RECONSTRUCTION AS REVOLUTION: THE FOURTEENTH AMENDMENT AND THE DESTRUCTION OF FOUNDING AMERICA

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INTRODUCTION

What is the relationship between Reconstruction and the Founding? Conventional wisdom has it that Reconstruction was a fulfillment of Founding ideals. The Founding Fathers, on this account, believed in the ideals embodied in the Fourteenth Amendment—indeed, they stated those ideals in the Declaration of Independence. Because of the institution of slavery, however, they were unable to put those ideals in the Constitution written in 1787. And so the promise of the Declaration went unfulfilled for almost a hundred years, until the Reconstruction Congress wrote it into Section One of the Fourteenth Amendment. Reconstruction marked an enormous change in our constitutional order, the received wisdom acknowledges—we could call it a Second Founding. But the Second Founding is an act of continuity, not revolution: it vindicates the ideals of the first. It represents the triumph of true American values over the deviant institution of slavery and the Confederate society that rejected the principles of the Declaration. Founding America wins the Civil War and is redeemed by its victory.

Or maybe not. The conventional story outlined above, I will argue, is confused in many ways. Most fundamentally, it misunderstands the relationship between Reconstruction and the Founding. Rather than a realization of Founding ideals, Reconstruction is better understood as a rejection of them. Rather than the vindication and triumph of Founding America, the Civil War and Reconstruction are its repudiation and defeat. Founding America did not win the Civil War; it lost. It was not redeemed by Reconstruction; it was destroyed. And while there is some room for pride

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at the achievements of Founding America, what true patriotism demands of us is pride in its destruction.

I. THE CONVENTIONAL WISDOM

It is commonplace nowadays to identify the Fourteenth Amendment as the provision by which the values of the Declaration of Independence entered into the Constitution. As Robert Reinstein puts it, “the Declaration of Independence was united with the Constitution in the enactment of the Fourteenth Amendment.”¹ This is no modern anachronism, at least not in terms of the self-understanding of the actors of the time. The Republicans who supported the Fourteenth Amendment said exactly the same thing.²

The logic seems airtight, even syllogistic. The Declaration of Independence proclaimed that a legitimate government must respect the equal rights of all people. The Fourteenth Amendment placed that command in the Constitution. So of course the Fourteenth Amendment embodies the Declaration of Independence.

There’s just one slight problem. That the government must respect the equal rights of all people is the meaning of the Declaration of Independence now. That is what it means to Americans today. It’s the meaning proclaimed by Martin Luther King in 1963, in the I Have a Dream speech. It’s the meaning asserted by Abraham Lincoln in 1863, in the Gettysburg Address, and before that in the Republican Party platforms of 1860 and 1856. But in 1776, Thomas Jefferson was saying something very different.

The first step towards understanding the relationship between the Founding and Reconstruction is to go back and investigate what the values of the Founding actually were. A closer look at the Declaration and the 1787 Constitution will demonstrate that we misunderstand both those documents.


² See, e.g., Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens) (“Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now.”).
We read them without attention to their historical context, forgetting both their goals and their intellectual backdrop. Recovering that context will show them in a very different light. The next Part explores the values of the Founding, first the Declaration and then the Constitution.

II. THE VALUES OF THE FOUNDING

a. The Declaration of Independence

Before discussing what the Declaration of Independence does not contain, it is worth reminding ourselves of what it does contain. And the easiest way to do that is to recall what it is supposed to do, and how.

The Declaration of Independence does two things. It announces to the world that the colonies are rejecting the authority of the British Crown—that they are assuming, “among the powers of the earth, the separate and equal station to which the laws of Nature and of Nature’s God entitle them.” And it endeavors to show that the assertion of independence is justified—that in the conflict between colonies and Crown, the Americans are the good guys.

What is required to show that this assertion of independence is justified? A general explanation of when it is proper for one people to dissolve the political bands which have connected them with another, and a specific demonstration that the colonists’ case fits that description. And that is what the Declaration provides. It explains where legitimate political authority comes from, and when it may legitimately be rejected.

Take the first issue first. Where does legitimate authority come from? One answer might be that it comes from God: some people (kings) are chosen by God to rule, and others must obey. “[T]he mass of mankind,” you might say, are “born with saddles on their backs,” and “a favored few booted and spurred, ready to ride them legitimately by the grace of God.” According to this theory of authority, the divine right of kings, rebellion would never be justified. It would be a sin.

The American colonists needed to reject the divine right of kings as a matter of theory: if God made George their king, they could not rightfully assert their independence. But the obstacle was mostly theoretical. The

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3. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

4. This phrasing comes from a letter in which Jefferson described the Declaration’s idea of equality—the rejection of the divine right of kings—as a “palpable truth.” See Letter from Thomas Jefferson to Roger Weightman [June 24, 1862], in THOMAS JEFFERSON: WRITINGS, 1516, 1517 (Merrill D. Peterson ed., 1984).
divine right of kings was important in seventeenth-century England, expounded by Sir Robert Filmer and asserted by Charles I. But Charles lost the Civil War, and hence the argument (a pattern we will see again). He was beheaded in 1649. The restored Stuart monarchy continued to assert the principle, but after the Glorious Revolution and the 1689 Declaration of Right, British monarchs no longer justified their authority as given by God.

The idea was marginal, not central, in 1776. Still, it was around, enough that Thomas Paine thought it worth attacking in Common Sense. But how much space did it merit? John Locke, who described his Two Treatises on Government as a justification of the Glorious Revolution, spent the whole of the first one rebutting the divine right of kings in a line-by-line critique of Filmer’s Patriarcha. Jefferson did it in a single phrase: all men are created equal.

