

ESTOPPEL BY NONVIOLENCE

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I

INTRODUCTION

There are two traditions of political change in America.¹ One tradition invokes Lexington and Concord, the minutemen, George Washington crossing the Delaware, and the surrender at Yorktown. This is the American tradition of political violence: Liberty seized through the sword. The other invokes Montgomery and Selma, the Freedom Riders, the march across Edmund Pettus Bridge, the signing of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. This is the American tradition of political non-violence: Freedom obtained through suffering. Both traditions find inspiration in scripture, the Declaration of Independence, and in appeals to natural law.

There are two traditions of political change in America, violent and non-violent; but one group—African Americans—have found the most success by using non-violence, even though they, as a group, have the most historical and moral justification to take freedom by force. But perhaps that’s not so bad. For in pursuing a successful political strategy committed to non-violence—despite every moral right to use violence—African Americans have delegitimized any lesser claim to force as a weapon in American politics. The blood of Martin Luther King Jr., John Lewis, Lamar Smith, Fannie Lou Hamer, and Viola Liuzzo has nourished the tree of liberty. Their sacrifice has supplanted the tradition of John Locke. Because of them, non-violence sets the baseline for fundamental constitutional change in America.

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1. Cf. Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 *TEX. L. REV.* 49, 87 (2012) (“At its best, our liberal democracy maintains a powerful commitment to political dynamism, resisting the entrenchment of political power and celebrating the constant possibility of significant political change.”).

II

THE AMERICAN TRADITION OF VIOLENCE

“Violence is as American as cherry pie.”²

Mobs do a lot of the dirty work in Robert Middlekauff’s comprehensive history of the American Revolution, *The Glorious Cause*. Pages of his book are devoted to the spontaneous violence of cobblers, sailors, apprentices, and adolescents. A ship condemned for violating British taxes is scuttled by rioters; a Stamp Act official has his home and business besieged by ruffians;³ another group of thugs, shouting “liberty and property,” ransack the home of the lieutenant governor for three hours, tearing off shingles, destroying papers, splintering furniture and looting the silver.⁴ The instigators of these attacks— who eventually call themselves the “Sons of Liberty”—did not apologize, nor did they express remorse for the violence.⁵

One such virtuous mob congregated on King Street in Boston on a snowy evening on March 5, 1770. A knot of about twenty “semiskilled workers and ordinary laborers,” the “most resentful among Boston’s citizens”; folks who liked booze and fistfights as much as they hated the British occupation, taunted off-duty British soldiers outside the customs house.⁶ What began with harmless missiles of snowballs and ice, became more menacing, as anonymous shouts to “kill them” erupted from the swelling, armed crowd.⁷ A panicked soldier, a slip on the ice, a volley of fire, and the Boston Massacre—as contemporaries themselves called it—became sealed in the American historical imagination.⁸

As the turmoil spread across the colonies, what originally had been the work of day laborers and street hooligans became the business of planters, businessmen, and lawyers. The destruction of 90,000 pounds of tea in the Boston harbor by men dressed as Native Americans was likely drawn from “a broad spectrum of Boston’s population.”⁹ The moral rectitude of such violence to resist injustice was, to them, apparent.¹⁰ Indeed, it was “self-evident.”¹¹ And, when the conflict finally culminated in shooting on Lexington Green between revolutionaries who would not put down their arms, and regulars who demanded

2. H. Rap Brown. Quoted in W.S. Tkweme, *Brown, H. Rap*, in *AFRICAN AMERICAN LIVES* 106, 107 (Henry Louis Gates Jr. & Evelyn Brooks Higginbotham eds., 2004).

3. ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION: 1763–89*, at 64, 70 (rev. ed. 2007). For more on the constitutional claims of mobs, see generally Farah Peterson, *Constitutionalism in Unexpected Places*, 106 VA. L. REV. 559 (2020).

4. MIDDLEKAUFF, *supra* note 3, at 64.

5. *Id.* at 74, 99.

6. *Id.* at 143.

7. *Id.* at 144.

8. *Id.* at 145.

9. *Id.* at 159.

10. *Id.*

11. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

them,¹² “a decent respect to the opinions of mankind” required public reasons for such violence.¹³ So a lanky, chronically indebted, red-haired dilettante named Thomas Jefferson offered them. King George III had inflicted “repeated injuries and usurpations” designed to impose “absolute Despotism” on the colonists.¹⁴ Among the “train of abuses” visited against the colonists were kidnapping and transportation to foreign shores and dissolution of their governing and cultural institutions; denial of trade, denial of trial by jury, imposition of foreign law, and withdrawing of protection from private violence. In the political vernacular of the time, England’s government had reduced them to “slaves.”¹⁵

