A TALE OF TWO AMERICAS

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I appreciate Professor Rebeiro’s thoughtful and generous review, and also the opportunity to respond. The Nation that Never Was makes several different claims. They are of different types: some are historical claims about how certain actors thought or understood certain documents; some are philosophical claims about what the implications of a particular theory are. Some are normative or predictive claims, about what would help us move forward as a nation. And sometimes claims contain elements of more than one of these categories.

I am more confident about some of these claims than others. For some questions I do not think it makes sense to say that there is a single true answer: history often comes down to interpretation. For others I do not think truth is even the right criterion—creating a national story, for instance, mixes art with history and is probably closest to policy choice. And I’m sure there is more to learn about all of them. In this response, I will try to set out the main claims, to clarify what type of a claim each is, and to explain why I find them compelling.

I. THE 1776 DECLARATION

One claim—perhaps the foundational one—is that the Declaration of Independence was not generally understood in 1776 the way we understand it today. In particular, it was not understood that way by Thomas Jefferson and the Continental Congress. (I will refer to their understanding as the 1776 Declaration.) This is basically a historical claim. The evidence it relies on is primarily a consideration of the historical context of 1776, both political and intellectual. Given what Jefferson and the Congress were trying to achieve, what would it have made sense for them to say? How would an educated person in 1776 have understood certain phrases in the Declaration? What

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light is shed on those phrases by a consideration of other contemporaneous documents? What understanding of the Declaration makes it internally coherent and fits with other actions of the people who wrote and signed it?

If we ask these questions, the 1776 Declaration emerges as a carefully crafted argument of political theory—one that does exactly what it needs to do, and quite deliberately nothing more. First, what were Jefferson and the Congress trying to do? The Declaration is supposed to do two things—to announce that the colonies are now independent states, and to show that they are justified in assuming that station. If that is the case, the Declaration must give readers a theoretical argument about when political authority can be rejected—when independence is justified—and a set of facts showing that the colonists’ situation fit that theory.

It is very easy to read the Declaration as doing exactly that. The theory is contained in the preamble. The Declaration first sets out to explain where legitimate political authority comes from. Enlightenment social contract theory, the dominant political philosophy of the 18th century and one with which Jefferson and his contemporaries were familiar, starts by imagining the state of nature: a world with no government and no laws. In such a world, no one has an obligation to obey anyone else. No one, for instance, can claim to be chosen by God to rule over others: there is no divine right of kings. If people just came into being in the state of nature—if they were created—they would all be equal in authority. All men are created equal.

In the state of nature, people have their natural rights—life, liberty, and perhaps property, although enlightenment social contract theorists differed on this. They are endowed by their creator with certain unalienable rights, including life, liberty and the pursuit of happiness. But their rights are not secure, because other individuals may violate them. So people leave the state of nature—they form a society, and a government, and they consent to subject themselves to the authority of that government as a means of preserving their rights. To secure these rights, governments are instituted among Men, deriving their just powers from the consent of the governed. Governments remain legitimate as long as they protect the natural rights of the people who created them. But if they go against that purpose—if they violate those rights in a

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1 As Locke put it, “Men [are] by nature, all free, equal, and independent.” JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 95 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).
way that suggests an intent to destroy rather than protect—their authority is no longer legitimate and people have a right to reject the old government and form a new one.\(^2\) When a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

That is the theory; what remains to show that the colonists face such circumstances. That is what the end of the Preamble alleges, and what the charges that follow are intended to show. Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

To anyone who had read Locke, as Jefferson and his contemporaries had, this argument would be very familiar. Locke’s First Treatise on government is an extended rebuttal of the divine right of kings, focusing on Sir Robert Filmer’s Patriarcha. (Jefferson read Filmer, too.\(^3\) His Second Treatise gives the same argument I have reconstructed above, often in almost the same words. (Locke’s “long train of Abuses, Prevarications, and Artifices, all tending the same way,”\(^4\) bears a striking resemblance to Jefferson’s “long train of abuses and usurpations, pursuing invariably the same object.”) It would be familiar likewise from other similar documents, perhaps most notably the Virginia Declaration of Rights.

The Virginia Declaration begins by declaring that “all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the

\(^2\) A slight complication arises here because one strand of social contract theory—that of Hobbes, as distinguished from Locke—does not recognize a right of revolution. Hobbes started with a similar account of natural rights but held that people surrendered them irrevocably to the sovereign in exchange for protection. It is to endorse Locke, rather than Hobbes, that Jefferson describes natural rights as “inalienable”—they cannot be given away, even voluntarily.