When we hear this phrase now, we think it means something about how governments should treat people (equally!), or about the legal rights that people should have (equal under law!). But that is not what an educated person in 1776 would have thought. They would have recognized it as an invocation of enlightenment social contract theory, the dominant political philosophy of eighteenth-century Europe. In particular, they would have understood it as a reference to the state of nature.

Social contract theory—developed by thinkers such as Rousseau, Locke, and Hobbes—was sufficiently widespread and accepted that its basic principles, at least, could be put forward as self-evident truths. One of those basic principles was the “state of nature” thought-experiment. To figure out the nature of legitimate political authority, social contract thinkers imagined a world in which it did not exist—a world in which there was no government, and no law—and asked how political authority would emerge. It would not simply exist, all social contract theorists agreed. If people simply popped into existence in a world without governments—if they were, hypothetically,

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5 ROBERT FILMER, PATRIARCHA OR THE NATURAL POWER OF KINGS (1680).
7 THOMAS PAINE, COMMON SENSE (1776).
9 See THE DECLARATION OF INDEPENDENCE (U.S. 1776).
created—no one would have any duty to obey anyone else. All men (and by this Jefferson clearly meant all people) would be created equal.

Jefferson’s equality, then, is a very precise and limited concept. It does specific work in the argument of the Declaration—it rebuts the divine right of kings. But that is basically all it does. It does not tell us what rights people should have in society; that is a different issue. It does not tell us how authority should be distributed in society; that is also a different issue. It does not tell us where legitimate authority comes from—only that it does not exist naturally. And so it does not tell us when authority ceases to be legitimate and can be rejected. All of that comes later.

After rejecting the divine right of kings, Jefferson turns to the question of where authority does come from. Again, there was broad agreement among social contract theorists. In the state of nature, people would have their natural rights—their rights to life and liberty, everyone agreed, and perhaps property. (The question of a natural right to property divided social contract thinkers, Locke in favor and Rousseau against, and the argument for independence does not rely on a particular answer—so Jefferson dodged the issue, substituting “the pursuit of happiness” for “property” in Locke’s triad). But those rights would not be secure, because other individuals might violate them—one person might restrict another person’s liberty, or even take their life. And so, social contract theorists agreed, people would naturally come together. They would form societies, and they would agree to accept some limits on their natural rights in exchange for protection. Government comes into being as, in essence, a mutual defense pact, and it gets its legitimacy from consent.

This common account is exactly what Jefferson gives. Governments are instituted to secure natural rights, deriving their just powers from the consent of the governed. There is one point, though, on which social contract thinkers differed, and which mattered to the argument for independence. People surrender some natural rights in exchange for the government’s

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12 Id.
13 Id.
15 See JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* § 87 (1690) (describing natural right to “life, liberty, and estate”).
protection. But can they assert those rights again if the government behaves badly? Can they rebel?

Thomas Hobbes said no. The surrender of natural rights, he said, is irrevocable, and once government authority is established, it is absolute. John Locke, on the other hand, said yes. There are some rights that people cannot surrender, even if they want to. And Jefferson here has to pick Locke rather than Hobbes if the argument of the Declaration is to work. He has to say that the social contract is not indissoluble. People do not irrevocably give up their natural rights—and the strongest way to make that claim is to say they do not because they cannot. It took Jefferson only a phrase to condense Locke’s First Treatise, and this point he managed to make with one word. There is a legal term that describes something its owner cannot give away, even voluntarily: inalienable.

“Inalienable rights,” then, is another example of a phrase of the Declaration that we simply read totally differently now, because we no longer understand the argument and the intellectual context. We think it means that these rights are very important, or sacred, or must be respected. But it had a different, very specific, technical meaning to Jefferson and he used it very deliberately.

The Declaration then goes on to make the argument for rebellion explicitly, following Locke’s Second Treatise. Governments are instituted to protect the natural rights of the people who form them, and if they threaten that purpose, the people may change them. In this passage, Jefferson follows Locke almost word for word. Locke identifies grounds that justify rebellion as a “a long train of abuses and usurpations, pursuing invariably the same object.” Jefferson says “a long train of abuses and usurpations, pursuing invariably the same object.”

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18 Id. at 298-299
19 See, e.g., DANIELLE ALLEN, OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY 173 (2014) (“What, then, does it mean to say that all people are endowed . . . with inalienable rights . . . ? It must mean that these rights are property that we get . . . from God . . . . Nobody should take this property away from us . . . .”).
20 Here, too, Jefferson is condensing Locke. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 15 (Thomas Peardon, ed., Macmillan Publishing Company 1982) (1689) (“This freedom from absolute, arbitrary power is so necessary to, and closely joined with a man’s preservation that he cannot part with it but by what forfeits his preservation and life together; for a man not having the power of his own life cannot by compact or his own consent enslave himself to any one, nor put himself under the absolute arbitrary power of another to take away his life when he pleases.
21 Compare THE DECLARATION OF INDEPENDENCE (U.S. 1776), with John Locke, SECOND TREATISE ON GOVERNMENT, § 225.
That is the general political theory. What remains is to show that the colonists’ situation fits it: “such is now the necessity which constrains them to alter their former systems of government.”

There follows the bill of particulars, the charges against King George intended to show that he and Parliament intend to establish an absolute tyranny.

So that is what is in the Declaration: a theoretical account of where legitimate political authority comes from and when it can be rejected, and a set of factual allegations showing that the colonists’ situation fits that theory. Let us turn to the second question: what is not in the Declaration?

