A TALE OF TWO DECLARATIONS

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I. INTRODUCTION

It is hard to not feel the heavy weight of the US’s current identity crisis. As the nation comes to grip with its past in a way perhaps not seen for over a hundred years, we struggle to understand that past, let alone carve out a way forward for the future. A microcosm of this struggle might be seen in the tension between the 1619 Project and the 1776 Unites project. On the one hand, the 1619 Project was launched in 2019 as an initiative to “reframe the country’s history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative.” Its proponents argue that the real foundations of the nation lay not in 1776, or in 1787–88 for that matter, but in 1619, when slavery was first introduced to the continent. The nation’s founding, as such, does not deserve our loyalty or respect given its dark, reprehensible nature. The 1619 Project’s reframing of the nation’s history in terms of slavery and its legacy has influenced the public mind and helped reorient scholarship. The project 1776 Unites, on the other hand, attempts to respond to the 1619 Project by

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explaining the foundational themes of the American experience as a story of self-determination, equality, and resilience.\(^3\) It was upon these values, 1776 Unites argues, that the US was founded. Among this war of alternative histories, one may find it difficult to come to terms with America’s legacy and what that legacy would mean for political action today.

Kermit Roosevelt III, however, has proposed a way out of this deep malaise: forget everything you thought you knew about the past, for it is all wrong! The ideas of the 1619 Project and 1776 Unites, though ostensibly polarizing, are really two sides of the same coin. Both cling to one central thing—the Declaration of Independence. Though the narratives concerning the circumstances surrounding its adoption are vastly different, the Declaration of Independence remains the focus of what Roosevelt calls the “standard story.” 1776 Unites merely represents a “triumphalist” version of events while the 1619 Project continues to question whether the ideas of the Declaration have enjoyed any true success in the US in the past, let alone the present.\(^4\) Both stories revolve around the Declaration as the guiding compass of America’s journey. The US has drawn closer to or drifted further from its set path, depending on who you talk to. But the Declaration’s status as a unifying symbol and an aspirational tool remains constant among the many versions of the standard story. Many things might be said of the Declaration, but, according to Roosevelt, its defining characteristic is unity: unity for those who are in, and exclusion for those who are out (more on this later). The task of the 1619 Project and the 1776 Unites project, despite their rather divergent methods, contribute to the Declaration’s project of unity—each hopes to widen the scope of those who are “in.”\(^5\)

II. THE NATION THAT NEVER WAS

Roosevelt’s work is arresting. His bold claims concerning the true nature of the Declaration of Independence, the Founder’s Constitution, the Civil War, and Reconstruction should cause anyone who reads it to pause and reconsider what they perhaps took for granted most of their lives. According

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\(^5\) Id. at 26–31.
to Roosevelt, the narrative that the Declaration of Independence proposed certain self-evident truths that would indelibly mark the path of America toward liberty and equality is false. The Founder’s Constitution, even in its best light, was not a document dedicated to justice and inclusion, but was at its core one of exclusion. The Civil War was not fought by southern rebels rejecting the principles of the Declaration and northerners who fought to preserve the same. And Reconstruction was no reconstruction. Rather, Reconstruction marked the victory of the North’s true cause: revolution. Reconstruction was an irreversible break with the Declaration of Independence and the Founder’s Constitution, and a necessary one for the sake of liberty and equality. Following the path of Reconstruction can lead America to the bright future it longs for, while clinging to the past and the Declaration will ensure only preserving the status quo, sacrificing liberty and equality for security and unity.

The first mistake people make, according to Roosevelt, is to assume that the Declaration was a document about rights. The Declaration was in fact about independence and exclusion: independence from an oppressive government and exclusion for those not welcomed into the new community. The Declaration is concerned with protecting the rights of those the community decides to include—no one else. The easiest way to see this is in the Declaration’s relation to slavery. While equality might exist in the state of nature, it has no bearing on how political society is formed. When people form a government, they do so to protect their own rights on an equal basis. Those on the inside of the political community have no obligation to honor the rights of those on the outside of it. In this way, “each political community controls its own membership, by whatever rules it chooses.” It would be nonsensical to discuss the natural rights of outsiders—they have none if the political community chooses to not recognize it. Thus, slavery is perfectly compatible with the Declaration—slaveholders were “in” and slaves were “out.” Understood in this light, the rights the Declaration sought to protect were those of slaveholders to keep their slaves. Roosevelt makes this point by arguing that the Declaration’s real purpose was essentially to preserve slavery against the rising tide of abolition coming out of England at

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6 See id. at 35–52.
7 Id. at 43–45.
8 Id. at 45.
the time, as evinced by *Somerset* and the British government increasing abolitionist efforts in the colonies during war time.\(^9\)

The second mistake people make is to assume that the Constitution had any firmer stance against slavery than the Declaration. In fact, for Roosevelt the Constitution was a significant victory for pro-slavery efforts and its main effect was to preserve white hegemony and black subjugation. Borrowing from Akhil Amar, Roosevelt describes the Constitution as a “geostrategic” document.\(^10\) Instead of a concern for liberty and equality, the Constitution’s essential goal was to preserve the separate states as a union for the sake of security.\(^11\) Even the Bill of Rights was not quite the Bill of Rights we understand today—it was seen as a protection from federal encroachment on liberty, and more so strengthened state power to protect their citizens than endowed federal citizens with a deep sense of rights.\(^12\) But perhaps nothing was more important for the geostrategic document than preserving slavery. From the Three-Fifths Clause to the Fugitive Slave Clause, the Constitution clearly preserved and, in some respects, actively supported slavery.\(^13\) Even the time-limited International Slave Trade Clause actively supported slavery, as it provided a clause that provided another nod to slavery’s legitimacy, even if did not provide a permanent protection for the trade.\(^14\)

People further misconstrue America’s past when they associate the “Union” with upholding the ideas of the Declaration and preserving the Constitution. First, Roosevelt reminds us that, even if the Declaration were really about protecting natural rights equally, the Constitution does not achieve that. The Constitution was a geostrategic document that bridged a state of nature between states, not equal individual rights-bearers.\(^15\) Second, when Republicans invoked the Declaration, they were necessarily invoking something new, something modern. When Lincoln invoked the Declaration in his Gettysburg Address, for instance, he was truly referencing a *new* nation. The old one was not dedicated to equality and not dedicated to freedom for

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9 See id. at 53–64.

