THE DECLARATION OF INDEPENDENCE AS CANON FODDER

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ALEXANDER TSESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE (2012). Pp. 408. Hardcover $29.95.

JUSTIN BUCKLEY DYER, NATURAL LAW AND THE ANTISLAVERY CONSTITUTIONAL TRADITION (2012). Pp. 208. Hardcover $91.00.

NICHOLAS BUCCOLA, THE POLITICAL THOUGHT OF FREDERICK DOUGLASS (2012). Pp. 225. Hardcover $65.00.

BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION (2012). Pp. 184. Hardcover $19.95.

Every August at law schools throughout the United States, young people in blue and gray suits can be found scurrying about in "dubious battle"[1] to find lucrative employment. The scene bears an eerie to resemblance to a Civil War reenactment fought entirely by lawyers. Meanwhile, ensconced in their upstairs offices, many professors, often dressed in blue or gray dungarees, are engaged in their preferred form of Civil War reenactment. Whole forests have been consumed for the production of law review articles and university press books devoted to demonstrating who are the modern day Unionists and who are the modern day Confederates. History, these manuscripts highlight, is not invariably told by the winning army. Rather, the contemporary army that wins the battle over history is likely to win the war over the direction of public policy. He or she who captures the mantle of George Washington, Thomas Jefferson, or Abraham Lincoln rules.

The Civil War is the single leading source of canonical material for contemporary American constitutionalism.[2] Slavery is the canonical constitutional evil in the United States. If a present practice is analogous to slavery, that practice is wrong and violates the Thirteenth Amendment.[3] Abraham Lincoln is the canonical political

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1. John Milton, *Paradise Lost*, Book I, line 104 (1674).

2. The classical article on that constitutional canon is J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

3. *See e.g.*, Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359 (1992); Andrew Koppelman, *Forced Labor: A Thirteenth*

leader and interpreter of the Constitution. If a present political act would have been sanctified by Abraham Lincoln, then that political act is justified.[4] *Dred Scott v. Sandford* is at the core of the anti-canon in the United States.[5] A constitutional argument that can be analogized to *Dred Scott* is, by definition, wrong.[6]

How contemporary American constitutionalists struggle over the Civil War differs from controversies over the contemporary significance of other periods in the history of the United States. Debates over Reconstruction focus on who should be considered the canonical figures. Randall Kennedy details how a battle royal has taken place for almost one hundred and fifty years over which prominent Republicans should be celebrated and who should be condemned.[7] We dispute whether Thaddeus Stevens and his fellow radicals were "determined upon a policy of revenge and self-perpetuation"[8] or nineteenth century egalitarians who "laid the foundation for the African American revolution of the twentieth century."[9] By comparison, everyone agrees that Abraham Lincoln is the patron saint of American constitutionalism, while disputing his teachings.

The Declaration of Independence is as much a canonical document of the Civil War as of the American Revolution. Alexander Tsesis's exceptional history of the Declaration in American political rhetoric observes that sectional disputes in antebellum American were "between those who regarded the Declaration of Independence as primarily a document about individual rights and those who thought of it as the affirmation of state self-government."[10] Antebellum opponents of slavery emphasized that human bondage was inconsistent with the founding commitment to the proposition that "all men are created equal."[11] Many Americans in 1860, and most Americans today believe the Civil War was justified only as an effort to maintain this aspiration for human freedom, and not as a means to hold the nation together.[12] The meaning of the Declaration at present is inextricably tied to the northern victory in 1865, which in turn was defined by Abraham Lincoln, who at Gettysburg declared, "[f]ourscore and seven years ago, our fathers brought forth on this continent a new nation conceived in liberty and dedicated to the proposition

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Amendment Defense of Abortion, 84 NW. U. L. REV. 480 (1990).

4. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1382-83 (1997) (explaining why Lincoln's attack on *Dred Scott* was nevertheless consistent with their theory of judicial supremacy); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1230 (2008) (claiming that one can defend judicial supremacy "only by rejecting one of Lincoln's most important political and constitutional positions.").

5. *See* MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 15-16 (2006); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 406-12 (2011).

6. *See* Planned Parenthood of SE Pa. v. Casey, 505 U.S. 833, 984 (1993) (Scalia, J., dissenting) (claiming that *Dred Scott* demonstrates the flaws in non-originalist methods of constitutional interpretation); Christopher L. Eisgruber, Dred *Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37, 64 (1993) (claiming *Dred Scott* demonstrates the flaws in originalist methods of constitutional interpretation).

7. Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521 (1989).

8. *See, e.g.*, ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT 73 (5th ed. 2010).

9. HANS L. TREFOUSSE, THADDEUS STEVENS: NINETEENTH CENTURY EGALITARIAN xiii (1997).

10. ALEXANDER TSESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE 99 (2012).

11. *See* JUSTIN BUCKLEY DYER, NATURAL LAW AND THE ANTISLAVERY CONSTITUTIONAL TRADITION 23-24 (2012).