There is not, in the argument I have reconstructed here, any requirement that government be democratic. We often associate the value of democracy with the Declaration of Independence, but that is rather obviously unjustified. There is no phrase in the Declaration that says people should have an equal voice in government, and if it did contain such a principle, the grievances against King George would have been unnecessary. It would be enough to say that George was a king, and therefore illegitimate—there would have been no need to show that he was a tyrant. (Nor would an anti-monarchical declaration have been very useful to the colonists in their attempts to win the support of the Kings of France and Spain).

There is no requirement that the government treat people equally. The government has an obligation to protect the natural rights of the people who form it. But that does not necessarily entail treating them equally. And of course the colonists did seem to believe that various forms of discrimination among citizens were permissible, or at least they practiced them. Women, to take an obvious example, were denied many rights.

If we turn to the question of the government’s obligation to noncitizens, those who are not among the people who form the government, the Declaration offers these outsiders nothing at all. It does not tell us, for instance, that the government should not enslave outsiders. The insider/outsider distinction explains why the colonists could breathlessly allege that King George aimed to reduce them to slavery while themselves enslaving half a million people. A government that enslaves insiders goes

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22 See THE DECLARATION OF INDEPENDENCE (U.S. 1776).
against its purpose of protecting their rights and loses its legitimacy. A
government that enslaves outsiders does not.

The Declaration avoids taking a position on the duties that a government
owes to outsiders for at least three reasons. First, that issue does not matter
to the argument the Declaration makes for independence. It is simply
irrelevant, so there would be no reason to include it. Second, condemning
slavery would brand the colonists as illegitimate oppressors, which would
undermine the argument. And third, the representatives of the southern
states would have rejected an anti-slavery Declaration. We know this
because they did: an early draft contained a passage that criticized the
Atlantic slave trade, and Congress took it out.26

All this is based on a close reading of the Declaration with an awareness
of its historical and intellectual context. There is also historical evidence.
People did not consider the Declaration especially important at the time, and
in particular they did not consider the Preamble important.27 They
recognized it for what it was: boilerplate enlightenment social contract
theory.

b. The Founders’ Constitution

So the value of equality that Lincoln and King appealed to was not
present in the Declaration of Independence. It would be surprising to find it
in the Constitution, and most people nowadays agree that it was not there.
This is in part because the Constitution, like the Declaration, was a document
designed to produce unity among supporters and opponents of slavery. In
neither case could we reasonably expect an anti-slavery document to emerge.
The supporters of slavery wanted to protect slavery and were willing to
sacrifice unity if necessary.28 The opponents wanted unity and were willing

26 See Frances Lee Anstey, Race and the Core Curriculum in Legal Education, 79 CAL. L. REV. 1511, 1542
(1991). Jefferson suggested the northern states didn’t like it either, writing in his autobiography that
“[o]ur Northern brethren also I believe felt a little tender under those censures, for tho’ their people
have very few slaves themselves yet they had been pretty considerable carriers of them to others.”
THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), reprinted in THOMAS JEFFERSON: WRITINGS 3, 18
27 See Maier, supra note 10, at 877.
28 See KERMIT ROOSEVELT III, THE NATION THAT NEVER WAS 91 (2022) (discussing Southern
threats to leave the Constitutional Convention if not granted protections for slavery).
to accept slavery as the price. That kind of negotiation ends only one way: accepting slavery is the cost of union.

The other reason, which is somewhat more fundamental, is that the evil of slavery is about relationships between individuals: it is the illegitimate oppression of one person by another. But what one individual does to another is really not a concern of the Founders’ Constitution. There is no provision in the Founders’ Constitution that limits what one individual can do to another, and the powers of Congress to protect individuals from each other is also quite limited. Congress could not in 1787 (and cannot now) enact a law generally prohibiting one American from killing another. The most basic protection of natural rights, the protection of life, is beyond the power of the federal government.

The reason for this is that the federal government created by the Constitution is just not the kind of government that protects individuals’ natural rights (the kind of government described in the Declaration). The Constitution assumes that states will protect the natural rights of their citizens. Its focus is what Akhil Amar has called geostrategic concerns—interstate and international relations, issues that cannot be left to the states. As far as the Founders were concerned, the protection of natural rights could be left to the states. And it was.

c. Summary

So what values should we associate with the Founding? The Declaration fairly clearly gives us some criteria for the legitimacy of government. It must be formed by the consent of the governed, and it must protect the natural rights of insiders. The Declaration gives us some kind of right of self-determination, too, and one that includes rebellion. If a cohesive political unit (a people) decides that the existing government is failing in its purpose, they can abolish that government and start over. (Madison, it is worth

29 See, e.g., Peter Irons, A People’s History of the Supreme Court 183-84 (1999) (“[T]he Framers recognized slavery in the Constitution, as the price for the ‘Great Compromise’ that created the Union.”).
remembering, wanted to put this right to rebellion in the federal constitution, and it was a feature of many state constitutions. Some kind of individualist anti-redistribution principle, maybe. The argument for this is a bit more complicated, but the Supreme Court has developed it in some well-known cases. The basic argument is that people create governments to secure their rights, and so they would not give it the power to interfere with those rights in an arbitrary or unreasonable way. And thus when the government acts against citizens, an arbitrary interference with their rights is not legitimate government action—it is not due process of law.

The key question is what counts as an arbitrary interference, and it’s in identifying that proscribed category of government behavior that the Supreme Court has made some mistakes. Promoting equality for its own sake, the Court has suggested, is an impermissible government purpose. Redistribution—taking from one person and giving to another—in order to promote equality is categorically forbidden. This principle, which comes from the Declaration of Independence, is the principle underlying Lochner and Dred Scott. So add this: Congress cannot abolish slavery even when it is exercising plenary power.