10 See id. at 69; see, e.g., AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 44–53 (2005).

11 ROOSEVELT, supra note 4, at 70.


13 ROOSEVELT, supra note 4, at 75–79.

14 Id. at 77–78.

15 Id. at 108.
What Lincoln called for was a revolution over the old regime, the old pro-slavery Constitution in favor of something fundamentally new and truly dedicated to liberty and equality.

Finally, Roosevelt argues that Reconstruction, and particularly the Fourteenth Amendment, was the culmination of the revolution Lincoln called for. The Fourteenth Amendment cured the ills of the Founder’s Constitution, replacing it with something completely new. No longer was the Constitution simply a geostrategic document, but one dedicated to liberty, equality, and preserving the rights of all persons. Reconstruction, in this way, displaced the old political community with a new one firmly committed to justice. This is America’s true legacy.

Roosevelt finds that adopting the new story can save us from the damnation of exclusive individualism and the complacency of compromise while providing the promise of an inclusive equality that is unmoored from the past, which allows us to herald in a brighter, more equal future with each generation. In the last century or so, hearkening to the Founding and the Declaration as a way forward for the nation has produced only compromise for the sake of preserving white supremacy. The story becomes one of slow, inevitable progress, and those who are on the outside looking in need only wait for the winds of change to blow again. Peace and conciliation, after all, is more valuable than turbulence and change. These principles can be tied to the Declaration, which, when applied to our Constitution, can have devastating effects, such as Dred Scott, Plessy, and Korematsu. Indeed racial resentment originating from the Founding can explain much of the lack of progress in the nation’s recent years. This, according to Roosevelt, is the what the standard story offers us: a story of redemption that gets us nowhere. But if we turn to the new story, we can realize that white supremacy and exclusivism are not our heritage. Instead, Reconstruction provides a story of overcoming the Founders in favor of equality and democracy—it was a revolution for true equality, for true freedom.

16 Id. at 155.
17 Id. at 160–67.
18 Id. at 173–79.
19 Id. at 133–47.
20 Id. at 117–23.
21 Id. at 195–98.
22 Id. at 196.
23 Id. at 208–09.
beauty of Reconstruction is that it teaches us we no longer need be moored to the past, not even the past of Reconstruction. After all, Reconstruction was not perfect—it left out women and, by many accounts, was not a success due to those who clung too much to the Founding and sought conciliation and peace over real change. In some ways, we can think of ourselves in a constant reconstruction—reconstructing society in a way that is evermore equal and free from the prejudices and racial hierarchies of the past. Those who oppose change must be convinced of their error or otherwise marginalized as traitors to the cause. We can thereby avoid the mistake of settling for redemption when we could instead reconstruct our way of living to embrace a more meaningful equality.

Roosevelt marshals significant evidence to support his claim in a persuasive way that requires careful consideration and a thorough response to rebut. Perhaps nothing short of a book response could truly grapple with all of Roosevelt’s cogent arguments. And this book review alone certainly cannot do the job. But that does not mean there is no alternative to Roosevelt’s position or that his is the correct one. I will endeavor to show through several points (some minor, some major) how one might think through these issues and understand the Declaration as it ought to be understood. The Declaration was a document dedicated to an eternal proposition: all men are created equal and are endowed with certain inalienable, natural rights. The Declaration’s principles lead to the proposition that is the duty of all governments to protect or otherwise not infringe on those rights, regardless of whether the rights-bearer is a citizen or not. Proceeding generations failed and succeeded in varying degrees to realize those principles, but their relative success did not change the full meaning of the principles. I ultimately disagree with Roosevelt’s take on the Declaration, but he provides an important critique. If Roosevelt’s work does nothing else, it provides the much-needed service of challenging the status quo; those who take up his challenge are sent back to first principles, causing them to search and to understand what those principles are and what they might mean for us for the past, present, and future. I argue that those who do can come to a deeper understanding of the “standard story” that makes

24 Id. at 209–13.
25 Id. at 211–17.
sense of America’s troubled past and—rather than promoting complacency as Roosevelt suggests—can pave the way for a brighter future.

III. A TALE OF TWO DECLARATIONS

Roosevelt boldly proclaims: “The real heirs of the signers of the Declaration of Independence are the southern secessionists.” But how could this be? Roosevelt’s method for understanding the Declaration is multifaceted, but at times obfuscates what may otherwise be clear from the text. At times he historicizes the Declaration and narrows its scope to the supposed interests of its drafter, Thomas Jefferson, and the Southern states that he represented. At other times he contextualizes the Declaration within the broader tradition of western political thought, outlining the intellectual history of its concepts and the intellectual milieu within which it was created. In this vein he mentions Hobbes, Locke, Rousseau, and others as providing the grounds for the Declaration’s philosophical foundation, though Hobbes’ theory fits best with Roosevelt’s understanding of the Declaration. But the principal take away is that, at the time of the text’s drafting, every colony permitted slavery. Any serious reading, according to Roosevelt, must be informed by that basic truth. With that context, it would be difficult to exclude as one of the Declaration’s aims the preservation of slavery and white supremacy. Such a document hardly stands for liberty and equality; it tainted our past and threatens to taint our future.