12. GRABER, *supra* note 5, at 14; Frederick Douglass, *The Mission of the War: A Lecture*, N.Y. TRIB. 1-2 (Jan. 14, 1864).

that all men are created equal."[13]

Tsesis's *For Liberty and Equality*, Brian R. Dirck's *Lincoln and the Constitution*, Nicholas Buccola's *The Political Thought of Frederick Douglass*, and Justin Buckley Dyer's *Natural Law and the Antislavery Constitutional Tradition* are among the very good recent books that, through an analysis of canonical Civil War figures and texts, inform judgments about the place of the Declaration in the Civil War and contemporary canon.[14] Each book combines historical and presentist ambitions, although the precise balance differs. Dirck, the most historically oriented of the authors surveyed in this review, focuses on Lincoln's constitutional thought from birth to death.[15] Buccola is interested is determining where Frederick Douglass fits in the American liberal tradition and how his thought might inform contemporary liberalism.[16] Dyer and Tsesis have written works more avowedly presentist in goals. Dyer seeks to remind us of the role natural law played in the antislavery movement in order to promote natural law thinking at present.[17] Tsesis seeks to remind us of the role the Declaration has played in progressive political movements throughout American history in order to promote more progressive constitutional thinking at present.[18]

This review essay introduces these fine books to the audience of the *Tulsa Law Review* and discusses some issues about the status of the Declaration of Independence in the American constitutional canon. Tsesis maintains that "[a]t every stage of American history, the Declaration of Independence provided a cultural anchor for evaluating the legitimacy of legal, social, and political practices,"[19] and that while "the Declaration's terms are broad enough to allow for differing opinions . . . what is steadfast is the Declaration's statement of human equality, which is irreconcilable with discriminatory regulation, adjudication, and law enforcement."[20] Abraham Lincoln, Frederick Douglass, and other antislavery advocates agreed. Each thought the Declaration expressed a national commitment to ending slavery that justified the carnage of 1861-1865. Dyer explicitly endorses this sentiment. He thinks the Declaration supported antislavery activism, Lincoln's decision to fight the Civil War, and particular sides in contemporary cultural wars.[21] Dirck and Buccola are sympathetic, at least with respect to the Declaration and the Civil War. A general consensus exists that the Declaration was on the side of the angels during the Civil War and supports specific causes at present.

I wonder. The thin Declaration of Independence[22] could be invoked by all par-

13. *Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg*, *in* 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler ed., 1953); *see also* GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 261 (2006).

14. NICHOLAS BUCCOLA, THE POLITICAL THOUGHT OF FREDERICK DOUGLASS (2012); BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION (2012); DYER, *supra* note 11; TSESIS, *supra* note 10.

15. *See* DIRCK, *supra* note 14.

16. *See* BUCCOLA, *supra* note 14.

17. *See* DYER, *supra* note 11.

18. *See* TSESIS, *supra* note 10.

19. *Id.* at 1.

20. *Id.* at 2.

21. DYER, *supra* note 11, at 187-91.

22. For a brief discussion of the thick and thin Declaration of Independence, see Mark A. Graber, *Thick and Thin: Interdisciplinary Conversations on Populism, Law, Political Science, and Constitutional Change*, 90 GEO. L.J. 233, 241-42 (2001).

ties to the debate over slavery. The thicker Declaration does privilege antislavery positions, but not necessarily the decision to fight the Civil War. Most important, neither the thin nor the thick Declaration privileges any participant involved in contemporary constitutional struggles. Controversies over such matters as abortion and affirmative action are better described as contests over what constitutes "discriminatory regulation" than debates over the merits of discrimination or disputes between proponents and opponents of natural law. The Declaration, like *Brown v. Board of Education*,[23] is suffering "the price of fame."[24] Both are canonical because whatever work they may have done has already been completed and, as a result, they can now be employed by all parties to contemporary debates. Canonical texts and figures, this review suggests, more often determine the location of our constitutional struggles than their outcomes.

THE BOOKS

Review essays are hard on good books. The usual flaws of reviews are inevitably multiplied when a reviewer takes on more than one work. The effort to combine volumes distorts by presuming a discussion that is not, in fact, taking place. No evidence exists that Professors Tsesis, Dirck, Buccola, or Dyer are in conversation with each other or even that they wish to join the same conversations.[25] The effort to find common themes further distorts particular manuscripts by highlighting some claims at the expense of others that may be as, if not more, central to the actual books the different authors wrote. Tsesis, Dirck, Buccola, and Dyer clearly think that the Declaration of Independence played a vital role in antislavery thought, but that is only one of the many diverse ideas each author hoped to convey. For this reason a brief discussion of the book each author actually wrote seems useful before the mind of the reviewer attempts to impose some order.

Alexander Tsesis meticulously details how the Declaration of Independence has stimulated and justified reform movements throughout American history. While he devotes an important chapter to various invocations of the Declaration in antebellum thought, *For Liberty and Equality* more broadly documents how "the manifesto's statement of national purpose has inspired generations of Americans."[26] For Tsesis, almost every positive development in American constitutionalism has roots in the Declaration. His "Declaration"

> makes clear that a representative government must act in accordance with the consent of the real source of power: ordinary people. . . . Arbitrary state actions committed against racial or nationality groups, women, religious minorities, propertyless persons, and other political disempowered individuals undermines the purposes for which the government was formed: protection of human equali-

23. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

24. Mark A. Graber, *The Price of Fame:* Brown *as Celebrity*, 69 OHIO ST. L.J. 939 (2008).

25. None of the books reviewed cites the others. There is surprisingly little overlap in the cited secondary literature.

26. TSESIS, *supra* note 10, at 312.

ty.[27]

Even those prone to a less romantic reading of American constitutional development and the Declaration will find Tsesis's thorough exploration of the central place the Declaration has occupied in American history to be a major contribution to American law, history, and political science.