We can take from the Declaration another principle, at least implicitly. Political communities get to decide who their members are. They are formed by consent and agreement, and if some people want to exclude other people, they can do so.

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32 See Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043, 1057 (1988) (discussing Madison’s proposed prefix to the Preamble declaring “[t]hat the people have an indubitable, unalienable, and indefeasible right to reform or change their Government,” which was “dropped because it was deemed redundant”) (internal quotation marks omitted).


34 See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 222 (“[I]t can never be supposed to be the will of the society, that the legislative should have a power to destroy that which every one designs to secure, by entering into society, and for which the people submitted themselves to legislators of their own making . . . ”). Justice Chase’s opinion in Calder v. Bull is probably the earliest notable statement in American constitutional jurisprudence: “The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it.” 3 U.S. 386 at 388 (1798) (emphasis omitted).

35 See ROOSEVELT, supra note 28, at 111-25.

36 Under the Founders’ Constitution, Congress could confer national citizenship through naturalization, U.S. CONST., art. I, § 8, cl. 4, but it was less clear that it could confer state
That may not be an especially attractive set of principles, but it is, I believe, a fair statement of the ideology of the Founding as expressed in the Declaration and the Founders’ Constitution. In the following sections we will see how Reconstruction rejects every one of these principles.

III. THE REJECTION OF THE FOUNDING: SUBSTANCE

a. The Civil War and the Declaration

In the Civil War, which side can claim the support of the Declaration of Independence? The standard story suggests that it is Lincoln’s side—Lincoln said he was fighting for the Declaration in the Gettysburg Address, of course, and the Republican Congress presiding over Congressional Reconstruction saw itself as enshrining the ideals of the Declaration in the Fourteenth Amendment.37

But I have said already that the ideal of equal rights under law is Lincoln’s equality, not Jefferson’s equality. And if we look at the values that actually are in the Declaration of 1776, we get a somewhat different picture. Rather clearly, the Declaration supports the people who are declaring their independence—that is, the rebel South. The national government was created to serve various purposes—mostly, as I have said, geostrategic ones—and among them was an accommodation of the policies of the supporters and opponents of slavery. To do that, it made several compromises, most of which tilted in a pro-slavery direction.38 The secessionists believed that the free states and the national government were distorting the Constitution and failing to uphold the bargain they had struck. That belief may have been right or it may have been wrong, but it does seem to have been sincere. And they were undeniably right that the national government had fallen into the hands of a political party that wanted to destroy the institution upon which

37 See CONG. GLOBE, supra note 2.
38 The Fugitive Slave Clause, for instance, stripped free states of an aspect of international sovereignty—the power to determine the status of people within their borders—to protect slavery. U.S. CONST., art. IV, § 2, cl. 3 (requiring a “person held to service or labor” who flees to any other state to be returned to their master). The Three-Fifths Compromise gave slave states extra representatives based on the presence of people whose interests were not being represented, a pro-slavery deviation from standard republican theory. U.S. CONST., art I, § 2, cl. 3 (determining each state’s population by adding the “whole Number of free Persons” to “three fifths of all other Persons,” excluding “Indians not taxed”).
their society was based. Under those circumstances, it was not at all unreasonable to conclude, as the Declaration put it, that a new government would better effect their safety and happiness.39

The Southern states said this in their secession letters, invoking the Declaration and the Revolution.40 During the Civil War, they celebrated the 4th of July and proclaimed themselves the true heirs of 1776.41 Their right to alter their form of government was recognized by many state constitutions. Madison had wanted to put it in the federal constitution,42 failing perhaps because wiser heads realized that a nation dedicated to the principle of revolution could not long endure.

Were they wrong? Abraham Lincoln attempted a rebuttal in his July 4, 1861 address to Congress.

The sophism itself is that any State of the Union may consistently with the National Constitution, and therefore lawfully and peacefully, withdraw from the Union without the consent of the Union or of any other State. The little disguise that the supposed right is to be exercised only for just cause, themselves to be the sole judge of its justice, is too thin to merit any notice.

He called this “rebellion . . . sugar coated.”43 And indeed it may be—my argument at this point is not that secession was legal under the 1787 Constitution, but rather that it could be justified by the principles of the Declaration of Independence.44 As to the claim that the people themselves must judge whether rebellion is justified, it may be thin, but it is the claim of the Declaration and of John Locke.

Locke considered the question of who could decide whether the government was acting against its purposes, and here is his answer:

Here, it is like, the common question will be made, Who shall be judge, whether the prince or legislative act contrary to their trust? This, perhaps, ill-affected and factious men may spread amongst the people, when the

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39 See THE DECLARATION OF INDEPENDENCE [U.S. 17776].


43 Abraham Lincoln, Message to Congress in Special Session, July 4, 1861, in 4 WORKS OF ABRAHAM LINCOLN 421 (Basler ed. 1953).