But there is another Declaration, one that fits the standard story but, I think, presents a clearer picture of what it means and how we could possibly understand our modern notions of liberty and equality as truly emanating from what that document stood for. For this interpretation I turn to one of my close mentors, Michael Zuckert, who masterfully elucidated the Declaration’s full meaning—its meaning within its context and its broader

26 Id. at 152.
27 See id. at 47. This point is significant inasmuch as the varying theories of states of nature espoused by social contractarians can produce notably different understandings of natural rights and the civil rights essential to securing natural rights in political society. For a more detailed analysis of how this might matter, see Bradley Rebeiro, Douglass’s Constitutional Citizenship, forthcoming 2023 GEO. J.L. & PUB. POL’Y (available upon request from author) [hereinafter Douglass’s Constitutional Citizenship]; Bradley Rebeiro, Natural Rights (Re)Construction: Frederick Douglass and Constitutional Abolitionism [Apr. 6, 2022] (unpublished Ph.D. dissertation, University of Notre Dame) [on file with author] [hereinafter Natural Rights (Re)Construction].
implications. Zuckert engaged in a close reading of the text, which revealed five basic principles: (1) equality, (2) government as artifact, (3) natural rights as the foundation and end of politics, (4) consent, and (5) the right of revolution.\(^\text{28}\)

It is perhaps serendipitous that Zuckert lists equality first, as equality is arguably the principle most suspect in Roosevelt’s Declaration—the Declaration might declare those within the community as equal, but outsiders are not. Zuckert has a very different telling. Not unlike Roosevelt, Zuckert acknowledges that the Declaration’s text is not entirely clear on what equality means. But a close reading of the text reveals that its structure “elucidates what the bare words leave obscure.”\(^\text{29}\) When speaking of humans, the text first speaks of human beings in their original state, “how human beings are when created—equal—and what they have from their Creator—inalienable rights.”\(^\text{30}\) The text then moves on to discuss the formation of government, namely why and how: government is formed to secure rights by the consent of the governed. Then it states that, should government go astray, “there is a right to alter or abolish it and a right to remake it.”\(^\text{31}\) These self-evident truths, Zuckert argues, “are not six separate points, they are inter-connected parts of one narrative.”\(^\text{32}\)

Equality means that, by nature, human beings are not governed—they are not subject to the rule of others. Government, therefore, is not natural and only possible if humans make it. All men, in this sense, are “created equal” because no one is “subordinated by nature or God to another.”\(^\text{33}\) The Declaration, as Roosevelt also recognizes, does not deny the possibility that inequalities exist among human beings, “but it does deny that any of these implies a right to rule.”\(^\text{34}\) This elucidates Jefferson’s quote: “the general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favor few booted and spurred, ready to ride them legitimately,

\(^{28}\) MICHAEL P. ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM 1, 21 (1994).

\(^{29}\) Id. at 23.

\(^{30}\) Id. at 23–24.

\(^{31}\) Id. at 9.

\(^{32}\) Id. at 9.

\(^{33}\) Id.

\(^{34}\) Id. (emphasis added); ROOSEVELT, supra note 4, at 42–47.
by the grace of god.”\textsuperscript{35} The real gravity of the Declaration and Jefferson’s understanding of it was quite revolutionary at the time, despite Roosevelt’s misgivings. Where much of the world presumed the propriety of “natural” rulers, the philosophy of the Declaration rejected this notion in favor of a world in which men might choose who rules and how they rule by “reflection and choice.”\textsuperscript{36} In this sense, where Roosevelt finds Massachusetts’s declaration of rights closer to how we might understand liberty and equality, Zuckert identifies the same as merely a clarification of the Declaration’s principles.\textsuperscript{37}

For brevity I will draw only two more important points from Zuckert’s Declaration that challenge Roosevelt’s narrative. First, Roosevelt makes much of the fact that a political society can do what it will so long as its citizens feel that their rights are protected.\textsuperscript{38} True, there is some sense of this in the Declaration: because government is ultimately a human construct, it is subject to human will. So long as it is based in popular sovereignty, we can set up whatever sort of government we like, which could lead to less-than-ideal arrangements, but also leave open the possibility of never-ending progress.\textsuperscript{39} But a finer point that Zuckert makes seems to fade into the background of Roosevelt’s Declaration: “if political life is understood as derived from God or nature, that suggests a limit to what can be done with it. It is what it is and what it should be. One must accept it with its limits; one must take a conservative attitude towards it.”\textsuperscript{40} Yes, political societies may act according to their citizens’ will, but the limits imposed on political


\textsuperscript{36} THE FEDERALIST NO. 1 (Alexander Hamilton); ZUCKERT, supra note 28, at 9.

\textsuperscript{37} ROOSEVELT, supra note 4, at 44; ZUCKERT, supra note 28, at 9.

\textsuperscript{38} See ROOSEVELT, supra note 4, at 35–52.

\textsuperscript{39} See ZUCKERT, supra note 28, at 10. Roosevelt makes much of the fact that a society can govern itself however it sees fit, whether that be a democracy, monarchy, or aristocracy, so long as it protects the rights of insiders. Though I am somewhat sympathetic to Roosevelt’s claim concerning what kind of regimes are permissible, there is some disagreement on this point among scholars. ZUCKERT, supra note 28 at 10, 163 (denoting the difference between theory and practice, which calls into question whether a non-democratic regime could adequately account for a political philosophy based on natural rights). Cf. THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM (2017) (arguing that a republic is the only legitimate form of government for a natural-rights-based regime).

\textsuperscript{40} ZUCKERT, supra note 28, at 25.
society are not what its citizens will, but what natural law requires. The other point is the nature of consent. Roosevelt relies heavily on the fact that the Declaration (and later the Constitution) was not a state of nature where there was no government—the colonies already existed in a relationship with the Crown and later the states already existed when crafting the Constitution. Therefore, the sort of equality and consent required in nature was not required at those two moments in time. But the sort of consent discussed in the Declaration (and much of state of nature theory, for that matter) “refers to a kind of moral account of the origin, or, perhaps better put, a rational reconstruction of the origin.” It is not a theory of the past or a real description of present or future phenomena. Rather, “it presents a way to reconceive the nature of politics and the relationship of citizens to it.”