\(^4\) LOCKE, supra note 1, at § 225.
means of acquiring and possessing property, and pursuing and obtaining
happiness and safety.”5 It goes on to note that “government is, or ought to
be, instituted for the common benefit, protection, and security of the people,
nation, or community . . . [and] when any government shall be found
inadequate or contrary to these purposes, a majority of the community has
an indubitable, inalienable, and indefeasible right to reform, alter, or abolish
it . . . .” That is exactly the argument of the Declaration.

The most straightforward reading of the Declaration for an educated
person in 1776, then, would be that it follows widely accepted principles of
enlightenment social contract theory. If it is read that way, it contains an
argument that the colonies are justified in declaring their independence,
which we would certainly expect. It does not contain other things that we
now associate with it. It does not, in particular, contain an ideal that the
government should treat all people equally, or an anti-slavery principle. (This
is a philosophical claim, about the consequences of the theory I have drawn
from the Declaration.) More precisely, it does not contain a principle that it
is wrong to enslave outsiders, people who are not members of the political
community. Enslaving insiders, the people who form the society, is wrong—
that is exactly what the Declaration charges that King George is attempting
to do, and that is why rebellion is justified. Whether a government must
respect the natural rights of outsiders is a different question, and one the
Declaration simply does not address.

At least, that question is not addressed by the argument I have
reconstructed, which is the argument Jefferson plainly intended. Is it possible
that Jefferson also thought he was writing a new broad moral principle that
in civil society (not the state of nature) government should treat all people
(not all citizens) equally (not just protect their natural rights) and thereby
implying that slavery was wrong? Is it possible that the Continental Congress
read it that way?

Almost certainly not, for several reasons. First, Jefferson himself said he
wasn’t doing that. His goal, he wrote, was “[n]ot to find out new principles,
or new arguments, never before thought of, not merely to say things which
had never been said before; but to place before mankind the common sense

docs/virginia-declaration-of-rights [https://perma.cc/U7U5-ZS5C].
of the subject.”

Second, if Jefferson had wanted to write such a principle, he would have said something different. He would have said that people were born equal, rather than created equal, because the word “born” suggests that the document describes actual people in the real world rather than hypothetical ones in an enlightenment thought experiment. He would have said that they remain equal, to make clear that his principles applied to societies where governments had been formed, not just the state of nature. He would have written something like this: “Men are born and remain free and equal in rights.” And he proved he was capable of writing that, or at least helping, because those are the first words of the French Declaration of the Rights of Man and of the Citizen, which he helped draft.

These might seem like fine distinctions, but people at the time were aware of them and considered them significant. The 1780 Massachusetts Declaration of Rights says that “all men are born free and equal.” The 1777 Vermont Constitution says that “all men are born equally free and independent.” Both those formulations were later understood to abolish slavery. Virginia’s Declaration did not use the word “born,” and it was not so understood. The drafters of the Virginia Declaration did have some concerns about whether enslaved people might invoke their equal natural rights, but according to Edmund Randolph, the concern was answered with the point “that slaves, not being constituent members of our society, could never pretend to any benefit from such a maxim.”

For further security, the phrase “when they enter into a state of society” was added at the suggestion of Edmund Pendleton, to make the distinction between natural rights and legal rights clear.

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7 Even the French Declaration was not understood to abolish slavery of its own force, but it did inspire a rebellion in Saint Domingue, which led to abolitionist legislation in 1794. Napoleon restored slavery in 1802, and abolitionism did not finally prevail in France until 1848.


9 Robert J. Reinstein, Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment, 66 Temp. L. Rev. 361, 371 (1993). Reinstein adds that Locke “defended slavery on the ground that slaves were outside of the social compact.” Id. at n.62. I am unable to find Locke explicitly articulating this view, but it is true that he drafted a constitution for the Carolinas that expressly approved racial slavery. (Locke’s Second Treatise, in section 83, does say that slaves are outside the social compact, but that is the consequence of slavery, not a justification for it. The
And third, we know what would have happened if Jefferson had written a passage that Congress thought criticized slavery—because he did. A draft of the Declaration contained an attack on King George for engaging in the international slave trade: George had “waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him captiving and carrying them into slavery.” This is what a natural-rights based critique looks like. It says not just that kidnapping someone into slavery violates their natural rights (a point that no one denied) but also that it is not justified, which was the matter of dispute between supporters and opponents of slavery. (This characterization of the debate is a mixed historical/philosophical claim.) It is important to note that the passage does not directly criticize slavery in America, because different justifications could be offered for that. The distinction between the international slave trade and slavery in America is perhaps why Jefferson thought this passage could be included, especially when paired with the pro-slavery complaint that George was inciting slave rebellions. He was wrong: Congress took it out.\footnote{Representative Andrew Smyth, debating the admission of Missouri, noted the irrelevance of inalienability: “[The Continental Congress] asserted that man cannot alienate his liberty, nor by compact deprive his posterity of liberty. Slaves are not held as having alienated their liberty by compact. They are held under the law and usage of nations . . ..” 35 ANNALS OF CONG. 1005 (1819) (Gales & Seaton ed., 1855). The state of nature was one of equality, Theodore Parsons granted, but “[s]uch is the nature of society, that it requires various degrees of authority and subordination.” Theodore Parsons & Eliphalet Pearson, A Forensic Dispute on the Legality of Enslaving the Africans, Held at the Public Commencement in Cambridge, New-England, July 21st, 1773, at 7 (London, John Boyle 1773) (Text Creation Partnership), http://name.umdl.umich.edu/N10168.0001.001 [https://perma.cc/D59X-NJXG].}

