave trade was bolstered by Virginia's economic interest in restricting the "supply" of enslaved people in the United States. See, e.g., THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 135–51, 170–71 (1832); WINTHROP JORDAN, WHITE OVER BLACK 301 (1968); Wills, *supra* note 76, at 67. Gary Nash, on the other hand, argues that "many believed that choking off further slave imports would bring about the gradual death of slavery itself." Nash, *supra* note 9, at 12–13.

285. When the Second Congress convened in 1791, the House began reading petitions the next day. See Carpenter, *supra* note 249, at 80–81.

286. See Blackhawk et al., *supra* note 246, at 823.

287. See Daniel Carpenter, *Recruitment by Petition: American Antislavery, French Protestantism, English Suppression*, 14 PERSPS. ON POL. 700, 706–07 (2016).

288. *Id.* at 707.

acting as president of the Pennsylvania Abolition Society, made it his last public act to sign off on an antislavery petition to Congress.[289] The petitioners "observed with great Satisfaction that many important & salutary Powers are vested in you for 'promoting the Welfare & Securing the blessings of liberty to the 'People of the United States.'" Assuming "that these blessings ought rightfully to be administered, without distinction of Colour, to all descriptions of People," the petitioners asked Congress to "Step to the very verge of the Powers vested in you for discouraging every Species of Traffick in the Persons of our fellow men."[290] Franklin had attended the Constitutional Convention; his participation in this collective act of constitutional interpretation indicated that he thought the meaning of the text remained in the hands of the people and their representatives.

If Congress was the primary recipient of this form of popular constitutional engagement in the 1790s, it was also the venue where the abolitionist implications of the new Constitution were most hotly contested. When the 1790 petition was received, Gary Nash writes, "comments were frequently heard during the day's debate, as they had not been heard at the Constitutional Convention less than three years before, regarding the total abolition of slavery."[291] On a tie-breaker vote, the committee considering the petition determined that the Preamble did not vest Congress with the power to regulate slavery.[292] When representatives from South Carolina and Georgia filibustered the committee's report for implying that Congress might have the power to abolish slavery after 1808, the House amended it (on Madison's motion) to specify "[t]hat Congress have no authority to interfere in the emancipation of slaves, or in the treatment of them within any of the States; it remaining with the several States alone to provide any regulations therein, which humanity and true policy may require."[293]

Abolitionists, however, did not consider the House's word final. In January 1797, four Black men—Jacob Nicholson, Jupiter Nicholson, Job Albert, and Thomas Pritchet—submitted their own congressional petition "for redress of our grievance."[294] The four men had been manumitted by Quakers in North Carolina but, "hunted day and night, like beasts of the

289. The petition of the Pennsylvania Abolition Society was submitted alongside a series of Quaker petitions. See Nash, *supra* note 9, at 38. One such petition draft appeared to reference the Preamble, citing representatives' "Professions of Attatchment to the Cause of Liberty & the general Wellbeing of the People over whom they preside." See Nicholas Wahn, First Draft of Philadelphia Yearly Meeting Address to Continental Congress (Oct. 13, 1783) (on file with Haverford College Quaker and Special Collections); 1 ANNALS OF CONG. 1224–25 (1789) (Joseph Gales ed., 1834).

290. Benjamin Franklin, Petition from the Pennsylvania Society for Promoting the Abolition of Slavery to Vice President John Adams (Feb. 3, 1790) (on file with the National Archives).

291. Nash, *supra* note 9, at 39.

292. Howard A. Ohline, *Slavery, Economics, and Congressional Politics, 1790*, 46 J. S. HIST. 335, 346 (1980).

293. 2 ANNALS OF CONG. 1524 (1790). Ohline, *id*., at 349–51.

294. Nicholas Wood sees the petitioners' language as an explicit echo of the First Amendment. See Wood, *supra* note 68, at 111.

forest, by armed men with dogs," they fled to the North to seek "refuge in such parts of the Union where more regard is paid to the public declaration in favour of liberty, and the common rights of men."[295] But even in Philadelphia, a member of the Black community was "now confined in the jail of this city, under sanction of the act of General Government, called the Fugitive Law," or the Fugitive Slave Act of 1793.[296]

Couched in the standard language of humility, the petition reflected a sharp attunement to evolving constitutional discourse in the final decade of the century and the place of petitioning within it. The petitioners did not "presume to ask for the interposition of your honorable body, beyond the extent of your Constitutional power of influence," they said, alluding to the House report of 1790.[297] But

> [m]ay we not be allowed to consider this stretch of power, morally and politically, a Governmental defect, if not a direct violation of the declared fundamental principles of the Constitution; and finally, is not some remedy for an evil of such magnitude highly worthy of the deep inquiry and unfeigned zeal of the supreme Legislative body of a free and enlightened people?