Brian Dirck in his short, very accessible scholarly work emphasizes that Lincoln treated the Declaration as foundational only during the 1850s and during his 1860 campaign for the presidency.[28] Lincoln in 1852 "discovered" the Declaration when eulogizing Henry Clay,[29] but after being elected to the presidency hardly "mentioned the document at all" in either public speeches or private letters.[30] *The Constitutional Thought of Abraham Lincoln* convincingly demonstrates two more consistent themes in Lincoln's constitutional thinking. The first was a Hamiltonian/Whig understanding of national power as a force for improving Americans. "His Constitution," Dirck writes, "was a vigorous, flexible instrument, with the latent power in its language necessary to allow the government room to grow and maneuver, and to meet the exigencies of new times and challenges."[31] Dirck does not make the point directly, but his book makes a powerful case that Lincoln began and ended his political life as a Whig. Although Lincoln claimed the Midwesterner, Clay, was his political idol,[32] he had much in common with the more openly antislavery John Quincy Adams, whose first inaugural address set out the different ways that early nineteenth century Americans could harness government to promote the general good.[33] The second theme Dirck identifies is Lincoln's "essentially optimistic view of the Constitution."[34] Dirck's Lincoln "saw the Constitution and the rule of law it represented as a vehicle designed to get Americans somewhere, someplace higher and better than where they had been: a more perfect Union."[35] In doing so, Lincoln anticipated contemporary aspirational theories of constitutional interpretation, which maintain "[t]he Constitution's coherence depends partly on its capacity to be reinterpreted, if need be, in light of better conceptions of justice."[36]

Nicholas Buccola's rich study of Frederick Douglass recognizes that the natural law teachings of the Declaration provided one of several foundations for Douglass's political thought. Douglass leaned heavily on the Declaration in part because, as Buccola demonstrates, he was attracted to the classical liberal position that the fundamental purpose of governmental institutions is to protect private

27. *Id.* at 313.
28. DIRCK, *supra* note 14, at 33-50.
29. *Id.* at 28.
30. *Id.* at 66.
31. *Id.* at 11.
32. *First Debate with Stephen A. Douglas at Ottawa, Ill.*, *in* THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 13, at 29.
33. John Quincy Adams, *Inaugural Address, in* 2 A COMPILATION OF MESSAGES AND LETTERS OF THE PRESIDENTS 9-16 (James D. Richardson ed., 1902).
34. DIRCK, *supra* note 14, at 5.
35. *Id.* at 135.
36. SOTIRIOS A. BARBER, THE CONSTITUTION OF JUDICIAL POWER 110 (1993).

rights.[37] Buccola's Douglass found liberalism particularly conducive to this political vision because when in human bondage he experienced the most illiberal form of domination. "As a former slave and abolitionist," Buccola writes, "Douglass was especially sensitive to the evils of inegalitarian ideologies. His goal was to purge American doctrines, institutions, and practices of the pernicious influence of these ideologies so that the promises of liberalism could be extended to all people."[38] Although Clarence Thomas claims Douglass was a classical liberal committed to the night watchman state,[39] Buccola points to the reform liberal strand in Douglass's thinking and political action. Douglass's willingness to endorse such policies as compulsory education and aggressive redistribution to benefit former slaves demonstrates his support for government intervention as an important means for securing human flourishing. Buccola writes:

> Douglass offered a strong case that the state had an important role to play in encouraging individuals to be responsible citizens. Through the use of force, the promulgation of law, the rhetoric of statesmen, the celebration of civic holidays, and the promotion of a robust educational system, the state can direct individuals toward the path of personal and social responsibility.[40]

Justin Buckley Dyer does a wonderful job highlighting how the Declaration of Independence in particular and natural law principles more generally inspired the antislavery movement in the United States. *Natural Law and the Antislavery Constitutional Tradition* boldly defends the Lincolnian proposition that "the Constitution drew aspirational content from the [natural law] principles in the opening lines of the Declaration of Independence,"[41] and is the best extant account of how prominent antislavery activists employed those principles in their effort to place slavery on "the course of ultimate extinction."[42] Dyer is clearly right when he asserts that most prominent "antislavery constitutional theories . . . were . . . bound up with the idea of a higher law that undergirded the law of the state and against which the law of the state might be judged."[43] The chapters on John Quincy Adams and Justice John McLean are particularly worth the price of admission. The former chapter provides a compelling description of how Christian natural law moved the Boston Puritan in his later years to become a vigorous champion of abolition. Dyer details how "Adams's arguments" in the *Amistad* case[44] "constitute a link in the chain" from the use of natural law in "the antislavery arguments of some of the principal American Founders" to "the antebellum Republican Party."[45] The chapter on McLean high-

37. BUCCOLA, *supra* note 14, at 42-43.
38. BUCCOLA, *supra* note 14, at 161.
39. See Grutter v. Bollinger, 539 U.S. 306, 378 (2003) ("[i]t has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to '[d]o nothing with us!'").
40. BUCCOLA, *supra* note 14, at 157.
41. DYER, *supra* note 11, at 22.
42. Speech at Chicago, Ill., *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 13, at 491.
43. DYER, *supra* note 11, at 187.
44. United States v. The Amistad, 40 U.S. 518 (1841).
45. DYER, *supra* note 11, at 74-75.