44 Tennessee said exactly this: “waiving any expression of opinion as to the abstract doctrine of secession, but asserting the right, as a free and independent people, to alter, reform, or abolish our form of government in such manner as we think proper” Tennessee Ordinance of Secession - Wikisource, the free online library.
prince only makes use of his due prerogative. To this I reply, The people shall be judge; for who shall be judge whether his trustee or deputy acts well, and according to the trust reposed in him, but he who deputes him, and must, by having deputed him, have still a power to discard him, when he fails in his trust.\(^{45}\)

No formal political institution exists to decide such a question, Locke reasoned. “[T]he appeal lies only to heaven; and in that state the injured party must judge for himself, when he will think fit to make use of that appeal, and put himself upon it.”\(^{46}\)

Characteristically, Jefferson condensed paragraphs of Locke into a phrase. The colonists, he said, were “appealing to the Supreme Judge of the world for the rectitude of [their] intentions.”\(^{47}\) If that connection is not clear enough, the Patriots restored Locke’s phrasing in the Pine Tree Flag, which shows a white pine (a source of conflict between Great Britain and New England) and four words: “An Appeal to Heaven.”\(^{48}\)

The core principle of the Declaration is that a people may define itself and determine its future by withdrawing consent from an existing government to fashion a new one. That principle supports Jefferson Davis, not Abraham Lincoln.

b. The Civil War and the Founders’ Constitution

What about the Founders’ Constitution? If Madison had prevailed in his attempt to insert the right to revolution in the preamble, the argument that the Founders’ Constitution supported the South would be relatively straightforward. As things turned out, secession did not receive that textual blessing. And I do not argue that the Founders’ Constitution clearly establishes that secession is legal. What I do argue is that the general perspective and presuppositions of the Founders favored the South.

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\(^{45}\) Locke, supra note 15, at § 240. See also id. at § 168 (“And where the body of the people, or any single man, is deprived of their right, or is under the exercise of a power without right, and have no appeal on earth, then they have a liberty to appeal to heaven, whenever they judge the cause of sufficient moment. And therefore, though the people cannot be judge, so as to have, by the constitution of that society, any superior power, to determine and give effective sentence in the case; yet they have, by a law antecedent and paramount to all positive laws of men, reserved that ultimate determination to themselves which belongs to all mankind, where there lies no appeal on earth, viz. to judge, whether they have just cause to make their appeal to heaven.”).

\(^{46}\) Id. at § 242.

\(^{47}\) See DECLARATION OF INDEPENDENCE (U.S. 1776).

Constitution drafters tend to fight the last war. New systems respond to the failures of the old. For the drafters of the Constitution, there were two lessons in mind. One was the failure of the Articles of Confederation, which taught that the states needed a stronger national government. But perhaps more potent was the Revolution, which taught that a distant general government might become a tyrant, and that if that happened the states would defend the liberties of their citizens—by force, if necessary. Concern that the national government might be too powerful was the main source of objection to the proposed Constitution, and it was one that the Founders took seriously.

One device to mitigate the risk of tyranny was the fact that congressional powers were limited and enumerated. The federal government would not invade individual rights because it had not been given the power to do so; the whole Constitution, said Alexander Hamilton, is a bill of rights. But that assurance was inadequate; people demanded an actual bill of rights. And they got it, although it wasn’t called the “Bill of Rights” at the time. The original Bill of Rights, to a degree we no longer understand, was designed to protect individual liberty not just by restraining the federal government but also by empowering the states. The Establishment Clause, for instance, banned not just federal establishment but also federal disestablishment: it protected state establishments. The Second Amendment preserved state militias as a potential military counterweight to the federal government. If necessary, the Founders thought, the states would fight the federal government just as they had fought the British.

In Federalist 46, Madison made this comparison explicitly. “[S]hould an unwarrantable measure of the federal government be unpopular in particular states, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand." States could refuse to cooperate with federal authority, he suggested; they could use “the frowns of the executive magistracy of the State; the embarrassments created by legislative devices.” And if push came to shove, there would be another Revolution.

A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations,

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49 See Federalist No. 84, at 515 (Alexander Hamilton) (Clinton Rossiter, ed. 1961).
51 Federalist No. 46, at 246 (James Madison) (George W. Carey & James McClellan eds., 2001).
52 Id.
in short, would result from an apprehension of the federal, as was produced by the dread of a foreign yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case, as was made in the other.\footnote{Id.}

And of course, he said, the federal government would lose. “[O]ne set of representatives would be contending against thirteen sets of representatives.”\footnote{Id.}

Madison did not get the Civil War quite right in Federalist 46. He supposed that all the states would unite against the federal government, and that all the people would support the states, which of course did not happen. And his back-of-the-envelope military calculations gave a 30,000 strong national army facing 500,000 militiamen. (In the Civil War, the United States fielded a peak fighting force of approximately 700,000 and the Confederacy half of that).\footnote{See Civil War Facts: 1861-1865, NATIONAL PARK SERVICE, https://www.nps.gov/civilwar/facts.htm [https://perma.cc/3SKU-97L6].} Thirteen against one was a striking forecast, though: if we accept the Confederate claims to Missouri and Kentucky, there were indeed thirteen states facing off against the national government, and the replay of the Revolution was on their mind. The first flag of the Confederacy, thirteen stars in a circle, deliberately echoed the Betsy Ross flag.\footnote{See JOHN M. COSKI, THE CONFEDERATE BATTLE FLAG: AMERICA’S MOST EMBATTLED EMBLEM 4-5 (2005).}

Where Madison was most wrong, of course, was in his prediction that the states would win. Instead, the national government prevailed. After its victory, it remade the nation. (This, again, is a point on which most historians agree).\footnote{See, e.g., ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).} But it did not remake America into a more perfect version of Founding America, realizing the values of the Declaration. It made a different nation entirely, one with a different set of founding principles and a different political structure.

c. The Fourteenth Amendment and the Founding

If, as I’ve argued, the South has the better claim to support from the Declaration of Independence and the Founders’ Constitution, the Fourteenth Amendment looks rather different. It does not codify the principles of the Declaration. Instead, it codifies a set of principles that are

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\footnote{Id.}
more or less directly opposed. And it does so, we will see in the next Part, through a process that is also directly opposed.