Why might these two points matter? It relates to the Declaration’s relation to slavery. It is a difficult question to answer, to be sure. Roosevelt is right that one cannot simply ignore the existence of slavery in telling the story. But it is equally a mistake to conclude that the Declaration is perfectly compatible with slavery, let alone that it may have been specifically intended to preserve the institution. In the next section I will discuss how antebellum anti-slavery advocates and abolitionists understood this, but for now it will suffice to discuss the Declaration’s philosophy rather than its immediate effects. The nature of inalienable rights, artificial government, and consent all point to the incompatibility of slavery with the Declaration. Consent, according to the Declaration, “must occur as often as human beings come to take up a place within a polity.” The clearest indicator of this is human beings’ ever-present right to revolution. As for inalienable rights, the Declaration is clear: liberty, among other things, is inalienable. One simply cannot consent to alienate liberty completely. Put differently, “no individual can voluntarily give it all up and become a slave; no people can voluntarily give it all up and become subjected to an absolute king.” This was why the language of slavery was key for revolutionaries in their cause—the same

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42 See ROOSEVELT, supra note 4, at 42–48.
43 Id. at 25.
44 Id.
45 Id. at 110.
46 Id.
principle that would prevent a man from being a slave was the principle that prevented him from being subject to an absolute king. The reason Roosevelt denies this proposition partly stems from his understanding of the state of nature, which mirrors much more a Hobbesian framework than a Lockean one.\textsuperscript{47} But there are real differences between the two, among the most important being that Hobbes’ state of nature is “nasty, brutish, and short,” and devoid of justice, as the natural law has no force whatsoever. Such a state of nature permits a regime that would allow individuals to alienate essentially everything except for one’s life. A Lockean state of nature, on the other hand, has more limits and the natural law, to an extent, has more force. A government emanating from such circumstances is, as mentioned earlier, more limited and conservative in nature. While Roosevelt is certainly correct that the Declaration does not assign a political community any duty to prevent the enslavement of a human being in another community, it does not provide any moral justification for human beings to enslave others in any community. Every individual has an inalienable right to liberty. The Declaration, in this sense, counterintuitively presents a constant indictment on the early American regime. This is important for reasons that come to light in the antebellum anti-slavery movement.

IV. THE REPUBLICAN HEROES: NATURAL INHERITORS OR ENEMIES OF THE FOUNDERS?

Not only is Zuckert’s story of the Declaration internally cogent, it maps on better to how the predecessors of Roosevelt’s heroes understood the story. Recall that Roosevelt beckons us to eschew the Founding Fathers and Framers of the Constitution in favor of the Framers of the Fourteenth Amendment—the Republicans—as our true legacy. Republicans, in Roosevelt’s account, inherited a vision of the future of America not from the Declaration or the Founders, but from a new wave of activists led primarily by black advocates seeking to be included within the scope of “We the People.”

To an extent Roosevelt is correct, but still a refined version of the standard story might better capture that phenomenon than a completely new story. Blacks in the antebellum period sought inclusion into the political

\textsuperscript{47} THOMAS HOBBES, LEVIATHAN (C.B. MacPherson ed., 1968) (1651); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 121 (Lee Ward ed., 2016) [hereinafter ST].
community, a movement that precipitated the first great civil rights movement in American history. This largely untold story needs to be highlighted more in the standard narrative, and Roosevelt’s book helps greatly in that endeavor. But even as he highlights some of the more important aspects of the antebellum American politics, Roosevelt unnecessarily minimizes the role of the Declaration and, at some points, seems to reinterpret how those activists understood the Declaration and America’s founding principles in a way that many of them might not recognize. This is partly the result of focusing on certain political actors to the exclusion of others, but a fair amount may have resulted from Roosevelt’s alternative version of the Declaration being applied to antebellum actors, both pro- and anti-slavery advocates alike, who likely did not agree with his version.

To be sure, when we engage in historical analysis it is difficult to choose what actors to focus on. Roosevelt chose to spend a great deal of time on Abraham Lincoln, which is quite understandable and defensible. Roosevelt highlights many important aspects of Lincoln’s thought and, I believe, properly attributes an abolitionist mindset to a figure that some today might too readily dismiss as no friend to the abolitionist cause. But even so, Lincoln is a notoriously difficult person to figure out. He was, after all, a political figure—one who acted with a depth of prudence not often seen before him and rarely, if ever, replicated after him. That prudence often made his theory hard to pinpoint. Yes, he was the figurehead of the Republican party and ushered in a new era of freedom and equality unprecedented in US history. But he was not the mastermind behind the constitutional jurisprudence of the Republican Party.

Though one cannot attribute the entire Republican platform to any one individual, it would be hard to locate many who had more influence on the

49 ROOSEVELT, supra note 4, at 150–60; Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 388 (Roy P. Basler ed., 1953). Though Lincoln may have been secretly abolitionist, this does not solidify the notion that he was not racist. More work, in that regard, would need to be done to understand Lincoln’s real position on race. For now, it suffices to say that some blacks, such as Frederick Douglass, were concerned about Lincoln because Lincoln was, at the very least, open to the idea of colonization and at times alluded to blacks as the cause of the Civil War. See Frederick Douglass, Oration in Memory of Abraham Lincoln (April 1876), in 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 309, 313 [Philip S. Foner ed., 1975] [hereinafter LW].
I turn to Chase because, unlike Lincoln, we have writings that take deep dives not only into the evils of slavery, but the specific nature of the Constitution’s relation to it and the role, if any, that the Declaration’s principles have in understanding the Constitution.

In bringing Chase to bear on the legacy of the Republican party and how it understood the Constitution, I will keep my remarks to two brief points. First, the Constitution mirrored the Declaration’s understanding of natural rights and self-governance. A political society (such as a state) could govern itself to the exclusion of others, but it could not justify the deprivation of one’s natural rights. This sentiment was captured well in Sean Wilentz’s book, *No Property in Man.* Though the Constitution did not seek to interfere with the domestic institutions of a state, the Constitution did not legitimize slavery for purposes of federal law. If adhered to (which the Union failed to do in its early history), that proposition had several implications for US politics. It would ensure that the North could not invoke the federal government to end slavery in any of the original states. To that end, the Constitution provided some immediate and long-term protections to ensure slavery’s survival. For instance, the three-fifths clause gave the South the power it needed to dictate federal policy for most of the first 70 years of the nation’s history—this is what Chase and others referred to as the “Slave Power.” The Constitution also protected the slave trade until 1808 and, even then, left open the question of the slave trade in DC.