lights how his dissent in *Dred Scott* is a far better expression of American antislavery commitments than the far weaker dissent by Justice Curtis.[46] Dyer points out how "McLean shared in common with Lincoln an aspirational theory of the Constitution and an understanding of natural justice that were absent from the Court's other opinions."[47] Finally, *Natural Law and the Antislavery Tradition* brings out the theological underpinnings of Lincoln's opposition to slavery and much antislavery thinking before the Civil War—a theme Dyer finds disturbingly absent in modern moral and jurisprudential discussions. "The natural law and providential aspects of Lincoln's thought," he claims, "shed light on the massive gulf between the underlying premises of modern constitutional theory and the tradition of American antislavery constitutionalism."[48]

THE DECLARATION

Abraham Lincoln, Frederick Douglass, and other antislavery activists placed the Declaration at the core of their attack on human bondage. Dirck and Dyer emphasize how Lincoln regarded the Declaration as an "Apple of Gold" and the Constitution a mere "silver frame" meant to protect and cherish the apple of gold.[49] In numerous speeches, Lincoln insisted that Jefferson established fundamental American constitutional commitments when he declared that all men are created equal. "I have never had a feeling politically," Lincoln declared in 1861, "that did not spring from the sentiments embodied in the Declaration of Independence."[50] Those sentiments, he continued, could be reduced to the "promise that in due time the weights should be lifted from the shoulders of all men and that all should have an equal chance."[51] Douglass regarded the Declaration as America's "civil catechism."[52] He was one of the first antislavery advocates to develop a theory of the Constitution that placed the Declaration at the core of the text.[53] In 1860, he stated:

> The Constitution declares that no person shall be deprived of life, liberty, or property without due process of law; it secures to every man the right of trial by jury, the privilege of the writ of habeas corpus—the great writ that put an end to slavery and slave-hunting in England—and it secures to every State a republican form of government. Anyone of these provisions in the hands of abolition statesmen, and backed up by a right moral sentiment, would put an end to slavery in America.[54]

46. *Id.* at 133-38.
47. *Id.* at 113.
48. *Id.* at 138.
49. *Fragment on the Constitution and the Union*, *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 13, at 169; DIRCK, *supra* note 14, at 31; DYER, *supra* note 11, at 15; *see* BUCCOLA, *supra* note 14, at 46-47 (claiming Douglass endorsed Lincoln's "apple of gold" metaphor).
50. Abraham Lincoln, Address at Independence Hall (Feb. 22, 1861).
51. *Speech in Independence Hall, Philadelphia, Pa.*, *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 13, at 240.
52. BUCCOLA, *supra* note 14, at 83.
53. *See id.* at 46-47, 85.
54. Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, *in*

Elsewhere, Douglass maintained that "[t]he science of government has received no very great alteration, illustration or illumination, since the signing of the Declaration of Independence by the American people."[55] Other antislavery advocates similarly revered the Declaration, sometimes at the expense of the Constitution. Dyer focuses his attention on those opponents of slavery who insisted that "the principles of the Declaration of Independence provided the normative foundation for subsequent constitutional politics."[56] John Quincy Adams, when insisting that American law compelled the Supreme Court to free the former slaves who revolted on the Amistad, concluded his argument by declaring, "I ask nothing more in behalf of these unfortunate men than this Declaration."[57] Tsesis discusses at more length those abolitionists who "contrasted the principles of the Declaration from the compromises of the U.S. Constitution."[58] Most famously, William Lloyd Garrison on July 4, 1839 burnt a copy of the Constitution, which he declared was "a covenant with death and an agreement with hell."[59]

Tsesis, Dirck, Buccola, and Dyer champion close attention to the Declaration of Independence as enthusiastically as prewar abolitionists. Tsesis and Dyer, in particular, regard the Declaration as the foundation for attacks on slavery and other human ills. Dyer celebrates a "regime founded on the equality of all men under the laws of nature and nature's God."[60] Tsesis claims "[t]he document's message of universal freedoms . . . continues to be the national manifesto of representative democracy and fundamental rights."[61] Dirck and Buccola are more muted in their treatment of the Declaration, in large part because their works are less presentist. Still, Dirck clearly approves Lincoln's use of the Declaration and Buccola clearly approves Douglass's use of the Declaration. Dirck concludes that "the greatest lesson we can take from Abraham Lincoln's approach to the Constitution" is that that text is "a means to a higher, greater moral end—some 'apple of gold,'"[62] which is shorthand for the Declaration of Independence.[63] Buccola admires "The Reformer" charged with "the task of reminding others of the fundamental moral truths of natural law" that "in the case of the United States . . . are most clearly stated in the Declaration of Independence."[64]

Antislavery advocates and their contemporary cheerleaders rely heavily on a very thin version of the Declaration. Their Declaration of Independence consists almost entirely of the second paragraph, the paragraph that begins by declaring "[w]e hold these truths to be self-evident." Indeed, most opponents of slavery in antebellum America discussed only the first two sentences of the second paragraph,

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ANTISLAVERY POLITICAL WRITINGS, 1833-1860: A READER 154 (C. Bradley Thompson ed., 2004).