The petitioners offered this critique not as direct constituents—"we cannot claim the privilege of representation in your councils"—but "as fellow-men": in that capacity, "we may hope for a share in your sympathetic attention while we represent that the unconstitutional bondage in which multitudes of our fellows in complexion are held, is to us a subject sorrowfully affecting."[298] Even as political outsiders, the petitioners considered themselves authorized to assert that "multitudes" like themselves experienced "unconstitutional bondage."

Congress dismissed the petition by 17 votes, on the logic that it could not judge whether the petitioners were legally free and therefore eligible to petition.[299] (Under the common law, freedom should not have been a condition of entry).[300] Abolitionists in Philadelphia were still not dissuaded. In the final days of the eighteenth century, Absalom Jones and Richard Allen joined two of the 1797 petitioners and 67 others—many likely members of St. Thomas and Mother Bethel—to submit one final petition.[301] "The Petition of the People of Colour, free men, within the City and Suburbs of Philadelphia" insisted that, as free men, the petitioners were eligible to seek relief on behalf of their "afflicted brethren" in slavery. But unlike the

295. 6 Annals of Cong. 2016 (1797).
296. *Id.* at 2017.
297. *Id.* at 2017.
298. *Id.* at 2018.
299. See Wood, *supra* note 68, at 129–31.
300. See *supra* note 248 and accompanying text.
301. See Wood, *supra* note 68, at 136.

1797 petitioners, they communicated their conviction that those in slavery were members of the body politic and equally entitled to political representation:

> We are incited by a sense of Social duty and humbly conceive ourselves authorized to address and petition you in their behalf, believing them to be objects of your representation in your public councils, in common with ourselves and every other class of citizens within the jurisdiction of the United States, according to the design of the present Constitution, formed by the General Convention, and ratified in the different states, as set forth in the preamble thereto in the following words, viz. 'We, the people . . .'

There may be many classes of citizens, the petitioners implied, but all of them, including the enslaved, were among the people parties to the "solemn compact" of the Constitution and therefore invoked in the Preamble. The petitioners then extended their textual argument to the rest of the Constitution (in a move that would become popular in the mid-nineteenth century): "In the Constitution and the Fugitive Bill, no mention is made of black people, or slaves," they pointed out; "therefore, if the Bill of Rights, or the Declaration of Congress are of any validity, we beseech, that as we are men, we may be admitted to partake of the liberties and unalienable rights therein held forth."[302] For the 1799 petitioners, the Constitution's textual silence on slavery was to be read in light of the "liberties and unalienable rights" represented in the Declaration of Independence and Bill of Rights.[303]

This act of popular constitutional interpretation provoked heated debate. John Rutledge, Jr., of South Carolina thought the petition was "improper and unconstitutional to discuss," enough to undermine the constitutional compromise on which the Union was based.[304] James Jones of Georgia was disturbed by the petitioners' claim that the enslaved were among the people mentioned in the Preamble and therefore parties to the "Federal compact."[305] Others cast doubt on the provenance of the petition itself. Harrison Gray Otis of Massachusetts suspected the petition was signed "by a number of individuals who were incapable of writing their names, or of reading the petition, and, *a fortiori*, of digesting the principles of it."[306] John Brown of Rhode Island insisted that the petition "did not come from the blacks, but from a combination of people"—the Quakers and abolitionist societies that collaborated with them—"who had troubled Congress for

302. See Douglass, *supra* note 14, at 386.

303. Absalom Jones et al., Petition of Absalom Jones, and Others, People of Color, and Freemen Against the Slave Trade to the Coast of Guinea (Jan. 2, 1800) (on file with the National Archives).

304. 10 ANNALS OF CONG. 230, 232 (1800).

305. *Id.* at 235.