Second, the Constitution granted *no power* to the federal government to expand slavery into the territories. In fact, Republicans understood the Constitution to expressly ban slavery in the territories, citing as evidence the Northwest Ordinance of 1787 and the Fifth Amendment. The Framers’ original policy concerning slavery in the territories and the bill of rights led

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52 Salmon P. Chase & Charles Dexter Cleveland, *Philadelphia and Cincinnati Liberty Addresses* 23–41 (1845) [hereinafter Liberty Addresses].
53 That final point might anti-slavery advocates may have unanticipated, but it would only be one of many such blunders by the Framers who sought to stave off the influence of slavery in the Union moving forward.
54 Roosevelt argues that the “bill of rights” was not understood as such until much later, but Kurt Lash has produced evidence suggesting otherwise. Lash, supra note 12, at 1445–50.
to the conclusion that no federal territory, let alone new state, could rightfully permit slavery. In this regard, the Missouri Compromise of 1820 and the 1850 Compromise were unconstitutional, not because it prohibited slave owners from bringing the enslaved into new territories as Taney suggested, but because slavery could never be permitted there.

That basic principle also led Chase to conclude that the Fugitive Slave Act of 1793 and (by the same reasoning) the Fugitive Slave Act of 1850 were unconstitutional. Chase used a strict construction to conclude that Article IV Section 2 of the Constitution did not grant Congress power to pass the Fugitive Slave Acts. While the same Article granted Congress power to ensure the Full Faith and Credit Clause, to admit new states, and to regulate the territories, it did not grant Congress power over the Privileges and Immunities Clause, nor the Fugitive Slave Clause. Chase found this omission significant, and there is some historical evidence that he was right to point it out. For Chase, the Fugitive Slave Clause amounted to a comity provision between the several states—it was a compromise necessary for Union, but one which isolated the federal government from its execution. The Framers left the problem of fugitive slaves to the several states to resolve without the federal government’s assistance. This move would ensure that the federal government, even as it tolerated slavery in the original states, would not be made into a vessel of power to ensure slavery’s perpetuation throughout the Union. Chase argued that the reason this distinction, though fine, was crucial to understanding the Constitution was because of natural rights. The federal government could not force each state to ensure natural rights (a fundamental flaw of the original Constitution), but it had an obligation not to be an active participant in the deprivation of those rights. Though the Framers failed miserably even in that small objective (something

56 See Brief for Defendant, Jones v. Van Zandt, 46 U.S. 215 (1847) (arguing that the Fugitive Slave Act was unconstitutional because “the provisions of the act are repugnant to several positive provisions of the Constitution” and because “the Constitution confers on Congress no power to legislate at all upon the subject.”).
57 See id. at 100-01 (asserting that a strict construction of Article IV Section 2 renders the Fugitive Slave Act unconstitutional).
58 WILENTZ, supra note 51, at 226.
Chase and others did not hesitate to point out, they at least provided the tools for those who would come after to achieve what the Framers could not.

It is inescapable that an anti-slavery understanding of the Constitution, crafted through the lens of the Declaration, was integral to the anti-slavery movement. This especially was the case for blacks that, in many respects, served as both the catalyst and principal drivers of the movement which led to a massive shift in American politics that culminated in the country’s first civil rights movement.

Perhaps no black political actor was more influential at that time than Frederick Douglass. As I have written about extensively, Douglass understood the Constitution to be fundamentally anti-slavery in nature. But Douglass did not always think this way. Early in his abolitionist days, Douglass took a hard Garrisonian approach to the Constitution, which saw the Constitution as a “covenant with death, an agreement with hell.”

Douglass changed his view of the Constitution to an anti-slavery position only after a careful study of “not only the just and proper rules of legal interpretation, but the origin, design, nature, rights, powers, and duties of civil governments, and also the relations which human beings sustain to it.”

The proper way to understand the Constitution was to interpret it according to its original understanding through a natural-rights lens. Douglass’s method shares many qualities with modern-day original public meaning originalism, though his unique view of construction to some degree sets him apart from how originalists today operate.

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59 See CHASE & CLEVELAND, Liberty Addresses, supra note 52, at 17 (arguing that legislation establishing slavery in Washington D.C. violated the Constitution).
60 MASUR, supra note 48, at 310–11. Roosevelt astutely notes as well that blacks played an indispensable role in the anti-slavery movement, even if he elected not to emphasize the critical role the Declaration (let alone blacks’ understanding of the Declaration that aligned closely with the standard story) played in the movement. See Roosevelt, supra note 4, at 104–07.
62 See Frederick Douglass, American Slavery (October 22, 1847), in LW, supra note 49, at 269, 274–75.
63 FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS 186 (1892) (Dover 2003).
64 Rebeiro, Original Originalists, supra note 61, at 951.
65 Some might even say that Douglass’s unique method does not separate him as much as it severs him completely from anything cognizable as originalism. I disagree, keeping him within the boundaries of originalism, for reasons I explain in my article. Id. at 944–49.
Roosevelt at times discusses Douglass’s constitutional thinking, but, taking a perspective similar to Paul Finkelman, speculates that Douglass did not truly change his mind concerning the Constitution or, alternatively, even if he did it was purely for political reasons. I have provided evidence that the more likely explanation is that Douglass did indeed change his mind concerning the Constitution. The most significant indicators being the gradual change in his theory over time and the uniqueness of his brand of anti-slavery constitutionalism. Some mistakenly believe Douglass merely parroted the anti-slavery thought of others, including Gerrit Smith, William Goodell, and Lysander Spooner. Though they certainly influenced his constitutional thinking, Douglass’s thought was uniquely his own as he improved upon those who came before him.

Douglass’s improvements led him to advance a more egalitarian form of constitutionalism, even more than Republicans. Douglass believed that the Constitution, properly understood, would protect the natural rights of all inhabitants in the US, not just those who were properly under federal jurisdiction, as antebellum Republican theory suggested. This was because “We the People” carried the full sense of its original meaning. Even slaves, who were “other persons,” were a part of that “People” contemplated under the Constitution. And Douglass understood the Fifth Amendment, much like Republicans, to be a nod to the natural rights articulated in the Declaration. Thus, with time and proper execution, the Constitution would eradicate slavery everywhere in the Union.