55. BUCCOLA, *supra* note 14, at 47.
56. DYER, *supra* note 11, at 85.
57. *Id.* at 97.
58. TSESIS, *supra* note 10, at 105.
59. *Id.* at 106.
60. DYER, *supra* note 11, at 191.
61. TSESIS, *supra* note 10, at 5.
62. DIRCK, *supra* note 14, at 134.
63. *See supra* note 50 and accompanying text.
64. BUCCOLA, *supra* note 14, at 104.

and they devoted far more attention to the first sentence than to the second. Lincoln on the campaign trail in Illinois signaled that he would have no difficulty denying to persons of color the various rights that Jefferson listed as being a cause of the American Revolution. The Declaration condemned King George III for "dissolv[ing] Representative Houses repeatedly" and "depriving us in many cases, of the benefits of Trial by Jury." Lincoln, during the debates with Douglas, informed Illinois voters that these liberties were for whites only. He was "not nor [had] ever been in favor of bringing about in any way, the social and political equality of the white and black races" and was not "in favor of making voters or jurors of negroes, nor of qualifying them to hold office."[65] Antislavery advocates paid no attention to Jefferson's assertion in the third sentence of the second paragraph that "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it." That was a staple of southern secession rhetoric.[66] No person reading Dirck, Buccola, Dyer or Tsesis would have good reason to believe the Declaration was longer than two sentences.

THE WORK OF THE DECLARATION

All four authors and their subjects agree that Americans ought to pay closer attention to the Declaration of Independence. This is a central theme in the Dyer and Tsesis books, and part of the concluding thoughts in the works by Buccola and Dirck.[67] When crusading against slavery, Abraham Lincoln called on Americans to rededicate themselves to the Declaration of Independence. An 1854 speech in Peoria concluded, "[l]et us re-adopt the Declaration of Independence, and with it, the practices, and policy, which harmonize with it."[68] "The Declaration of Independence is no mere ornament of the past," Tsesis writes, but a valuable means for interpreting the Constitution and criticizing such Supreme Court decisions as *Citizens United v. Federal Elections Commission*.[69] Dyer, in a later book, invokes the Declaration repeatedly in defense of a constitutional commitment to banning abortion.[70] Their Declaration is not simply a series of words ritually chanted at patriotic ceremonies. Rather, as Frederick Douglass urged, patriotic ceremonies in which the Declaration plays a central role inspire persons to greater commitment to and action on behalf of fundamental natural rights.[71]

The Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*[72] might raise some questions about the value of invoking

65. *Fourth Debate with Stephen A. Douglas at Charleston, Ill.*, *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 45 (2008).

66. *See* TSESIS, *supra* note 10, at 169.

67. *See supra* notes 60-64 and accompanying text.

68. *Speech in Peoria, Ill.*, *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 13, at 276.

69. TSESIS, *supra* note 10, at 316-17.

70. JUSTIN BUCKLEY DYER, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING 69-70, 150-52 (2013).

71. BUCCOLA, *supra* note 14, at 148. *See* DIRCK, *supra* note 14, at 7 (noting that most Americans living in the nineteenth century "harbored a quasi-mystical nationalism that combined secular religious symbolism and pageantry . . . centered primarily on George Washington, and a deep-seated reverence for the hallowed texts of the Revolutionary generation.").

72. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) [hereinafter *Parents Involved*].

canonical texts for partisan causes. Legal arguments calling on the justices to think deeply about the meaning of *Brown v. Board of Education*[73] had no impact on that case. Both the majority and dissenting opinions insisted at great length that *Brown* supported their basic and sharply divergent contentions. Chief Justice John Roberts and Justice Clarence Thomas thought *Brown* a vital precedent for the proposition that racial classifications are constitutionally odious. "[W]hen it comes to using race to assign children to schools," Roberts stated,

> [H]istory will be heard. In *Brown v. Board of Education*, we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954.[74]

Thomas declared that giving "school boards a free hand to make decisions on the basis of race" was "an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education*."[75] Justices Breyer and Stevens insisted just as vigorously that *Brown* was committed to an antisubordination conception of equal protection. Challenging the plurality's effort to appropriate *Brown* for anticlassification purposes, Breyer declared, "segregation policies did not simply tell schoolchildren 'where they could and could not go to school based on the color of their skin,' they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination."[76] Stevens observed, "[t]here is a cruel irony in the Chief Justice's reliance on our decision in *Brown v. Board of Education*," given that "only black schoolchildren" were prohibited from attending the schools of their choice.[77]

The American experience with *Brown* suggests that constitutional canons go through three phases. In their first phase, they fight to survive. In their second phase, they fight to expand. In their third phase, they become celebrities, endorsed by all political factions in large part because their central teachings can be invoked by parties to all sides of the most salient controversies of the day.[78] This metamorphosis does not render the canonical texts entirely without meaning. The canonization of *Brown* provides an impregnable barrier that prevents Americans from returning to the days of Jim Crow. Nevertheless, as the opinions in *Parents Involved* suggest, *Brown* is no longer a very effective weapon in contemporary struggles over racial equality.[79]

The extent to which the Declaration of Independence was and remains capa-

73. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
74. *Parents Involved*, 551 U.S. at 746.
75. *Id.* at 748 (Thomas, J., concurring).
76. *Id.* at 867 (Breyer, J., dissenting).
77. *Id.* at 798-99 (Stevens, J., dissenting).
78. This point is developed in Graber, *supra* note 24, at 942.
79. *See id.* at 1011-13.

ble of converting the heathens, as opposed to inspiring the faithful, depends on the canonical status of that document in 1860 and at present. Abraham Lincoln consistently presented the Declaration as in the second phase, as a constitutional canon fighting to expand. He maintained that the Declaration was "meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and therefore constantly spreading and deepening its influence."[80] Tsesis agrees that the Declaration still has partisan bite. He thinks that "the neglect" of the Declaration in contemporary discourse "is unfortunate."[81] A good deal of evidence, however, suggests that the Declaration was in phase three by 1860, and remains at present a constitutional celebrity that can be invoked for all causes rather than a precedential weapon that can be wielded effectively only by partisans on one side of a live debate.