Start with the substance. The first sentence of the Fourteenth Amendment reverses *Dred Scott*: rather than being forever barred from national citizenship, black people born in the United States are citizens from birth.58 That rejects the Founders’ Constitution, according to the seven Justices who formed the *Dred Scott* majority, because that Constitution categorically excluded black people from federal citizenship. It also rejects the Declaration’s assumption that a people may define and govern itself. It takes away from the states the authority to determine who constitutes their political community.

This inverts the Founders’ understanding in a more general way. While the relationship between state and federal citizenship was complicated and obscure before the Civil War, there was a general sense that state citizenship was primary and the ordinary path to federal citizenship. As Joseph Story wrote in his Commentaries on the Constitution, “[e]very citizen of a State is *ipso facto* a citizen of the United States.”59 But the Fourteenth Amendment makes federal citizenship primary, and the path to state citizenship: every person born within the United States is a federal citizen, and also (derivatively) a citizen of the state in which they reside.60

As far as the relationship between the states, the people, and the federal government is concerned, the Fourteenth Amendment flips things again.61 While the Founders saw the national government as the threat to liberty and the states as its defenders, the Reconstruction Congress saw the states as the threat and the national government as the liberator. That is why the Fourteenth Amendment reads like an inversion of the Bill of Rights, as Akhil Amar has noted.62 Rather than “Congress shall make no law,” it provides

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58 U.S. CONST., amend. XIV, § 1. The grant of birthright citizenship operated retroactively in one sense: it conferred citizenship upon formerly enslaved people who were born in the United States before its ratification. Whether it operated retroactively in a different sense, establishing that they had been citizens since birth, is a different issue, one raised by the question of whether black senators such as Hiram Revels met the Constitution’s requirement of having been “nine years a citizen of the United States.” See generally Richard Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680 (2006) (discussing the Senate’s deliberations on the issue and its ultimate decision to admit Revels).


60 See U.S. CONST. amend. XIV.

61 This inversion of Founding understandings is what the Supreme Court denied in the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 78 (1873).

“[n]o state shall make or enforce any law.”63 And when it gets to Congress, in Section Five, it again says the opposite: “Congress shall have the power to enforce . . .”64

The Reconstruction Amendments reject Founding laws of slavery, too—and, crucially, in a manner associated with revolution rather than reformation. The Thirteenth Amendment, of course, banned slavery.65 But what did that mean for the status of pre-abolition laws of slavery? Were they eradicated prospectively, with the recognition that they had been valid laws while they existed, or were they rejected as if they had never been valid?

This is the distinction between reformation and revolution. A reform movement that does not change the governing legal regime will alter laws, but it will usually do so in a way that reflects their prior validity. When Northern states abolished slavery before the Civil War, they did so gradually and/or paid compensation for the property rights they were eliminating.66 During the Civil War, when slavery was abolished in the District of Columbia in 1862, slaveowners received compensation.67 Even the preliminary Emancipation Proclamation, also in 1862, expressed an intent to offer “pecuniary aid” to states that abolished slavery.68

Revolution, by contrast, does not recognize the legitimacy of prior laws. It rejects claims based on them. We can see in the Fourteenth Amendment how the laws of an illegitimate government are treated. There shall be no payment of rebel debt, Section Four provides: “all such debts . . . shall be held illegal and void.”69 The Confederacy was never a legitimate government, this provision tells us. Its laws were never valid. (By contrast, Article VI of the Constitution affirms continuity with the Articles of Confederation by assuming the debts incurred under them).70

Through 1862, then, abolition of slavery was a matter of reform and not revolution. But the Fourteenth Amendment takes a different position. Rebel debt is void ab initio, Section Four tells us, and something else is too: “any claim for the loss or emancipation of any slave.” Uncompensated emancipation might not seem radical now, because it was so obviously the right thing to do, but it was radical at the time. What it suggests is that the

63 U.S. CONST. amend. XIV, § 1.
64 Id. at § 3.
65 U.S. CONST. amend. XIII.
68 See Preliminary Emancipation Proclamation.
70 See U.S. CONST. art. VI, cl. 1.
laws of slavery were never valid, that they are part of a regime that is being destroyed and set aside.

That, too, might not seem radical. Of course, you might think, the Fourteenth Amendment refuses to recognize Confederate debt. Of course it rejects claims based on the Confederate laws of slavery. Of course it destroys and sets aside the political order of the Confederacy.

But that is not the regime that is being destroyed.

The laws of slavery, even in the Confederate states, were not Confederate laws—they existed from before the Founding. And they existed in states that remained loyal—Delaware and Maryland, certainly, Kentucky and Missouri perhaps. And then the Fourteenth Amendment swept them away if they were no more valid than rebel debt, because the legal regime that birthed them was being overthrown, and that regime was not the Confederacy. It was Founding America.

Not so fast, the conventional wisdom says. Even revolutionary change can be accomplished through the process of constitutional amendment, and then it’s legal. The Reconstruction Amendments were enacted through the Article V amendment process, so they still represent the vindication of Founding ideals.

The first point to be made in response is that this is a non sequitur. Whether the Reconstruction Amendments were adopted legally according to the Founders’ Constitution is not the same question as whether they embody a vindication or a repudiation of Founding ideals. That question turns on the content of the ideals of Reconstruction as compared to the Founding, and I have shown, I think, that the content is in fact quite different. The Founders believed in natural rights, sure, and some of them may even have believed that there was a duty to respect the natural rights of all people, of all races. But some of them quite clearly did not believe that. The theory articulated in the Declaration of Independence is that governments must respect the rights of the people that form them. The assumption of the Declaration is that a state can decide who counts as one of its people. The Founders’ Constitution leaves the protection of natural rights almost entirely up to the states, and it excludes black people from national citizenship, according to seven justices. For the national government to become a

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71 Kentucky and Missouri were admitted to the Confederacy and counted in its thirteen-star flag, but their purported Confederate governments existed almost entirely in exile during the war and did not control the states. See Harold M. Hyman & William M. Wiecek, Equal Justice Under Law: Constitutional Development, 1835-1875, at 215 (1982).
defender of natural rights, for it to force black citizenship upon unwilling states, is not a fulfilment of Founding ideals.