But the reason Douglass arrived at this more radical view of an anti-slavery Constitution was in part because he recognized a deficiency in the philosophy of the Declaration similar to what Roosevelt identifies: a distinct lack of positive duties. Though the political philosophy behind the Declaration does not justify slavery in the way Roosevelt argues, it nevertheless does not impose a duty upon individuals to protect others from rights deprivations. The Declaration’s state of nature mirrors that of Locke’s,

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66 Paul Finkelman, Frederick Douglass’s Constitution: From Garrisonian Abolitionist to Lincoln Republican, 80 Mo. L. Rev. 15 (2016) (“[B]y the 1850s, Douglass was less interested in theoretical consistency than in practical results.”).
67 Rebeiro, Original Originalists, supra note 61, at 917-28.
68 Douglass did not believe, even with his natural-rights lens guiding him, that the Constitution contemplated eradicating slavery immediately upon ratification. Rather, he argued that the Constitution’s structure was geared specifically to end slavery over time. See Rebeiro, Natural Rights (Re)Construction, supra note 27.
which finds human beings to be fundamentally individual, atomistic, and driven by self-interest.69 While the natural law carries duties that require these individuals to not infringe the rights of others (including enslaving one’s fellowman!), it says very little about what duties an individual has of preventing someone else from infringing the rights of another. Each person may have the executive power to prevent personal injustices, but there is no requirement to exercise that power on the behalf of others. Douglass recognized this subtle distinction and proposed a new state of nature that found human beings as fundamentally social, not atomistic.70 Everyone was connected to each other in a meaningful way that imposed certain duties to not only refrain from infringing on the rights of others, but actively protect the rights of others.

Focusing on this distinction, it becomes clearer (at least in part) why Douglass’s Constitution would lead to the eradication of slavery while the Republican party’s motto remained “Slavery Local—Freedom National.”71 For Republicans, the federal government had a solemn duty to protect the natural rights of all inhabitants within the federal government’s jurisdiction. There was no duty (let alone power) to protect the rights of people that were within the jurisdiction of local state governments. For Douglass, on the other hand, that natural law duty extended to protecting others, and the Constitution reflected that duty—it endowed the federal government with power to protect the rights of all inhabitants within US borders.72

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69 LOCKE, ST, supra note 47, at §§ 4–6, 25–34; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). In the state of nature, all men are created equal and live in a state of perfect freedom where no one person has a right to rule over another. In fact, there is no natural political community among individuals. Only the laws of nature, which largely serve to dictate the legitimate acquisition of property, govern. For a critique of enlightenment thought, see Patrick J. Deneen, A House Divided: Peter Lauder’s America Rightly Understood, 37 PERSPECTIVES ON POL. SCI. 147, 147 (2010) (expressing deep misgivings about the implications of Lockean individualism, arguing that it upholds individual autonomy as “the norm and standard of human good.”). But see Michael Zuckert, On Constitutional Welfare Liberalism: An Old-Liberal Perspective, 24 SOC. PHIL. & POL’Y, 266, 267 (2007) (arguing that that, though there are many versions of liberalism that have individualistic underpinnings, it would be erroneous to associate every iteration with Locke’s liberalism). Thomas West contests this point, arguing that protecting natural rights requires much more than simply allowing each person to pursue individual interests as long as they do not harm others. See WEST, supra note 39.

70 For a deeper exploration of how this different state of nature worked, see Rebeiro, Douglas’s Constitutional Citizenship, supra note 27.


72 Rebeiro, Original Originalists, supra note 61, at 965–75.
Regardless of the nature of duties emanating from the Declaration, the consistent claim was that slavery was antithetical to the Declaration and the Constitution—a monument to the Declaration—stood for the eventual eradication of slavery. One thing Douglass, Chase, and Lincoln could agree on was this: the Constitution was meant to put slavery on the ultimate path of extinction, that is, before it was coopted by the Slave Power.73

And Southerners understood this as well. While there were some that tried to reread the Declaration in the same way Roosevelt does, John C. Calhoun and others understood the dangers of the ideas espoused in the Declaration and sought to distance the Union from its most basic principles. One infamous example of a pro-slavery reading of the Declaration’s effect on the Constitution was Roger Taney’s *Dred Scott* opinion. Using an argument that invoked some of the language of the Declaration, Taney argued that the Founders never intended to include blacks in their grand proclamations and the Constitution solidified that intention. Slavery functioned as something close to a natural, inalienable right; blacks could not be citizens of the United States; and, to top it all off, blacks had no rights the white man was bound to respect.74 To be fair, Roosevelt essentially concedes that *Dred Scott*, even within his own vision of the Declaration, was wrongly decided.75 Nevertheless, for Roosevelt *Dred Scott* serves as a sort of indictment on the Declaration and the Constitution. The point is that Taney’s reasoning was close enough that it proves the point that the Declaration and the Constitution, taken seriously, will inexorably strengthen white hegemony at the expense of blacks by protecting slavery and denying blacks equal rights.

But some of the more sophisticated southern minds rejected the Declaration, particularly the natural rights doctrine it espoused. Calhoun, for instance, understood the danger of the Declaration as applied to the Constitution in this sense. Calhoun argued that the Declaration, taken

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73 Abraham Lincoln, Address at Cooper Institute, New York City (Feb. 27, 1860), in 3 The Collected Works of Abraham Lincoln, supra note 49, at 522; Chase & Cleveland, Liberty Addresses, supra note 52, at 23–41; Frederick Douglass, The Kansas–Nebraska Bill (November 1854), in 2 LW, supra note 49, at 316, 323 (“I understand the first purpose of the slave power to be the suppression of all anti-slavery discussion. Next, the extension of slavery over all the territories. Next, the nationalizing of slavery, and to make slavery respected in every State in the Union.”)