\footnote{Again, it is worth noting that the debate in Congress, as Jefferson later described it in his autobiography, was about the international slave trade and not slavery in America. He described the clause as “reprobating the enslaving the inhabitants of Africa,” and said it “was struck out in compliance to South Carolina & Georgia, who had never attempted to restrain the importation of slaves, and who on the contrary still wished to continue it.” Notes of Proceedings in the Continental Congress, July 2, 1776, Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/01-01-02-0160 [https://perma.cc/WJL9-D56G].}
II. TRANSFORMATION

Rebeiro does not, as far as I can tell, disagree with my analysis of the 1776 Declaration. But he says there is “another Declaration” that stands for liberty and equality.

Of course there is. That is our modern Declaration. I do not deny that we now understand “all men are created equal” to stand for the principle of universal equality under law, rather than merely equality in the state of nature. I just claim that this ideal is a later interpretation—what I call Lincoln’s equality, rather than Jefferson’s equality.

I do deny that the modern understanding is immanent in Jefferson’s version, which Rebeiro perhaps suggests by calling it the full meaning of the Declaration. For the reasons I have discussed, I think it is fairly clear that the drafters quite deliberately avoided taking a position on equal rights within society or the propriety of enslaving outsiders. They disagreed about those things, and they wanted unity.

In that they succeeded, at least well enough to win the war. Enough Americans rallied behind the Declaration. (Perhaps as many as a third of the colonists remained loyal.) But the Declaration they rallied behind was not an antislavery document that announced a startling new moral principle in the phrase “all men are created equal.” As Pauline Maier has shown—decisively, in my view—that phrase was not considered significant in 1776 because it was understood as a boilerplate invocation of the state of nature.

The abolitionist re-reading did not become a meaningful presence until around the 1820s.

And even then, there were people who defended the original understanding against the abolitionist re-reading. The Declaration should be understood “by the circumstances and purposes for which it was made,” said Jefferson Davis in his farewell address to the Senate.

The communities were declaring their independence; the people of those communities were asserting that no man was born—to use the language of Mr. Jefferson—booted and spurred to ride over the rest of mankind; that men were created equal—meaning the men of the political community; that there was no divine right to rule; that no man inherited the right to govern; that

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12 The one third estimate comes from John Adams. 10 THE WORKS OF JOHN ADAMS 193 (Charles Francis Adams ed., Bos., Little, Brown & Co. 1856). It has been disputed.

there were no classes by which power and place descended to families, but that all stations were equally within the grasp of each member of the body-politic. These were the great principles they announced; these were the purposes for which they made their declaration; these were the ends to which their enunciation was directed. They have no reference to the slave; else, how happened it that among the items of arraignment made against George III was that he endeavored to do just what the North has been endeavoring of late to do— to stir up insurrection among our slaves? Had the Declaration announced that the negroes were free and equal, how was the Prince to be arraigned for stirring up insurrection among them? And how was this to be enumerated among the high crimes which caused the colonies to sever their connection with the mother country?\textsuperscript{14}

The phrase “all men are created equal,” said John C. Calhoun, is a “hypothetical truism” about the state of nature. The fact that liberty is inalienable does not matter to the status of enslaved people, said Representative Andrew Smyth, “Slaves are not held as having alienated their liberty by compact. They are held under the law and usage of nations . . . .”\textsuperscript{15} Roger Taney, in \textit{Dred Scott}, marshalled the Declaration to make an argument \textit{against} emancipation.\textsuperscript{16}

There is, I am sure, something shocking about the suggestion that we should listen to Davis, or Taney, or Calhoun, or Smyth about the meaning of the Declaration. They were apologists for slavery. But the \textit{ad hominem} fallacy is a fallacy, and as I point out in the book, Malcolm X read the Declaration in a similar way. More important, the reason we instinctively reject the arguments of slavery apologists is that those arguments, if successful, would have advanced the cause of slavery \textit{when they were made}. And the qualification is crucial. If we care about the consequences of different interpretations—and I do, although my focus in this section is historical accuracy—we should understand that we are not living in antebellum America, and interpretations that had one implication then may have a different one now.