306. *Id.* at 231.

many years past, and he feared never would cease."[307] John Randolph of Virginia "hoped that the conduct of the House would be so decided as to deter the petitioners, or any persons acting for them, from ever presenting one of a similar nature hereafter."[308]

Others thought the petition should be treated like any other. John Smilie of Pennsylvania described the petitioners as "a part of the human species, equally capable of suffering and enjoying with others, and equally objects of attention, and therefore they had a claim to be heard."[309] George Thatcher of Massachusetts pointed out that "whether they could write, or whether not, was entirely immaterial: they stated their sufferings under a law of the United States, and that was argument enough for a respectable reference." Their right to a hearing was especially marked given that illiteracy was a product of enslavement.[310] William Edmond of Connecticut thought the southern congressmen had lost their heads. "Was it consistent that the House, instead of a reasonable and patient attention, should come forward and treat this complaint with an inattention which passion only could dictate?"[311]

After two days of debate, Congress resolved 85 to 1 "that the parts of the said petition which invite Congress to legislate upon subjects from which the General Government is precluded by the Constitution, have a tendency to create disquiet and jealousy, and ought therefore to receive no encouragement or countenance from this House."[312] Congress did convene a slave trade committee, but its findings, which granted that the petitioners were entitled "to freedom & Protection" and that Congress had "a Duty to revise [the Fugitive Slave] Law & modify it," went unreported. More legislation followed, including the Slave Trade Act of 1800, which further restricted Americans' involvement in the traffic.[313] The question of Black political membership, meanwhile, remained an open one. Many Black Americans were "citizens of the United States," declared Massachusetts representative John Bacon in 1803; "they were such previous to the time of forming the Constitution, and actually had a voice in the adoption of that solemn compact."[314] Allen, in particular, continued to insist that Black Americans "participate[d] in common" in public life with other "citizens."[315]

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307. *Id.* at 232–33.
308. *Id.* at 233.
309. *Id.* at 231.
310. *Id.* at 232.
311. *Id.* at 237.
312. *Id.* at 245. George Thatcher delivered the one negative vote. *Id.*
313. See Wood, *supra* note 68, at 138–39.
314. 12 ANNALS OF CONG. 468 (1803). Bolton went on to argue that a restriction on Black mobility violated the Privileges and Immunities Clause in Article IV, Section 2. See Wood, *supra* note 68, at 140–41.
315. Richard Allen, *Eulogy of George Washington*, PHILA. GAZETTE & UNIVERSAL DAILY

It is telling that the Sixth Congress found the 1799 petition so threatening. James Jones "would ask gentlemen whether, with all their philanthropy, they would wish to see those people sitting by their sides deliberating in the councils of the nation? He presumed not."[316] For Jones, enslaved Americans were "those people," not *the* people, and not fit for deliberative democracy. But if "those people" continued to act like they were among the people responsible for constitutional interpretation, who was Congress to say they were not? "To encourage a measure of the kind," warned Harrison Gray Otis, "would teach them the art of assembling together, debating, and the like, and would soon, if encouraged, extend from one end of the Union to the other."[317] The multiplication of abolitionist assemblies across the Union might portend the abolition of slavery altogether. At the very least, it would spur the debate necessary to produce it.

CONCLUSION: THE END OF COMMON SENSE

In 1800, the nation's capital moved from Philadelphia to Washington, D.C. The 1799 petition was the last Black petition to reach Congress until 1813, when Paul Cuffe requested authorization to transport "Free people of colour in Baltimore Philadelphia, New York and Boston" to Sierra Leone in response to their continued exclusion from the body politic.[318] This setback in antislavery organizing reflected a rejection of the old constitutional principles. Slavery was opposed to "the law of humanity, common sense, reason and conscience," Daniel Coker wrote in 1810:

> The flagrant violation of the rights of humanity was set forth in an humble manner, by the Rev. Absalom Jones, and Mr. James Forten of Philadelphia, in their petition to congress at one of their sessions, held in Philadelphia, in behalf of their suffering brethren in captivity; but were their petitions granted? NO.[319]

In freedom suits, too, the interpretive authority of common sense lost purchase.[320] When in 1820 a group of Haitian litigants who were smuggled

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ADVERTISER, Dec. 31, 1799, at 2. See also Richard S. Newman, *"We Participate in Common": Richard Allen's Eulogy of Washington and the Challenge of Interracial Appeals*, 64 WM. & MARY Q 117, 118 (2007); DERRICK SPIRES, *Neighborly Citizenship in Absalom Jones and Richard Allen's* A Narrative of the Proceedings of the Black People During the Late and Awful Calamity in Philadelphia in the Year 1793*, in* THE PRACTICE OF CITIZENSHIP 34–78 (2019).

316. 10 ANNALS OF CONG. 235 (1800).

317. *Id.* at 232. Even where Black suffrage was denied, it was rarely on the basis of any explicit doctrine of Black inferiority. Forbes, *supra* note 142, at 86.

318. Letter from Paul Cuffe to James Madison (June 16, 1813) (on file with the National Archives). See Thomas, *supra* note 258, at 90; Wood, *supra* note 68, at 141–42.