Slavery, as Bernard Bailyn observed, was “a political concept” for the Founders with a “specific meaning.”¹⁶ It was a condition of utter subjugation, the complete and total inability to “maintain one’s just property in material things and abstract rights.”¹⁷ It was “the absolute political evil” one that animated “every statement of political principle . . . every discussion of constitutionalism or legal rights . . . every exhortation to resistance” in the Founding Era.¹⁸

Eighteenth century luminaries were profligate with the term. In 1765, John Dickinson of Pennsylvania claimed that “We are taxed without our consent expressed by ourselves or our representatives. *We* are therefore—SLAVES.”¹⁹ Josiah Quincy of Boston bemoaned British oppression in 1770 with the declaration “[*W*]e are slaves.”²⁰ In the Continental Congress’s 1774 *Address to the People of Great Britain*, the writers complained that the blockade of the Port of Boston would force the colonists to “consent to become slaves . . . acquiescing in whatever disposition [the British Parliament] might think proper to make of their lives and property.”²¹ A delegation of South Carolinians—a colony with a history of brutal repression of slave rebellions—declared their preference of “death to slavery.”²²

Slavery was the term the Founding generation used to describe the absence of liberty—a liberty which they roughly equated with the immemorial rights

12. MIDDLEKAUFF, *supra* note 3, at 190.

13. THE DECLARATION OF INDEPENDENCE, *supra* note 11, at para. 1.

14. *Id.* at para. 2.

15. See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 232–33 (50th anniversary ed. 2017) (discussing the political use of the term “slavery” in eighteenth century political discourse).

16. *Id.* at 233.

17. *Id.*

18. *Id.* at 232.

19. A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 375 (1978).

20. *Id.*

21. John Jay, Address to the People of Great Britain (Oct. 21, 1774), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jay/01-01-02-0071> [<https://perma.cc/6ST6-PNKQ>].

22. JOHN PHILLIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 99 (1988).

guaranteed by the British constitution and common law.²³ Therefore, offenses to the basics of British constitutionalism equated to an attempt to enslave them: taxation without representation, a standing army, government without the consent of the governed.²⁴ The litany of British “usurpations” itemized in the Declaration of Independence were all calculated to “reduce [the colonies] under an absolute Despotism.”²⁵ This despotism, according to John Phillip Reid, was “the absence of law: law that protected the individual and law that limited the authority of private masters and public rulers.”²⁶ To be subject to the despotic and arbitrary caprice of another—whether a private person or a government—was the very definition of slavery.²⁷ And to be threatened with slavery, according to the philosopher John Locke, was to be placed in a footing of war, which not only justified violence,²⁸ but imposed a duty to “throw off such government.”²⁹

Roughly contemporaneously, persons of African descent in North America—actual, not rhetorical slaves—rose up to throw off their literal, not metaphorical chains. Efforts at self-emancipation began within a generation of the first recorded arrival of Africans in Jamestown in 1619. In 1640, a Black man named Emmanuel conspired with six white servants to steal guns and ammunition, food, and sail down the Elizabeth River to escape servitude.³⁰ That same month, a black servant named John Punch fled with a Scottish and Dutch servant, only to be recaptured and sentenced to indenture for life for seeking his freedom.³¹

In 1712, in New York City, warriors from Africa’s Gold Coast—humiliated by servitude and the work they were forced to perform—plotted a revolt with local Indians to commence on April 6. Armed with guns, swords, knives and axes, the revolutionaries set fire to a barn, and ambushed the men who came to investigate. The rebellion was rapidly quelled, and twenty-one executed in gruesome fashion.³²

In 1739, a group of enslaved Africans, including some Kongolese who may have been familiar with weapons and military training, sparked a revolt near Charleston, South Carolina near the Stono River.³³ The aim of the Stono

23. *See id.* at 49 (“[T]he eighteenth-century idea of liberty was the [British] constitution, and slavery was the opposite.”).

24. *See id.* (“[P]urported violations of [colonial] American constitutional rights were almost certain to be labeled slavery by someone.”).

25. THE DECLARATION OF INDEPENDENCE, *supra* note 11, at para. 2.

26. REID, *supra* note 22, at 48.

27. *Id.* at 48–51, 55.

28. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 320 (Peter Laslett ed., 1960) (“[H]e who makes an attempt to enslave me thereby puts himself into a state of war with me.”).

29. THE DECLARATION OF INDEPENDENCE, *supra* note 11, at para. 2.

30. HIGGINBOTHAM, *supra* note 19, at 27.

31. *Id.* at 28.