Slaveholding devils and their allies in antebellum America could quote "American Scripture."[82] Both Stephen Douglas in his debates with Lincoln and Roger Taney in *Dred Scott* aggressively challenged claims that Jefferson had any commitment to racial equality. Douglas in the fifth debate asserted, "[t]he signers of the Declaration of Independence never dreamed of the negro when they were writing that document. They referred to white men, to men of European birth and European descent, when they declared the equality of all men."[83] Dyer correctly notes that Douglas could not defend popular sovereignty unless he denied Lincoln's understanding of the Declaration.[84] By the same token, Lincoln could not have defended banning slavery in the territories unless he denied Douglas's understanding of the Declaration. All this suggests is that Americans at the time of the Lincoln-Douglas debates could agree on the canonical status of the Declaration of Independence only because no consensus existed as to how the principles of the Declaration applied to the controversies of that time period.

An important interpretive practice supported those Jacksonians who maintained that the Declaration of Independence was not an antislavery document. When debating the Bank of the United States, Madison emphasized the interpretive significance of the framing decision not to empower Congress to incorporate a bank. His position was made "stronger," Madison informed the First Congress, "because he well recollected that a power to grant charters of incorporation had been proposed to the General Convention and rejected."[85] As is well known, the Second Continental Congress decided not to include a specific attack on the slave trade in

80. *Speech at Springfield, Ill.*, *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 13, at 406.

81. TSESIS, *supra* note 10, at 317.

82. *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE (1997).

83. Stephen Douglas, *Fifth Debate with Stephen A. Douglas, at Galesburg, Illinois*, *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 13, at 406.

83. TSESIS, *supra* note 10, at 216; *see* Dred Scott v. Sandford, 60 U.S. 393, 407 (1856) ("[T]he language used in the Declaration of Independence show(s), that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.").

84. DYER, *supra* note 11, at 121.

85. 1st Cong., 3d Sess. Rec. 1896 (Feb. 2, 1791) (statement of James Madison).

the Declaration. Jefferson's original draft contained the following passage:

> [H]e has waged cruel war against human nature itself, violating it's [sic] most sacred rights of life & liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither.[86]

That passage was deleted. If the Father of the Constitution insisted that the Constitution should be interpreted in light of the decision not to include a specific clause giving Congress certain powers, then interpreting the Declaration in light of the well-known decision to delete an attack on slavery seems entirely reasonable.

Whether the Declaration enabled Lincoln and other antislavery advocates to make a persuasive case against slavery, if persuasion is measured by the people actually persuaded, is doubtful. Lincoln was a minority president, elected by less than forty percent of those who cast ballots in the 1860 presidential election. Even making the incredibly doubtful assumption that all Lincoln voters in 1860 cast their ballots on the slavery issue,[87] reasons other than natural law principles motivated many voters to cast ballots for the Republican ticket. As Eric Foner and others have demonstrated, Republicans appealed to free state residents who believed that the United States was being dominated by a slave power that was denying fundamental rights to white persons.[88] In a passage neither Dirck nor Dyer repeat, Lincoln asserted:

> Whether slavery shall go into Nebraska, or other new territories, is not a matter of exclusive concern to the people who may go there. The whole nation is interested that the best use shall be made of these territories. We want them for the homes of free white people. This they cannot be, to any considerable extent, if slavery shall be planted within them.[89]

The most powerful arrow in the Republican quiver, as their consistent references to "white" people suggest, was the self-interest of free state voters, not the selfless notion that slavery was inconsistent with the natural law principles laid down in the Declaration of Independence.

Nevertheless, escaping the Declaration seems more difficult than the above

86. Thomas Jefferson, *Declaration of Independence*, *in* 2 AMERICAN CONSTITUTIONALISM 105 n.30 (Howard Gillman, Mark A. Graber & Keith E. Whittington eds., 2013).

87. *See* MICHAEL E. HOLT, POLITICAL PARTIES AND AMERICAN POLITICAL DEVELOPMENT FROM THE AGE OF JACKSON TO THE AGE OF LINCOLN 13 (1992) ("The northern voter realignment of the mid-1850s . . . played an absolutely critical role in causing the Civil War, and the evidence is simply indisputable that enthnocultural issues and tensions had a decisive impact in permanently converting a substantial majority of northern voters against the Democracy.").

88. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970); LEONARD L. RICHARDS, THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780-1860 (2000).