319. Daniel Coker, *A Dialogue Between a Virginian and an African Minister, in* PAMPHLETS OF PROTEST 53, 56 (Richard Newman, Patrick Rael & Philip Lapsansky eds., 2001). James Forten was a prominent free Black businessman in Philadelphia. See Wood, *supra* note 68, at 138.

320. See Cover, *supra* note 166; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, 9–16 (1977).

into Maryland claimed their freedom under the state's own laws, the law of nations, and a consideration of "natural law, common sense, and common justice," the court decided against them.[321] With the rise of the Supreme Court, the professionalization of judges and lawyers, and the consolidation of judicial review, common sense made less sense as an interpretive principle: it was too democratic, too wayward, too unlearned.[322]

The decline of common-sense constitutionalism marks an important divide between constitutional discourse and lawmaking in the late eighteenth century and the interpretive principles and methodologies that govern constitutional interpretation today. We operate on such different assumptions about what constitutional law means, and who should be responsible for adjudicating its questions, that the attempt to import constitutional findings from the founding period becomes rife with difficulties. When did slavery become unconstitutional in Massachusetts? Were the North Carolina petitioners wrong when they called the bondage of multitudes unconstitutional? Who was *really* included in "We the People"? These questions were continually answered in the late eighteenth century and not answerable by any one authority.

We can attempt to "fix" constitutional meaning today by choosing winners: William Cushing was right, or wrong; James Madison was right, or wrong; James Jones was right, or wrong. But to side with elite officeholders over the many others who put themselves forward as constitutional arbiters is not only an ideological choice; it also departs from the material conditions and epistemological premises of the early republican period. For early American abolitionists, from Lemuel Haynes to Elizabeth Freeman to Absalom Jones, the unconstitutionality of slavery was, from the beginning, common sense. But common sense was precisely the contested domain that required continued argument, activism, and organizing—not to settle the question, but to continue to engage it.[323] Common-sense constitutionalism was, in the end, a dynamic source of constitution-making, one that afforded unprecedented opportunities for liberation and inclusion alongside oppression and exclusion.[324] If we cannot derive definitive meaning from the interactions of such diverse, dispersed original publics,

321. Patricia A. Reid, *The Haitian Revolution, Black Petitioners and Refugee Widows in Marland, 1796–1820*, 50 AM. J. LEGAL HIST. 431, 450 (2008).

322. See, e.g., Kramer, *supra* note 15, at 93–127; Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997).

323. See Rosenfeld, *supra* note 16, at 15.

324. See, e.g., Egerton, *supra* note 5, at 247; Horne, *supra* note 5; LARRY E. TISE, THE AMERICAN COUNTERREVOLUTION (1998). See also Brown, *supra* note 250, at 35 ("In the Black petitions of the 1770s, we may even grasp the moment in which freedom was a possibility for Blacks in America, the moment before the failure—for Blacks—of the Revolution's narrative of liberty.") Nash, *supra* note 9, at 4 ("[B]y the time of the Convention the high tide of abolitionist sentiment was already receding."); Quarles, *supra* note 105, at xxx ("The idealism of the Declaration of Independence gave way to the conservatism of the Constitutional era.").

we should still reckon with the debates they produced—the most profound legacy of the American founding.

We cannot return to the common-sense constitutionalism of another era. We live in a constitutional age dominated by the Supreme Court and judicial review.[325] If common sense is cited in a Supreme Court decision today, it most likely appears as a rhetorical flourish.[326] But that does not mean there is no room or necessity for popular engagement with constitutional law, or contestation over what constitutional common sense entails.[327] The example of early abolitionists, acting as individuals and nascent collectives, demonstrates that every one of us—any one of us—has the right to interpret the constitutional law that governs us, if we claim it. That engagement might not result in a clear, court-directed victory. Nor should that be the goal (or at least not the only goal). The Court has limited capacity to engage in the kind of creative constitutional thinking that is transformative of political reality. Early American abolitionists invite us to ask what it would mean to look elsewhere for constitutional meaning—not to an authority above, or to an idea of the past, but to our own strongly held convictions and the communities they exist within. That would require, not fixing the Constitution, but opening it for debate.

325. See Kramer, *supra* note 15. See also Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021).

326. In *United States v. Rahimi*, for instance, the Court reasoned, "Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." United States v. Rahimi 602 U.S. 680, 698 (2024). Thank you to Bernadette Meyler for mentioning this citation.

327. Richard Thompson Ford has made the case for a "commonsense approach to legal rights" and judgment that draws on public opinion and social change. See RICHARD THOMPSON FORD, RIGHTS GONE WRONG 127–33 (2011).