32. KERRY WALTERS, AMERICAN SLAVE REVOLTS AND CONSPIRACIES: A REFERENCE GUIDE 36–37 (2015).

33. John K. Thornton, *African Dimensions of the Stono Rebellion*, 96 AM. HIST. REV. 1101, 1103 (1991).

Rebellion was to head south to Augusta, Florida, where the Spanish governor had promised them freedom. Led by a man named Jemmy or Cato, they raised a standard, and with cries of “liberty” seized weapons, cut down whites in their path—except for one tavern keeper who had been “kind to his slaves”—and eventually settled down at a riverbank waiting for reinforcements. Instead, they were confronted by the white militia. Most fled; but a core of them fought, using guerilla tactics of attack, withdrawal, and attacking again, until most had been captured or killed. George Cato, the great, great grandson of “Commander Cato”³⁴ said “He die, but he die doin’ [the] right, as he see it.”³⁵

In 1800, a blacksmith named Gabriel, owned by a planter named Prosser, planned a multiracial republican revolution against slavery and merchant oppression in Henrico County, Virginia. Steeped in an atmosphere “in which heady talk of liberty and natural rights were common,” Gabriel planned an uprising that would upend the social system in Virginia and, with luck, the nation.³⁶ He was aided by two Frenchmen, “political radicals and staunch antislavery men who were willing to forfeit their lives in the effort to achieve the kind of liberty and equality of which the Jeffersonian leadership only spoke.”³⁷ (However, when the time came for the rebellion to commence, the Frenchmen had fled.)³⁸ The plan involved enlisting slaves with access to firearms and swords, a march on Richmond to secure additional weapons, and the hoisting of a banner with “Death or Liberty” emblazoned upon it.³⁹ However, the plan was betrayed and the incipient revolution quashed. The plan was used as a political tool by Federalists to show that liberal talk of freedom and equality by Jefferson’s allies had poisoned the minds of African Americans. And, even as Gabriel and his associates faced the gallows, Jefferson conceded in private correspondence, cryptically, of “the rights of the two parties & the object [freedom] of the unsuccessful one.”⁴⁰

Twenty years later, a free Black polyglot and carpenter named Denmark Vesey became the face of an abortive uprising in Charleston County, South

34. Steven J. Niven, *The Stono Slave Rebellion Was Nearly Erased From US History Books*, THE ROOT (Feb. 22, 2016), <https://www.theroot.com/the-stono-slave-rebellion-was-nearly-erased-from-us-his-1790854336> [<https://perma.cc/NCM6-3Q6C>].

35. JACK SCHULER, *CALLING OUT LIBERTY: THE STONO REBELLION AND THE UNIVERSAL STRUGGLE FOR HUMAN RIGHTS* 94 (2009).

36. GORDON WOOD, *EMPIRE OF LIBERTY* 535 (2009).

37. DOUGLAS R. EDGERTON, *GABRIEL’S REBELLION: THE VIRGINIA SLAVE CONSPIRACIES OF 1800 AND 1802*, at 45 (1993).

38. WALTERS, *supra* note 32, at 55.

39. Susan DeFord, *Gabriel’s Rebellion*, WASH. POST (Feb. 6, 2000), <https://www.washingtonpost.com/archive/lifestyle/2000/02/06/gabriels-rebellion/33c9061a-e33d-4f18-bf02-fe3cd294f5df> [<https://perma.cc/W5UW-JPME>].

40. William G. Merkel, *To See Oneself as a Target of a Justified Revolution: Thomas Jefferson and Gabriel’s Uprising*, 4 AM. NINETEENTH CENTURY HIST. 1, 20 (2003) (quoting Jefferson’s letter to Virginia’s governor counseling that some of Gabriel’s associates should be deported rather than executed).

Carolina.⁴¹ Armed with a copy of Rufus King’s denunciation of slavery “in the name of natural rights,”⁴² and surrounded by reports of the successful slave revolution in St. Domingue—now Haiti—Vesey drew up a plan of attack. On midnight, June 16, 1822, the revolution would commence with an assault on Charleston’s storehouse of firearms and stables; a detachment would form a cavalry unit and seize their freedom from the whites “however shocking and bloody might be the consequences.”⁴³ He exhorted his followers with rhetoric infused with Old Testament fury and indignation.⁴⁴ But before the plan could come to fruition, Vesey and his comrades were betrayed. Going to death with courage, one of them enjoined the others to “Die silent, as you see me do.”⁴⁵

Within a decade, the mystic Nat Turner commenced an uprising in Southampton, Virginia that galvanized the nation. Originally planned for the fifty-fifth anniversary of the Declaration—July 4, 1831—the date was moved to the fortieth anniversary of the Haitian Revolution on August 21. The march towards the county seat, Jerusalem, claimed the lives of between fifty-five to sixty-three whites. Whites of all ages and sexes fell in Turner’s insurrection. It was a shockingly bloody business; but one that Turner exhorted was “not a war for robbery, nor to satisfy our passions” but “a *struggle for freedom*.”⁴⁶ Nat Turner’s rebellion, like all those before it, ended with capture, executions, and mass punishment of the Black population.