\textsuperscript{14} Jefferson Davis, Speech on Retiring from the Senate [Jan. 21, 1861], in 2 THE PAPERS OF JEFFERSON DAVIS: 1853–1855, at 344–52 (Lynda Lasswell Crist et al. eds., 1982).
\textsuperscript{15} 35 ANNALS OF CONG. 1005 (1819) (Gales & Seaton ed., 1855).
\textsuperscript{16} \textit{In re Dred Scott v. Sandford}, 60 U.S. 393, 450 (1857).
A very similar dynamic plays out with the Constitution, and I think the comparison is enlightening, though I will discuss it relatively briefly. People disagreed about whether the constitution was pro- or anti-slavery. As with the Declaration, the language can support an anti-slavery reading, although again such a reading benefits from inattention to history and context. An extreme example is Lysander Spooner, who argued that the Founders’ Constitution abolished slavery. More moderate examples are the later Frederick Douglass, Abraham Lincoln, and Salmon Chase, to whom Rebeiro devotes significant attention.

As with antislavery readings of the Declaration, we need to be clear on what question we are asking in evaluating antislavery constitutionalism. Was the antislavery view the most common understanding of the Constitution among the ratifiers? Certainly not the Spooner view. Probably not the Chase view, which suggested that the federal government had consistently been violating the Constitution from at least 1793. Perhaps Lincoln’s came closer.

Was it the dominant view in the mid-nineteenth century? Again, no—as a legal matter, obviously, the controlling interpretation of the Constitution was *Dred Scott*. Lincoln rejected *Dred Scott*, of course, and vowed to try to reverse it, but that was going to be a challenge. *Dred Scott* was a 7-2 decision, and afterwards disserter Benjamin Curtis resigned in disgust, to be replaced by the far more pro-slavery Nathan Clifford. Antislavery constitutionalism prevailed as an interpretation of the Founders’ Constitution, if it did, not because it was more persuasive, or because it won the support of the judges. It prevailed because Lincoln’s side won the war.

And it is not clear to me that it did prevail, not in the way that the antislavery reading of the Declaration has triumphed. It is interesting to compare what Republicans said about the Founders’ Constitution before the Civil War to what they said about it after. Before the war, they argued, as Rebeiro describes, that the Founders’ Constitution embodied the natural rights philosophy of the Declaration of Independence. The Republican platforms of 1856 and 1860 both vow fealty to principles “promulgated in the Declaration of Independence, and embodied in the Federal
Constitution.” In 1864, the Declaration goes unmentioned, perhaps because the Republicans were fighting a war against independence, but they endorse an amendment banning slavery. And in 1868, the Declaration is back—no longer embodied in the Founders’ Constitution but cited as an aspiration: “we hail with gladness every effort toward making these principles a living reality on every inch of American soil.”

What explains the change? Mainly that the Republicans no longer needed to appeal to the Founders’ Constitution to argue against slavery, so they could admit its shortcomings. The Thirteenth Amendment had been ratified in 1865. Ratification of the Fourteenth Amendment was a few months away—it is presumably one of the “efforts” the 1868 platform invokes. When debating the 14th Amendment, Republicans said unanimously that it was designed to put the principles of the Declaration into the Constitution, and at least some of them admitted that those principles hadn’t been there before. “Throughout their deliberations,” Robert Reinstein says, “the Republicans reiterated the theme that the Founders had omitted the Declaration’s principles from the Constitution because of slavery, and that those principles must now become the supreme law of the land.”

Once we have moved forward, we can afford to let go of the past. We have done so, mostly, with the Founders’ Constitution: a modern argument against slavery, or for equality, would rely on the Reconstruction Amendments, not the theories of Lysander Spooner. And most scholars, particularly those with legal training, concede that the Founders’

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18 Reinstein, supra note 9, at 385.
19 The Warren Court, famously, justified imposing an equal protection obligation on the federal government in Bolling v. Sharpe on the grounds that it had been imposed on the states. See 347 U.S. 497 (1954) (“In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”). The most striking counterexample to modern reliance on Reconstruction is Martin Luther King’s ‘I Have a Dream’ speech, which appeals to the Founders’ Constitution, rather than the Fifteenth Amendment, for an argument against racial discrimination in voting.
Constitution promoted and protected slavery in very significant ways. We have not let go of the Declaration, perhaps because the replacement is not so clear. But we could. (In the book, I argue that the Declaration can be replaced by the Gettysburg Address.) And we should.