Second, the argument fails on its own terms. Rather than an ordinary Article V reformation of government, Reconstruction looks like a revolution in terms of the process too. I am not going to argue that Reconstruction was illegal according to the Founders’ Constitution, although I think it might well be. (This is one of the questions to which I think there is probably no objectively right answer). What I will argue is that if we understand it correctly, it is a revolution, and therefore its consistency with the legal rules of the prior regime doesn’t matter. We should not care whether Reconstruction was legal under the Founders’ Constitution any more than we care whether the first Revolution was legal under British law. The legitimacy of our current political regime does not depend on continuity with the Founding.

IV. THE REJECTION OF THE FOUNDING: PROCESS

What happened during Reconstruction? The historiography is vast, and the dominant narrative changes over time. I will tell the story only briefly and make just a few points, but I hope they are enough.

After the Confederate defeat, U.S military forces moved through the South, sweeping away Confederate authority and protecting the rights of the formerly enslaved. In May 1865, President Andrew Johnson announced his plan for Reconstruction. He returned land that had been distributed to the formerly enslaved and placed few conditions on the reconstitution of southern governments. The southern states formed new legislatures, which looked very much like the legislatures that had voted to secede in 1861. (This is not surprising, because the constitutional conventions called to create the new southern governments selected delegates from the pool of people eligible to vote in 1861). These legislatures ratified the Thirteenth amendment—not because they were especially enthusiastic about it, but because they understood that they had no choice.\footnote{See generally ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION, 1863-1877 (2015).} They lost the war, and slavery was over—at least in name.

What freedom would look like, though, was still a relatively open question. Following the ratification of the Thirteenth Amendment, southern legislatures suggested their answer: overt discrimination and continued white
supremacy. They codified this idea with the Black Codes, which came as close as possible to restoring the structure of slavery.\textsuperscript{73}

The Reconstruction Congress was unwilling to accept this vision of a new South. They reacted with the Civil Rights Act of 1866, which preempted many provisions of the Black Codes and declared that all persons born in the United States were citizens. Concerned that the Civil Rights Act rested on a shaky constitutional foundation (it contradicted \textit{Dred Scott}) and that a future Congress containing representatives from the South might repeal it, Republicans in Congress decided an amendment was necessary to place those principles beyond the reach of courts and ordinary politics.\textsuperscript{74} This was the Fourteenth Amendment. Its content is of course controversial and disputed, but one thing it clearly did was to grant birthright citizenship to the formerly enslaved and their descendants.\textsuperscript{75} Congress passed this amendment and sent it to the states for ratification on June 8, 1866.\textsuperscript{76} Congress asked Founding America to accept Black people as members of the political community.

Founding America said no.

Tennessee ratified the proposed amendment in July 1866. But that was the only yes from the former Confederacy: eight former Confederate states voted no between October 1866 and February 1867. And as with the claims based on emancipation, which the Fourteenth Amendment dismissed as no more valid than rebel debt, the rejections did not involve only the former Confederacy. Kentucky, Delaware, and Maryland all voted no in 1867. (Ohio and New Jersey would follow suit in 1868). By March 1867, it was clear that the Fourteenth Amendment had no chance of reaching the twenty-eight ratifications necessary under Article V.\textsuperscript{77}

And so on March 2, 1867, Congress passed the first of what would be four Reconstruction Acts, overriding Johnson’s veto. The first Act declared that “no legal state governments or adequate protection for life or property now exists in the rebel States” of the former Confederacy, excepting Tennessee. It divided those states into military districts and subjected them to the military authority of the United States. It directed the people of the states to form new governments: to hold constitutional conventions, in which formerly enslaved could participate and former Confederates

\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} U.S. CONSTIT. amend. XIV, § 1.
\textsuperscript{76} FONER, supra note 72.
\textsuperscript{77} Id.
disenfranchised for rebellion or disqualified from holding office by the Fourteenth Amendment could not. Once a constitution had been approved by Congress, and the legislature ratified the Fourteenth Amendment, the states could resume their places in Congress.\footnote{Id.}

What do we call this? There is a lively, though to my mind inconclusive, debate about its legality. Akhil Amar argues forcefully that Congress’s measures were an appropriate exercise of its power under the Guarantee Clause.\footnote{See U.S. CONSTIT., art. IV, § 4, Cl. 2.} I’m not so sure. Amar’s claim is that denying the formerly enslaved the right to vote rendered the Southern governments non-republican, because they disenfranchised such a large percentage of their citizens.\footnote{See \textit{Amar, America’s Constitution} 364-80.} But the disenfranchisement of women seems equally problematic, and I think the argument only gets off the ground if the formerly enslaved are citizens of the states in which they reside. The Civil Rights Act of 1866 said they were, but \textit{Dred Scott} said they were not. Congress could not overrule \textit{Dred Scott}’s interpretation of the Constitution, and whether Congress had the power to grant citizenship on its own was unclear.