The hypocrisy of American revolutionary rhetoric was not lost on these men and women who ventured their lives for liberty. The *American Museum* magazine, published in Philadelphia, ran articles by Black men in 1788 and 1789, demanding adherence to the Declaration of Independence,⁴⁷ and included a piece by “A Free Negro” who asked: “Do rights of nature cease to be such when a Negro is to enjoy them? . . . Or does patriotism in the heart of an African rankle into treason?”⁴⁸ A Black man hanged for his part in Gabriel’s rebellion said: “I have nothing more to offer than what George Washington would have had to offer, had he been taken by the British and put to trial by them. I have adventured my life in endeavoring to obtain the liberty of my countrymen.”⁴⁹

41. DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 160–63 (2007).

42. *Id.* at 161.

43. WALTERS, *supra* note 32, at 104 (quoting LIONEL H. KENNEDY & THOMAS PARKER, *AN OFFICIAL REPORT OF THE TRIALS OF SUNDRY NEGROES* 95 (1822)).

44. *See id.*

45. HOWE, *supra* note 41, at 162.

46. *Id.* at 324 (quoting VINCENT HARDING, *THERE IS A RIVER* 95 (1981)) (emphasis in original).

47. Herbert Aptheker, *The Negro in the Abolitionist Movement*, reprinted in HERBERT APTHEKER *ON RACE & DEMOCRACY: A READER* 32, 36 (Eric Foner & Manning Marable eds., 2006).

48. Herbert Aptheker, *The Negro in the Abolitionist Movement*, 5 *SCI. & SOC’Y* 148, 153 (1941) (quoting *THE AMERICAN MUSEUM*, 1788, V, 72; VI, 80).

49. Seth Davis, *The Thirteenth Amendment and Self-Determination*, 104 *CORNELL L. REV. ONLINE* 88, 100–01 (2019) (quoting Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 *HARV. C.R.-C.L. L. REV.* 299, 390–91 (1993)).

Although African Americans and their allies expressly or implicitly appealed to principles of natural right and “nature and nature’s God” to justify violence; their revolutions were almost always viewed as acts of riot and menace, not valiant acts of liberation. And the response by authorities was frequently to impose ever more punitive and draconian sanctions.

The same generation of Americans that acted on John Locke’s theories of morally justified political violence, and who armed themselves to defy British laws they described as “Intolerable,” imposed a “brutal, hereditary, and thoroughly racialized form of slavery that became the exceptional version of the institution in the United States.”⁵⁰

South Carolina’s slave laws are emblematic of this progression. The colony’s 1690 “Act for the Better Ordering of Slaves”—enacted just after publication of Locke’s *Two Treatises of Government*—is perhaps the first law in South Carolina that concerns itself exclusively with slavery.⁵¹ It precluded emancipation due to a slave becoming Christian —eradicating the previous justification of slavery as appropriate only for “heathen.”⁵² It imposed a pass system for slaves found off their plantations;⁵³ created a bounty system for returning escaped slaves;⁵⁴ authorized the monthly search of slave homes for “clubs, guns, swords and mischievous weapons;”⁵⁵ and called for a special tribunal for slaves suspected of plotting rebellions, fining whites that harbored them.⁵⁶ It also immunized private individuals who killed any slave who resisted arrest: “any law, custom or usage to the contrary notwithstanding.”⁵⁷

Ten years later, in 1701, South Carolina updated the law. It offered inducements and conscripted locals to help catch those seeking to escape slavery.⁵⁸ Officers that did not assist were subject to a fine of twenty pounds.⁵⁹ It broadened the immunity of whites pursuing African American runaways: providing a “right to ‘beat maim and assault’ and, if necessary, ‘kill any Negro or

50. Miller, *supra* note *, at 4.

51. Linda O. Smiddy, *Judicial Nullification of State Statutes Restricting the Emancipation of Slaves: A Southern Court’s Call for Reform*, 42 S.C. L. REV. 589, 595 (1991). Locke himself was potentially a contributor to the slaveocracy of the Carolinas. See David Armitage, *John Locke, Carolina, and the Two Treatises of Government*, 32 POL. THEORY 602, 602–03, 607 (2004). Speaking of Locke and his white male contemporaries, Alice Ristroph has noted “[f]or themselves, they may have liked the idea of a social contract and government by consent, but they were not prepared to recognize in every human equal political standing.” Alice Ristroph, *The Second Amendment in A Carceral State*, 116 NW. U. L. REV. 203, 233 (2021).

52. Smiddy, *supra* note 51, at 596.

53. *An Act for the Better Ordering of Slaves* (1690) § 1, reprinted in 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 343 (David J. McCord ed., 1840).

54. *Id.* at § 4.

55. *Id.* at § 5.

56. *Id.* at § 10.

57. *Id.* at § 12.

58. L.H. Roper, *The 1701 “Act for the Better Ordering of Slaves”:* *Reconsidering the History of Slavery in Proprietary South Carolina*, 64 WM. & MARY Q. 395, 402–03 (2007).