IV. Why it matters

Arguing for a pro-slavery interpretation of the Declaration or the Founders’ Constitution was once a means of advancing slavery. It is no longer. So an important question is why different interpretations matter: what is at stake?

One issue is who should get credit for articulating and championing our national value of equality. Should we celebrate people like Benjamin Banneker, Prince Hall, Frederick Douglass, and the Radical Republicans? Or should we continue to give, in Lincoln’s words, “all honor to Jefferson”?

That has something to do with historical accuracy, but there is more to it than that. Our national story has an ideological component. It tells us our values, and our heroes, and what we should do to be good Americans. And it is at this point that I think the superiority of a Reconstruction-focused story becomes most evident. (This is a predictive and normative claim.)

We can say that the Declaration stated an ideal of universal equality and freedom, but then we have to admit that its signers did not live up to those values. They announced an ideal, and fought for its application to them, but they knew that its application to others would have to wait. Until the circumstances were right, until times were more accepting, until it would be less disruptive . . . There is a very direct line from that reading of the Declaration to the “white moderates” of the Letter From the Birmingham Jail. Justice for me now, is the message of the Founding, justice for others later. Maybe.

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20 See, e.g., Juan F. Perea, Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution, 110 MICH. L. REV. 1123, 1125 (2012) (“The majority position among historians today appears to be that the Constitution was proslavery, in the sense that slavery and slavery protection played a central role in the formation of the Constitution.”). But see SEAN WILENTZ, NO PROPERTY IN MAN 97 (2019) (arguing that the decision not to include the word “slave” had “substantive” consequences). Oddly, Wilentz nowhere explains what legal significance he thinks the word choice had.

21 As King put it,
And what else comes from the Declaration? The idea that we should judge when offenses against our own rights warrant rebellion. That we should focus on our own grievances and ignore the injustices we inflict on others—the colonists, remember, asserted breathlessly that George was bent on figuratively enslaving them while they literally enslaved half a million people. That treason against the national government is American patriotism. That is why there were Revolutionary flags at the Capitol on January 6.

“You can’t be pro-insurrection and pro-American,” said Joe Biden in a speech on September 1, 2022. But of course you can, if the Declaration of Independence is your guiding light. Biden spoke from what he called the “sacred ground” of Independence Hall, where Americans pledged their lives, their fortunes, and their sacred honor to support the insurrection we celebrate to this day.

If even the reinterpreted Declaration brings undesirable values with it, how should we go forward? Rebeiro suggests that we should learn from Martin Luther King that “the true legacy of the Declaration” is “the equality of all human beings.” But I don’t think that’s what King has to teach us. I describe in the book, as Rebeiro notes, how King shifted from a focus on Reconstruction in 1944, to a focus on the Founding in 1963. But I also point out that King’s evolution did not end in 1963. By 1967, he was saying that “some of the old optimism was a little superficial.”

He had, I believe, come to see that invoking the Founding does not bring Americans together in support of change; instead, it tends to support the status quo. And in his last speech, I’ve Been to the Mountaintop, when he lists the high points of history, he skips the Founding entirely. He likes the present, 1968—not because it is peaceful, but because “the masses of people are rising up.” He closes not with an invocation of Founding ideals or a pacific vision of little black and

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We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have yet to engage in a direct action campaign that was ‘well timed’ in the view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word ‘Wait!’ It rings in the ear of every Negro with piercing familiarity. This ‘Wait’ has almost always meant ‘Never.’ We must come to see, with one of our distinguished jurists, that ‘justice too long delayed is justice denied.’


white children holding hands, but with the Union Army and the Civil War. The last line of his last speech, which contains literally his last words to America, is the first line of The Battle Hymn of the Republic. And celebrating those who defeated a slaveholders’ rebellion makes more sense to me than celebrating those who perpetrated one.

The larger point is that we carry on the vision of Douglass and Lincoln and King not by saying the same things they did, but by doing what best advances the values they fought for. Changing our national story to one centered on Reconstruction does that. The heroes of abolitionism and Reconstruction did not flagrantly violate our deepest principles. They did not demand justice for themselves and patience from others. They risked their lives to fight injustice even when they received no personal gain, even when the injustice could have benefited them. Those are the people we should emulate; that is the America we should be.