89. *Speech at Peoria, Ill.*, *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 13, at 268.

paragraphs indicate. The Declaration occupied a different place in Republican thought than in Jacksonian constitutional thinking. Republicans and abolitionists agreed that the Declaration was an anti-slavery document. Lincoln, Douglass, and John Quincy Adams were among the numerous opponents of slavery who insisted that the Declaration provided the necessary principles for the attack on slavery. The basic divide between the most radical abolitionists in the United States was between those, like Lincoln and Douglass, who insisted that the Constitution embodied the anti-slavery ethos of the Declaration and those, like William Lloyd Garrison and Wendell Phillips, who thought the Constitution betrayed the anti-slavery ethos of the Declaration.[90] By comparison, Democrats either assigned the Declaration a more minor role or sought to take the Declaration off the canonical pedestal. The more moderate following Douglas, insisted only that the Declaration was silent on the subject of slavery. In his view, Americans had no constitutional commitment to either the maintenance or the abandonment of slavery. Douglas thought that a person committed to the Declaration would "not care whether slavery was voted up or down."[91] Other slaveholding politicians, by comparison, insisted that the Declaration was simply wrong, that Americans should not venerate the words of Jefferson's second paragraph. "The Declaration of Independence is exuberantly false," declared the Richmond Enquirer."[92]

The Declaration may have an antislavery bias because, as Lincoln, Douglass, and the authors surveyed clearly believe, slavery does violate the natural law principles of Constitution. No one denies that enslaved persons are "men." Therefore, if "all men are created equal" and "if they are endowed by their Creator with certain inalienable rights among which are life, liberty and the pursuit of happiness," then the injustice of slavery follows as a matter of deductive logic. At least to the modern ear, Lincoln's arguments are convincing. Perhaps John Quincy Adams and Dyer are correct when they claim that slaveholders were not really developing a contrary tradition, but were suffering from mental diseases, "a perpetual agony of conscious guilt and terror attempting to disguise itself under sophistical argumentation and braggart menaces"[93] or, in Douglass's words, "selfishness."[94]

Nevertheless, the Declaration of Independence's reference to natural law does not explain what made Jefferson's handiwork a particularly valuable source for antislavery rhetoric. Natural law was the currency of the realm in antebellum America.[95] Numerous authoritative legal documents and canonical texts made reference to natural law principles because these principles were considered the foundations for all arguments about rights, whether the position defended was the right of a slave to freedom, the right of a slaveholder to property, or any other contested claim for human freedom. Hardly any general writing on natural law became foun-

90. *See supra* notes 58-59 and accompanying text.

91. Stephen Douglas, *Fifth Debate with Stephen A. Douglas at Galesburg*, Ill., *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 13, at 241.

92. TSESIS, *supra* note 10, at 169.

93. DYER, *supra* note 11, at 82 (citing John Quincy Adams, 9 MEMOIRES OF JOHN QUINCY ADAMS 349 (1837)).

94. BUCCOLA, *supra* note 14, at 19-22.

95. *See* DYER, *supra* note 11, at 170.

dational texts for the antislavery movement. The preambles to the Constitution of South Carolina in 1778[96] and the Constitution of Georgia in 1777[97] made reference to natural rights, but no one ever interpreted those documents as rooted in anti-slavery aspirations. The first paragraph of the Virginia Declaration of Rights was nearly identical to the famous second paragraph of the Declaration,[98] but was not a part of the anti-slavery canon in the years immediately before the Civil War. John Locke's writings on natural rights were well known,[99] but Lincoln and other abolitionists spent little energy invoking Locke when making natural law attacks on slavery.

A thicker understanding of the Declaration of Independence may help us understand the power of that text as an anti-slavery document. Americans in 1856 revered Jefferson's Declaration of Independence, not a neutered Declaration of Independence promulgated by faceless delegates to the Second Continental Congress. Lincoln in his speeches repeatedly referred to Jefferson, and the Jefferson he referred to was not only the author of the Declaration of Independence, but the sponsor of the ban on slavery in the Northwest Ordinance and a founder known to believe that slavery was a violation of natural law. In his third debate with Douglas, Lincoln stated that "the duty of Congress to oppose [slavery's] extension into Territory now free" was "recognized by the Ordinance of 1787, which received the sanction of Thomas Jefferson, who is acknowledged by all to be the great oracle and expounder of our faith."[100] Such proponents of slavery as Judah Benjamin may have believed slavery sanctioned by natural law,[101] but Lincoln was convincing when he maintained that the Declaration that Jefferson wrote regarded slavery as violating natural law.

The thick Declaration was also anti-slavery in light of common understandings of leading Revolutionaries. Virtually every major figure in the American Revolution thought slavery violated the natural law. Anti-slavery advocates could quote chapter and verse of such leading Virginians as George Washington, Patrick Henry, and George Mason for the proposition that human bondage was a necessary evil, not a public good. George Washington maintained, "there is not a man living who wishes more sincerely than I do, to see a plan adopted for the abolition of [slavery]."[102] Prominent South Carolinians and Georgians did not share those sentiments, even in the eighteenth century.[103] Nevertheless, the Pinckneys and Rutledges of Revolutionary America did not have the same status as did the Virginians who consistently bemoaned the existence of human bondage in the United States. In

96. S.C. CONST. of 1778, pmbl. (endorsing "the many great and weighty reasons therein particularly set forth" in the Declaration of Independence).

97. GA. CONST. of 1777, pmbl. ("assert[ing] the rights and privileges they are entitled to by the laws of nature and reason.").

98. *Virginia Declaration of Rights*, *in* 2 AMERICAN CONSTITUTIONALISM: RIGHTS AND LIBERTIES 89 (Howard Gillman, Mark A. Graber & Keith E. Whittington eds., 2013).

99. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 18 (1996).

100. *Third Debate with Stephen A. Douglas at Jonesboro, Ill.*, *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 13, at 124.