75 See Roosevelt, supra note 4, at 114–21.
literally and in its fullest sense, was wrong. Calhoun argued that, whether one speaks of “men born free and equal” or “created equal” (a distinction Roosevelt finds significant), it was manifestly untrue that human beings were born or created free, much less equal. What was more, such a proposition was irrelevant to the real justification for seeking independence: “Breach of our chartered privileges, and lawless encroachment on our acknowledged and well-established rights by the parent country, were the real causes, and of themselves sufficient, without resorting to any other, to justify the step.” It was a breach, in other words, of positive rights that emanated from positive laws that justified revolution. Government was not made for protecting natural rights, but for guarding liberty of the powerful. Rather than government by consent, liberty is to be taken by force by the best, not acknowledged and granted based on some abstract notion of natural right, let alone equality. It should come as no surprise, then, that rebel state constitutions, while adopting the Declaration’s rhetoric around the right to revolution, definitively rejected the Declaration’s principles concerning human beings being created equal and their status as equal bearers of natural rights.

76 John C. Calhoun, Senate Speech on the Oregon Bill (June 27, 1848), in UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 539, 566 (Ross M. Lence ed., 1992). Roosevelt references this speech but skips over the most significant insight from it: that the southern position must reject the notion of not only equality, but also the existence of natural rights. See ROOSEVELT, supra note 4, at 51. The rights Calhoun speaks of are positive in nature, so in a sense, can map on to natural rights theory inasmuch as natural rights theory permits some distinction between insiders and outsiders and the rights they carry (a proposition, I imagine, that is not all that controversial: few would argue, for instance, that citizens of one state should be able to vote in another state without having first established residency in that new state). But it is the omission of the possibility of natural rights, not necessarily the reliance on positive rights, that leads to a pro-slavery Constitution.

77 Id. at 565–66. “Instead, then, of liberty and equality being born with man; instead of all men and all classes and descriptions being equally entitled to them, they are high prizes to be won, and are in their most perfect state, not only the highest reward that can be bestowed on our race, but the most difficult to be won and when won, the most difficult to be preserved.” Id. at 569. At times Roosevelt seems to embrace this philosophy, imagining that the Republicans did something similar—changing the Constitution through force in, though in the name of liberty and equality rather than oppression and white supremacy. See ROOSEVELT, supra note 4, at 173–79. Perhaps embracing a philosophy akin to will to power is all that one is left with when rejecting the possibility of natural right. See FRIEDRICH NIETZSCHE, THE WILL TO POWER (Walter Kaufmann trans., 1968).

78 ROOSEVELT, supra note 4, at 107. See, e.g., Constitution of Georgia (1861), in WALTER MCERLEATH, A TREATISE ON THE CONSTITUTION OF GEORGIA 281 (1912); Constitution of the State of South Carolina (1861), in ORDINANCES AND CONSTITUTION OF THE STATE OF SOUTH
V. RECONSTRUCTION’S LEGACY AND REFLECTING ON OUR PATH FORWARD

For Roosevelt, Reconstruction was much less a reconstruction than a revolution. The Civil War was not a war of the North v. the South, the Union v. the Confederacy. Rather, the true story of the Civil War was of a rebellion v. a revolution. The southern states rebelled to preserve the spirit of the original Constitution; those that remained had begun a revolution. According to Roosevelt, Lincoln said as much in his Gettysburg Address. He did not, as the Constitution did, address the United States as a plural noun, which would pay homage to the distinct character and sovereignty of the several states. The Union, in that sense, was only that—a collection of independent sovereign states. Instead, Lincoln referred to “a new nation,” singular, “conceived in liberty, and dedicated to the proposition that all men are created equal.”

And just as that new nation could only be secured through war, so too Reconstruction could only be secured through the exercise of power. Roosevelt argues that the Reconstruction Amendments (especially the Fourteenth and Fifteenth) did not abide the Article V amendment process; rather, the Reconstruction Amendments were introduced and adopted by

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\footnote{Carolina 37 (1861); Constitution of the State of Texas (1861), \textit{in} John Sayles, \textit{The Constitutions of the State of Texas} 226 (4th ed., 1893) ("All \textit{freemen}, when they form a social compact, have equal rights") (emphasis added); Constitution of the State of Alabama, \textit{in} Wade Keyes \textit{et al., The Code of Alabama} 1876 71 (1877) ("All \textit{freemen}, when they form a social compact, have equal rights") (emphasis added); Constitution or Form of Government for the People of Florida, As Revised and Amended, \textit{in} The Compiled General Laws of Florida 4901 (Harry B. Skillman, comp., 1927) ("all \textit{freemen}, when they form a social compact, are equal, and have certain inherent and indefeasible rights") (emphasis added); Constitution of the State of Arkansas (1861), \textit{in} U.M. Rose, \textit{The Constitution of the State of Arkansas} 211, 212 (1891) ("all \textit{free white men}, when they form a social compact, are equal, and have certain inherent and indefeasible rights") (emphasis added).}
\footnote{See Roosevelt, \textit{supra} note 4, at 157.}
\footnote{This resonates with the compact theory of the Constitution—the theory that the Constitution was ratified not by the people, but by the states. Southerners especially championed a compact theory of the Constitution for it carried with it a robust notion of states’ rights. But Chief Justice Marshall, Abraham Lincoln, and many others rejected this theory of the original Constitution. It was not ratified by the states, but the people of those states. The states were merely a conduit of the \textit{people’s} exercise of sovereignty. In that sense, states may have some sense of “rights,” but nothing nearly as robust as a compact theory of the Constitution would demand. See Sotirios A. Barber, \textit{The Fallacy of States’ Rights} (2013).}
\footnote{Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), \textit{in} 7 The Collected Works of Abraham Lincoln, \textit{supra} note 49, at 23.}
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the bayonet. There is certainly some truth to this. The Republicans played a lot of political hard ball, expelling former confederate officers from Congress, using the Reconstruction Acts to set up military districts, abolishing southern state constitutions, making adoption of constitutional amendments a condition of reentry into the Union, and, perhaps most controversially at the time, permitting blacks to vote in former rebel states. One might fairly conclude that securing liberty and justice and finally securing a firm place in the political community for all persons could be done only through exercising power over those who stood in the way of democracy’s march forward. This will mean that someone is left on the outside looking in, but at times setting aside the principle of consent is a necessary cost to the overall benefit of securing more of democracy’s promises. Reconstruction was not perfect, and we may not be perfect, but the legacy of Reconstruction teaches us that we can take on the true spirit of change, jettisoning the past in favor of a brighter future.