But again, legality is not my concern. My main claim is that the states that ratified the Fourteenth Amendment were not the same states that voted to secede and to ratify the Thirteenth Amendment. Consider what Congress did. It eradicated the governments that existed. It returned the South to the state of nature. (During Reconstruction, the federal government did take on the role of a Declaration-style government, protecting the natural rights of individuals.)\footnote{See Lisset Marie Pino & John Fabian Witt, \textit{The Fourteenth Amendment as an Ending: Constitutional Beginnings and the Demise of the War Power}, 10 J. CIVIL WAR ERA 5 (2020).} Then it created new political communities: it specified who would be citizens of the states. It determined who would hold political power: it specified who could vote for and serve as delegates in constitutional conventions and who could hold state and federal office. The legislatures that ratified the Fourteenth Amendment generally looked quite different from those that ratified the Thirteenth—the latter were white and Democratic, the former integrated and Republican.

Conventional wisdom suggests that the former Confederate states were coerced into ratifying the Fourteenth Amendment as a condition of resuming their place in Congress,\footnote{See generally, e.g., Thomas B. Colby, \textit{Originalism and the Ratification of the Fourteenth Amendment}, 107 NW. U.L. REV. 1627, 1643-55 (2013).} but for most of the legislatures, no coercion was necessary. The legislatures that ratified the Thirteenth Amendment could
be called coerced—they probably were not entirely enthusiastic about abolition, but they had no choice. The legislatures that ratified the Fourteenth were pro-equality legislatures, because they were representatives of a new political community. New constitutions, new governments, new citizenry. . . . if we think that anything more than name and geography matters, these are new states.

The best understanding of the ratification of the Fourteenth Amendment, I submit, is that when Founding America rejected it, Congress annihilated ten states that wouldn’t ratify and made new ones that would, in order to get over the twenty-eight-state threshold. We can argue about whether that was legal, but legality is really beside the point. The question we should be asking is whether this is the triumph of Founding America or its destruction, and the answer to that seems clear.

Again, consider the values and the theory of the Declaration, and note the contrasts with Reconstruction. People come together to form a government to protect their rights, says the Declaration. No, says the Reconstruction Congress, we will decide who is a member of your political community. Governments get their just authority from the consent of the governed, says the Declaration. No, says the Reconstruction Congress, we do not seek your consent; in fact, we silence the voices of many of those who previously held power.

Move on to the complaints against King George. He has dissolved representative houses? He has kept among us standing armies? He has affected to render the military independent of and superior to the civil power? He has deprived us in many cases of the benefits of trial by Jury. Check, check, check, and check. And, of course, the colonists complained that the British were emancipating the people they enslaved. Check that box, too. Reconstruction and the Fourteenth Amendment did not fulfill the ideals of the Declaration of Independence; they rejected those ideals. Reconstruction is not a people defining itself by mutual consent, separating from another, and creating a government to secure the rights of its citizens. It is a society created from above, imposed on a people who rather preferred their prior system and had tried to do just what the Declaration promised they could.

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83 See DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
84 Congress dissolved southern governments, occupied the South, placed military authorities in charge, and authorized them to conduct trials by military commission.
85 See DECLARATION OF INDEPENDENCE (U.S. 1776).
What is the significance of all of this? I have argued that the words and values of Founding America support the Confederacy far more than we like to admit. The Confederates made these arguments too, of course, and some people might think that is enough reason to reject them. But the consequences and valence of constitutional arguments change over time. Antebellum abolitionists sought to claim the Declaration for their side because they had no other federal document to appeal to. Second Reconstruction activists who did the same thing probably hoped to enlist whites who were uncomfortable with Reconstruction.

Our historical moment is different. Unlike Lincoln and the antebellum abolitionists, we have constitutional text to rely on to support arguments for equality: the Reconstruction Amendments. And unlike Second Reconstruction activists, we can see the costs of embracing the Declaration and the Founding. Arguing that Reconstruction rejects the Founding should no longer weaken our attachment to Reconstruction. It should weaken our attachment to the Founding. The legitimacy of our constitutional system does not depend on its continuity with the Founders’ Constitution. We should root our identity in Reconstruction, not the Founding.

That is true as a matter of intellectual history, as I have tried to argue, but it is also true as a matter of political strategy, if the values of Reconstruction are those we hope to promote in the future. The struggle between Reconstruction America and the Confederacy did not end in 1868, of course. Confederate values prevailed in Redemption; the Reconstruction Amendments were all but nullified until the Second Reconstruction brought them back to life in the mid-twentieth-century. That Second Reconstruction met a Second Redemption, which continues to this day. And what we need to understand about how it works is that the Confederacy comes to us cloaked in the Founding.

I have tried to show above that there are in fact deep ideological similarities between the Confederates and the Founders, between the first

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87 See generally J.M. Balkin, Ideological Drift and the Struggle Over Meaning, 25 CONN. L. REV. 869 (1993) (arguing that “theories of constitutional interpretation do not have a fixed normative or political valence”).

Revolution and the Southern secession. Redemption is a bit different because it involves overthrow, rather than separation, but we are seeing that now too. The Pine Tree flag that announced the Patriots’ 1776 appeal to heaven flew at the Capitol on January 6; so did the Gadsden “Don’t Tread on Me” flag, and Betsy Ross’s thirteen stars in a circle. And so did the Confederate battle flag; the insurrectionists understood the connection.89

We make it harder to condemn white paramilitaries fighting the national government—the Proud Boys, the Oath Keepers, the Three-Percenters—if we tell ourselves that white paramilitaries fighting the national government—the Minutemen, the Sons of Liberty—are the heroes of our national story. And there is a better story available, in which the national government is the good guys and the white paramilitaries fighting it—the Red Shirts, the White League, the Klan—are the bad guys. We should understand that the America that destroyed the Confederacy was not Founding America but Reconstruction America—and it destroyed Founding America as well. If we want a different future, we must build it from a different past.