101. DYER, *supra* note 11, at 170.

102. GEORGE WASHINGTON: A COLLECTION 319 (W.B. Allen ed., 1988). *See* GRABER, *supra* note 5, at 108.

103. *See* GRABER, *supra* note 5, at 110.

short, to the extent antebellum Americans associated the Declaration with a particular group of people, the natural rights language of that document privileged anti-slavery positions.

The thick Declaration nevertheless had substantial limits as an antislavery tract. Persons reading the Declaration in light of framing practice could plausibly conclude that natural law rights were to be subordinated when they conflicted with federalism and the need to maintain national union.[104] Lincoln was on strong grounds when he insisted that the framers hoped slavery was on a course of ultimate extinction, but the Constitution they framed did little to achieve that end. With notable exceptions,[105] leading framers claimed that the Constitution had nothing to do with slavery. Oliver Ellsworth declared, "the morality or wisdom of slavery are considerations belonging to the States themselves."[106] A delegate to the Massachusetts Constitutional Convention stated, "if we ratify the Constitution, shall we do anything by our act to hold blacks in slavery—or shall we become partakers of other men's sins. I think neither."[107]

Most important, perhaps, the thick Declaration could not be cited for anything beyond a natural law antipathy to slavery. Everyone knew that Jefferson and friends believed slavery violated the natural law, but everyone also knew that Jefferson and his Virginian friends did not believe a multi-racial society was either possible or desirable. "Nothing is more certainly written in the book of fate," the author of the Declaration of Independence declared, "than that these people are to be free; nor is it less certain that the two races, equally free, cannot live in the same government."[108] Natural rights, in particular, ran out when citizenship was on the table. Herbert Storing observed that "[t]o concede the Negro's right to freedom is not to concede his right to U.S. citizenship."[109] When Republicans during Reconstruction cited the Declaration as supporting granting fundamental rights to persons of color,[110] others cited Jefferson's claim that "the two races . . . cannot live in the same Government."[111] Lincoln, after assuming office, never invoked the Declaration of Independence or Jefferson as supporting a broad catalogue of rights that persons of color granted freedom should enjoy.[112]

THE DECLARATION'S PROGENY

During the 1860s, the Declaration of Independence gave birth to the Gettys-

104. *See* GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC (2010).

105. *See The Documentary History of the Ratification of the Constitution*, *in* 2 RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA 463 (Merrill Hensen, John P. Kaminski & Gaspare J. Saladino eds., 2001).

106. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 364 (Max Farrand ed., 1937).

107. *Documentary History of the Ratification of the Constitution*, *in* 6 RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS 1371 (John P. Kaminsky et al., eds., 2000).

108. THOMAS JEFFERSON, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 51 (Adrienne Koch & William Peden eds., 1944).

109. Herbert J. Storing, *Slavery and the Moral Foundations of the American Republic*, *in* SLAVERY AND ITS CONSEQUENCES: THE CONSTITUTION, EQUALITY, AND RACE 59 (Robert A. Goldwin & Art Kaufman eds., 1988).

110. See TSESIS, *supra* note 10, at 183-201.

111. *See* 40th Cong., 2d Sess. Rec. 2869 (1867) (statement of Senator James Doolittle).

112. *See* DIRCK, *supra* note 14, at 66.

burg Address and the South Carolina Ordinance of Secession, both of which claimed Jefferson's handiwork as authority for their most vital claims.[113] The Gettysburg Address now enjoys canonical status. The Ordinance of Secession is a longstanding member of the anti-canon, although secession movements continue to occupy a place on the fringe of American politics.[114] The story Americans like to tell about themselves is that the Gettysburg Address became the rightful heir to the Declaration of Independence because the principles Lincoln declared in 1863 are true to the spirit of Jefferson's work while secessionists in South Carolina perverted natural law. The Civil War, which killed two percent of the American population, however, also had something to do with the construction of the contemporary constitutional canon.

Struggles to claim parentage and grandparentage from the Gettysburg Address and Declaration of Independence remain vibrant in American politics. Both Dyer and Tsesis agree that the Thirteenth and Fourteenth Amendments further constitutionalized the American commitment to the proposition that "all men are created equal."[115] Each, however, invokes that commitment for different causes. Dyer maintains that Americans rededicated to the Declaration will ban abortion.[116] Tsesis thinks Americans rededicated to the Declaration will expand access to reproductive services and abolish discrimination against homosexuals.[117] Perhaps virtue and natural law will triumph in the form of the better argument winning solely by virtue of being the better argument. Nevertheless history indicates that ordinary politics and perhaps violence will also play a major role in determining whether *Roe v. Wade*[118] or Justice Scalia's dissenting opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* [119] is part of the constitutional canon in the second half of the twenty-first century.

113. *Address Delivered at the Dedication of the Cemetery at Gettysburg*, *in* 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 13, at 23; *South Carolina Ordinance of Secession*, *in* 1 AMERICAN CONSTITUTIONALISM 278 (Howard Gillman, Mark A. Graber & Keith E. Whittington eds., 2013).

114. *See* Sanford Levinson, *The 21st Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate or Serious Arguments to Be Wrestled With?* 66 ARK. L. REV. (forthcoming 2014).

115. DYER, *supra* note 11, at 187-90; TSESIS, *supra* note 10, at 183-201.

116. *See supra* note 70 and accompanying text.

117. TSESIS, *supra* note 10, at 315-16.

118. Roe v. Wade, 410 U.S. 113 (1973).

119. Planned Parenthood of SE Pa. v. Casey, 505 U.S. 833 (1992).