59. *Id.* at 413.

slave' who resisted."⁶⁰ "For the first time," the law prohibited any "Negro or slave" from carrying firearms off the master's property without authorization.⁶¹ It upped the search of slave homes for weapons from once per month to once per week.⁶² Those caught attempting to self-emancipate were subject to ear-cropping, branding, castration—if male—and, upon further offense, hobbling by cutting the Achilles tendon.⁶³ If the owners failed to inflict this latter punishment within seven days, they forfeited property rights in the person and a petitioner could come into court to inflict the punishment himself.⁶⁴

Twenty years later, South Carolina again updated its code, but "the most important change made in 1712 was the addition of a preamble in which, for the first time, Carolina planters explain themselves."⁶⁵ That preamble stated:

WHEREAS, the plantations and estates of this Province cannot be well and sufficiently managed and brought into use, without the labor and service of negroes and other slaves; and forasmuch as the said negroes and other slaves brought unto the people of this Province for such purpose, are of barbarous, wild savage natures, and such as renders them wholly unqualified to be governed by the laws, customs and practices of this Province; but that it is absolutely necessary, that such other constitutions, laws and orders should in this Province be made and enacted, for the good regulating and ordering of them, as may restrain the disorders, rapines and inhumanity, to which they are naturally prone and inclined. . . .⁶⁶

Of course, South Carolina was not alone in developing a second, separately applicable set of laws for Black people. In addition to imposing slavery through the status of the mother (*partus sequitur ventrem*) and forbidding interracial sex, Virginia's slave code of 1705, like South Carolina's, enlisted private parties to police slavery; permitted mutilation of those attempting to escape; and proscribed firearms in the hands of slaves. It also provided that any owner who killed a person for resisting his enslavement should be acquitted "as if such accident had never happened."⁶⁷ New York's 1712 "Act for preventing Suppressing and punishing the Conspiracy and Insurrection of Negroes and other Slaves," sanctioned those who harbored runaways, curtailed Black ability to possess property or arms, and created unique tribunals for slaves accused of capital crimes.⁶⁸

Many of these repressive slave codes trafficked in the same "usurpations" that the Founding Fathers denounced as justification for a war of independence.

60. *Id.*

61. *Id.* at 403.

62. *Id.* at 410.

63. *Id.* at 403, 411.

64. *Id.*

65. Christopher Tomlins, *Transplants and Timing: Passages in the Creation of an Anglo-American Law of Slavery*, 10 THEORETICAL INQUIRIES L. 389, 401 (2009).

66. *Id.* at 401–02.

67. *An Act Concerning Servants and Slaves (1705)*, reprinted in 2 SLAVERY IN THE UNITED STATES: A SOCIAL, POLITICAL, AND HISTORICAL ENCYCLOPEDIA 535 (Junius Rodriguez ed., 2007).

68. William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1767–68 (1996).

Slaves were denied basic liberties guaranteed under the common law, they were subjected to “alien” civil laws like *partus sequitur ventrem* rather than the common law custom that status followed the father. Slaves were subject to punishment by specific tribunals—if any process was available to them at all, and were denied trial by jury of their peers. An ability to assemble, engage in a trade, speak, sell their labor, and to own property were all subject to restriction or prohibition.⁶⁹ Every article lodged against George III in the Declaration of Independence was intensified in the laws that regulated Africans in America during this time.

But the perversion of the American tradition of violent resistance to despotism did not end with the Revolutionary War. Throughout American history, enslavers, white supremacists and their apologists have frequently used the rhetorical power of subjugation and resistance to tyranny to justify their own acts of oppression. As far back as the Founding era, some slave owners characterized limits on “their right to own slaves [as] a violation of their liberty.”⁷⁰ As the Southern states became more committed to slavery, their rhetoric of rights in human chattel—and the presumed despotism of emancipation—became more strident. By the middle of the nineteenth century, slavery’s apologists like Thomas R.R. Cobb were going so far as to say natural law supported enslavement of Africans.⁷¹

When the Southern states finally broke into open warfare against the Union to preserve slavery, they invoked the Founders and the natural rights of the Declaration. South Carolina’s declaration “appeal[ed] to the Supreme Judge of the world for the rectitude of [their] intentions.”⁷² The Mississippi declaration was candid: “Our position is thoroughly identified with the institution of slavery.” Abolition was tyranny, “[u]tter subjugation”; hence “[w]e must either submit to degradation . . . or we must secede from the Union framed by our fathers, to secure this as well as every other species of property. For far less cause than this, our fathers separated from the Crown of England.”⁷³ Jefferson Davis, upon assuming the presidency of the Confederacy, announced that the slaveholder’s governments had “merely asserted the right which the Declaration of Independence of July 4, 1776, defined to be ‘inalienable.’”⁷⁴

69. Miller, *supra* note *, at 4.

70. PETER KOLCHIN, AMERICAN SLAVERY 91 (1993).

71. See, e.g., 1 THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY 51 (Philadelphia, T. & J.W. Johnson & Co. 1858) (arguing that “[N]egro slavery, as it exists in the United States, is not contrary to the law of nature”; instead, it “perfects” the nature of Africans).