Yet, there is another way to understand the past and its relation to our future. One point I take from a wonderful insight gained from Roosevelt’s work, another from a challenge to his vision of the Declaration. First, minorities, and particularly blacks, understandably can have a hard time stomaching the standard story. It presumably is filled with inconsistencies, hypocrisy, and, if Roosevelt is right, has served only to exacerbate the inequalities and disrespect blacks have been subjected to over the course of American history. But, properly understood, the principles of the Declaration are liberating not only for blacks, but also whites, a message that can unify all not simply for the sake of unity but for the sake of realizing the highest sense of our ideals.

For this point I turn back to Frederick Douglass, but also add Martin Luther King, Jr., to the equation. As mentioned earlier, Douglass started out as a fierce opponent of the Founders and the Constitution. There was very little value to be found in the Founding, and much less in the Constitution.

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82 ROOSEVELT, supra note 4, at 173 – 79.
84 See Roosevelt, supra note 4, at 163, 211.
85 Id. at 209–13.
86 ROOSEVELT, supra note 4, at 189–200.
87 See id.
But after a careful study of law, philosophy, and legal rules of interpretation, Douglass became a fierce defender of the Constitution, and lauded the Founders. He did not laud them or all their actions blindly—Douglass mainly praised the Framers for those eternal principles adopted in the Declaration of Independence. It was a proper understanding of those principles (albeit slightly improved through a revamped theory of the state of nature) that promised a new America that was not just possible, but inevitable. True, it required future generations to take up the mantle of justice and advance it forward, but they could always invoke the authority of the past as they forged a new path forward in the future. Reading Roosevelt’s work suggests that Douglass was not an anomaly in this respect. King also had a similar experience. When in high school, King had a similar tone to early Douglass, pointing out the dark nature of the Founding and the Constitution. Similar to Roosevelt, King looked to Reconstruction for the promise of a brighter future for blacks. But King noticeably shifts gears in his speech “I Have a Dream” and “Letter from Birmingham Jail,” where he invokes the Declaration and natural law as a firm basis for the claims blacks have upon the nation. Why this change? Roosevelt approaches King in a similar way to how he approached Douglass—King made this shift for practical reasons. King must have realized that invoking Reconstruction was not unifying, but divisive and possibly counterproductive to the movement. But I think a more plausible explanation indeed mirrors how we can understand Douglass, just not in the way Roosevelt might prefer. King’s change in position came sometime after he had finished his undergraduate work at Morehouse College and finished his graduate studies in divinity school. Put differently, King, after a careful study of philosophy, law, and similar subjects may have come to realize for himself that the true legacy of the Declaration was also the legacy of the Constitution and of Reconstruction. Realizing the equality of all human beings and securing the inalienable rights

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88 Douglass, even after his change of opinion, was quite critical, for instance, of the short-sightedness of the Framers. Even if they pointed the nation in the right direction, they did so poorly.
89 See id. at 128–29.
91 See ROOSEVELT, supra note 4, at 129.
of life, liberty, and pursuit of happiness is and always was the true nature of the American project.

For the second, and final point I will make, I turn back to Michael Zuckert and his reading of the Declaration. If one understands the Declaration as Zuckert does, that its most basic premise is the idea that all human beings have natural rights and the only means of government is through consent, then Reconstruction cannot properly be seen as a revolution. Rather, Reconstruction and the amendments that resulted from it should be seen as “completing the Constitution.”92 Here again, the plain language evinces a strong connection with the Declaration, the ideas it espouses, and how Republicans believed the Declaration influenced the Constitution. What was once implicit in the Constitution now became explicit—all persons born with US borders under its jurisdiction were citizens and entitled to certain privileges or immunities associated with that citizenship. And all persons, whether citizens or not, were guaranteed basic security in their natural rights, namely life, liberty, and property.

This is what Lincoln meant in his Gettysburg Address—that “new nation” conceived was conceived in 1776, and the heavy mantle containing the Declaration’s promises is passed on to each generation to not only ensure its survival but also its flourishing. This is what it means to commit to the idea of a sovereign, rights-bearing individual. Government cannot be legitimated through force or power, but only through consent. Some generations answer the call, even if imperfectly (such as the Republicans of Reconstruction), and some reject it (such as the hegemonic Slave Power between 1820 and 1850). As Lincoln put it: “Slavery is founded in the selfishness of man’s nature—opposition to it in his love of justice. These principles are an eternal antagonism . . . repeal all compromises—repeal the Declaration of Independence—repeal all past history, you still cannot repeal human nature.”93 The struggle between right and wrong (for Lincoln’s generation, the struggle manifested itself most plainly in the problem of slavery) is ever-present. Nevertheless, the project remains the same, and it remains unfinished. Invoking a proper understanding of the standard story


need not leave us stranded as Roosevelt suggests, nor does it inexorably require us to sacrifice justice for unity (though prudence, at times, may require that from even the greatest fighters for justice\(^94\)). It has the power of helping those who have grown accustomed to infringing on the rights of others to see that advancing justice is a part of their story as well, and that the story is necessarily unfinished. And those who have not yet seen the promises of the Declaration in their own life can find some confidence for the future.

Douglass always spoke of a rational hope in this sense. The story of America has much disappointment, but it also carries much triumph—triumphs, like Reconstruction, that often begin with a simple but powerful invocation to the Declaration and the promises it offers. Looking upon the ruin of a failed Reconstruction, a time of unprecedented change and advancement of civil rights, one might expect civil rights advocates to be disheartened and to question whether the American project was a mistake from the start. But not Douglass. He stated: “The sky of the American Negro is dark, but not rayless; it is stormy, but not cheerless.”\(^95\) So long as there were those willing to take up the mantle, one could see a path to realizing the promises of the Declaration.


\(^95\) Frederick Douglass, The United States Cannot Remain Half-Slave and Half-Free (April 1883), in 4 LW, supra note 49, at 354.