72. *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union* (Dec. 24, 1860), AVALON PROJECT, http://avalon.law.yale.edu/19th_century/csa_scaresec.asp [<https://perma.cc/HL5A-TSJM>].

73. *A Declaration of the Immediate Causes Which Induce and Justify the Secession of the State of Mississippi from the Federal Union* (Jan. 26, 1861), AVALON PROJECT, http://avalon.law.yale.edu/19th_century/csa_missec.asp [<https://perma.cc/EKC4-JJ9X>].

74. Jefferson Davis, Confederate States of America-Inaugural Address of the President of the Provisional Government (Feb. 18, 1861), AVALON PROJECT, http://avalon.law.yale.edu/19th_century/csa_csainau.asp [<https://perma.cc/4G9C-YG5L>].

After Appomattox, and the end of the Civil War, white supremacist organizations continued to justify their actions by reference to the Founders and natural rights. During Reconstruction, writes historian George Rable, “[w]hite leaders,” appealed to John Locke and a “tradition of resistance to tyranny, particularly the spirit of 1776” to justify their terrorist campaigns.⁷⁵ Klan initiates were asked whether they believed in the “inalienable right of self-preservation of the people against the exercise of arbitrary and unlicensed power.”⁷⁶

On July 4, 1964, segregationist George Wallace denounced the Civil Rights Act of 1964 as “a fraud, a sham, and a hoax” with repeated invocations and quotations from the Declaration.⁷⁷ The Act was “an act of tyranny. It is the assassin’s knife stuck in the back of liberty.”⁷⁸ Others argued that the public accommodation requirements of the Civil Rights Act of 1964 actually violated the Thirteenth Amendment’s abolition of involuntary servitude. In their brief before the Supreme Court, counsel for the Heart of Atlanta Motel argued that “[w]hen an individual is either coerced into working for another or punished for failure to do so, the inescapable conclusion is that such employment amounts to involuntary servitude.”⁷⁹

The most recent version of this corruption occurred on January 6, 2021. Hundreds of supporters of then-President Donald J. Trump, some armed, whipped into a frenzy by false claims of voter fraud and a stolen election, stormed the seat of the national legislature, beating police, threatening law makers, and calling for the hanging of the Vice President of the United States. They attacked the seat of government with Gadsden banners; they paraded a Confederate battle flag within the Capitol.

The continuing effort to retcon an authoritarian moment as an act of virtue is grotesque. Right wing media refuses to condemn the rioters, and some politicians have referred to the insurrectionists as “patriots.”⁸⁰ Two Republican congress members called January 6 the “Republicans’ ‘1776 moment.’”⁸¹ But the prize for candor goes to Ron Johnson, a sitting Republican senator from Wisconsin.

75. GEORGE C. RABLE, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION* 63 (1984)

76. *Ku Klux Klan: Organization and Principles*, reprinted in 2 DOCUMENTS OF AMERICAN HISTORY 49 (Henry Steele Commager ed., 1958).

77. George Wallace, *The Civil Rights Movement: Fraud, Sham and Hoax* (July 4, 1964), <https://www.let.rug.nl/usa/documents/1951-/speech-by-george-c-wallace-the-civil-rights-movement-fraud-sham-and-hoax-1964-.php> [<https://perma.cc/NJQ2-WJER>].

78. *Id.*

79. Jurisdictional Statement & Brief for Appellant at 57, *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964) (No. 515), 1964 WL 81380, at *57.

80. Eamon Whalen, *Across the Country, Republican Groups Are Holding “Vigils” for January 6 “Patriot Martyrs”*, MOTHER JONES (Jan. 6, 2022), <https://www.motherjones.com/politics/2022/01/across-the-country-republican-groups-are-holding-vigils-for-january-6-patriot-martyrs> [<https://perma.cc/6JBK-MEMZ>].

81. *Identifying Far-Right Symbols that Appeared at the U.S. Capitol Riot*, WASH. POST (Jan. 15, 2021), <https://www.washingtonpost.com/nation/interactive/2021/far-right-symbols-capitol-riot/> [<https://perma.cc/9AMV-M876>].

Johnson, who literally had to take refuge from the mob on January 6, had this to say about the insurrectionists:

Even though those thousands of people that were marching to the Capitol were trying to pressure people like me to vote the way they wanted me to vote, I knew those were people that love this country, that truly respect law enforcement, would never do anything to break the law, and so I wasn't concerned. . . . Now, had the tables been turned . . . and President Trump won the election and those were tens of thousands of Black Lives Matter and Antifa protesters, I might have been a little concerned.⁸²

The implication of the Senator's statement is clear: "only whites can use violence to overthrow a white man's government."⁸³

III

THE AMERICAN TRADITION OF NON-VIOLENCE

"But I say to you who hear: Love your enemies, do good to those who hate you, bless those who curse you, and pray for those who spitefully use you. To him who strikes you on the one cheek, offer the other also."⁸⁴

Seizing by force those rights that will not be willingly surrendered is but one tradition in American history. There's also another tradition—a tradition whose heroes are rarely stamped onto coins, have no equestrian statutes raised in their honor, but whose torn and broken bodies bear up modern America.

Enslaved persons, denied effective use of violence for universal liberation,⁸⁵ engaged in numerous acts of small, quiet rebellion. Tools would "accidentally" break; laborers would suffer bouts of deafness and confusion, or be struck sick; hogs and sheep would disappear, unexplained fires would consume the master's buildings while he was away; all these forms of "silent sabotage" demonstrated that "absence of massive rebellion" did not equal acquiescence to injustice.⁸⁶ More than one hundred thousand heroes liberated themselves by self-emancipation, at great personal risk.⁸⁷

Abolitionists and their allies also resisted slavery and discrimination through non-violence. In 1847, Francis Weyland, president of Brown University, "voiced a higher law doctrine of passive resistance to the encroachment of the slave

82. Caroline Kelly, *Ron Johnson Says He Might Have Been Concerned for Safety Had Capitol Rioters Been BLM and Antifa*, CNN (Mar. 13, 2021), <https://www.cnn.com/2021/03/12/politics/ron-johnson-capitol-riot/index.html> [<https://perma.cc/7NS8-NTW8>].

83. Miller, *supra* note *, at 3.

84. *Luke 6:27–29* (New King James).

85. Not that slaves offered no physical resistance. *See, e.g.*, SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS AND AUTOBIOGRAPHIES 170, 173, 220, 236 (John W. Blassingame, ed. 1977) (providing different accounts of physical resistance to enslavers). Only that it was never sufficient to generate widespread emancipation.

86. KOLCHIN, *supra* note 70, at 157.

87. Mary Niall Mitchell, Joshua D. Rothman, Edward E. Baptist, Vanessa Holden & Hasan Kwame Jeffries, *Rediscovering the Lives of the Enslaved People Who Freed Themselves*, WASH. POST (Feb. 20, 2019), <https://www.washingtonpost.com/outlook/2019/02/20/rediscovering-lives-enslaved-people-who-freed-themselves> [<https://perma.cc/C2T6-UU6J>].

power.”⁸⁸ Widespread non-compliance with the reviled Fugitive Slave Act of 1850 rendered its enforcement costly and difficult in the North.⁸⁹

The Reconstruction Amendments nominally guaranteed African Americans freedom from bondage, equal protection of the law, and—at least for men—the franchise. As a practical matter, the end of Reconstruction in 1877 witnessed the imposition of Jim Crow and massive disenfranchisement through public and private means. The result is that from the end of Reconstruction to the middle of the 1960s, Southern elections were reliably skewed away from reflecting anything like the preferences of the citizenry.

While such widespread oppression has led to periodic—and quixotic—efforts at emigration or colonization, the most notable feature of Black struggles for freedom in America is that they have been arguments for citizenship *within* the body politic. They are not separatist movements; nor are they movements to establish an independent Black nation. The decision about integration was decided long ago and encapsulated in the 1865 *Address From the Colored Folk of Norfolk Virginia*: “We are Americans, we know no other country, we love the land of our birth and our fathers. . . .”⁹⁰ The “long civil rights movement” that begins before Reconstruction is one where the signal feature is both non-violence *and* a commitment to full equality as American citizens.⁹¹

During this period African Americans and their supporters used passive resistance to challenge segregation and disenfranchisement. Ninety years before Rosa Parks sparked the Montgomery Bus Boycott, Octavius Catto refused to sit in a segregated streetcar in Philadelphia, and enjoined his fellow citizens do the same.⁹² Pauli Murry outlined a multi-pronged strategy of protests against segregation in the fall of 1942 that was “simple, nonviolent, unceasing and results-oriented.”⁹³ That same year, A. Philip Randolph’s March on Washington Movement endorsed a set of principles of “non-violent direct action on the Gandhi model.”⁹⁴ The strategy would involve boycotts, widespread disobedience, and when arrested an attitude of “love instead of hate.”⁹⁵ Passive resistance was the method, but it was “not resignation . . . not submission . . . [but] bold, aggressive, and revolutionary.”⁹⁶

88. Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 73 (1990).

89. *Id.* at 73–74.

90. EQUAL SUFFRAGE. ADDRESS FROM THE COLORED CITIZENS OF NORFOLK, VA., TO THE PEOPLE OF THE UNITED STATES. ALSO AN ACCOUNT OF THE AGITATION AMONG THE COLORED PEOPLE OF VIRGINIA FOR EQUAL RIGHTS. WITH AN APPENDIX CONCERNING THE RIGHTS OF COLORED WITNESSES BEFORE THE STATE COURTS 8 (1865).

91. See KATE MASUR, UNTIL JUSTICE BE DONE 258 (2021) (describing non-violent political and legal efforts made for Black citizenship).

92. DOUGLAS R. EDGERTON, THE WARS OF RECONSTRUCTION 170 (2014).

93. GLENDA ELIZABETH GILMORE, DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS 1919–1950, at 384–85 (2008).

94. *Id.* at 386.

95. *Id.*

96. *Id.*

The long civil rights movement culminated in the period from the early 1950s to the 1960s which featured coordinated, widespread, and persistent non-violent confrontation as the primary political program of African Americans and their allies. African Americans had every moral right to develop a military capacity to engage in a violent guerilla campaign to force political compromise, but civil rights leaders chose non-violent, passive resistance to segregation and disenfranchisement—even at the cost of their lives.

Bayard Rustin, the gay, African American activist brought an organizing prowess and philosophical commitment to non-violence. Rustin had traveled to India in the late 1940s to study Gandhi's practice of passive resistance. He came back convinced that physical but non-violent resistance was the only way to liberation. "Our power is our ability to make things unworkable. The only weapon we have is our bodies and we need to tuck them into places so wheels don't turn."⁹⁷ Non-violence was the most practically and philosophically sound strategy for lasting change.

College students embraced these non-violent techniques to protest segregated lunch counters and other places of public accommodation. In Greensboro, North Carolina, on February 1, 1960, four men at North Carolina A&T decided to desegregate the local Woolworth's lunch counter. They didn't wield knives or pistols; they didn't grab the hostess, they just sat. And then students up and down the eastern seaboard did the same.

Under the tutelage of Ella Baker, James Lawson, Diane Nash and other civil rights luminaries, the young civil rights soldiers learned the discipline of non-violent confrontation. They sat until the store closed; they sat while white hooligans blew smoke in their face, hurled epithets, and poured coffee in their laps.⁹⁸ They sat while the police cuffed them. They fought without striking a single blow. An army of civil rights revolutionaries, trained in non-violence, fighting segregation through unimaginable courage and endurance.

During the Freedom Summer, volunteers armed with the strategies of non-violence sought to register African Americans in some of the most racist and violent counties in the South. They were instructed how "to roll into a ball to protect vulnerable parts of their bodies from kicking and clubs."⁹⁹ They were taught how to remain calm and stoic, even as every fiber—every instinct to self-preservation—urged them to strike out.

97. Renee K. Gadousa, *Gay Civil Rights Activist, MLK Mentor Bayard Rustin to be Honored*, WASH. POST (June 30, 2015), https://www.washingtonpost.com/national/religion/gay-civil-rights-activist-mlk-mentor-bayard-rustin-to-be-honored/2015/06/30/bb466d10-1f57-11e5-a135-935065bc30d0_story.html [<https://perma.cc/6VDB-VAAH>].

98. Ben Cosgrove, *Civil Rights: Preparation and Protest, 1960*, LIFE, <https://www.life.com/history/life-and-civil-rights-anatomy-of-a-protest-virginia-1960> [<https://perma.cc/DQD7-25LK>].

99. MARK H. LYTLE, *AMERICA'S UNCIVIL WARS: THE SIXTIES ERA FROM ELVIS TO THE FALL OF RICHARD NIXON* 158 (2006).

A twenty-six-year-old preacher, Martin Luther King, Jr. became the political leader of this non-violent army. As King spoke shortly after taking leadership of the Montgomery Bus Boycott, “first and foremost—we are American citizens—and we are determined to apply our citizenship—to the fullness of its means.”¹⁰⁰ But this was to be a revolution through peaceful resistance: “[W]e are not here advocating violence,” he declared. No whites would be pulled from their beds and murdered in the street—that was the work of the Klan.¹⁰¹ “The only weapon that we have in our hands . . . is the weapon of protest.”¹⁰²

The reasons behind King’s commitment to non-violence were both pragmatic and philosophical. As political scientist Karuna Mantena has written, “King took the right of self-defense to be an accepted moral universal that did not require explicit elaboration or defending. The real issue was not whether violence could be morally just, but whether it could ever be a useful weapon for social change. This is what Gandhi and King denied: that a coherent, effective policy or strategy for change can emerge from the moral right of self-defense.”¹⁰³

Only nonviolence, according to King, could navigate the conflict between resignation and retaliation; and only non-violence could accomplish what the African-American freedom struggle had committed itself to since Reconstruction—liberation *through* integration.¹⁰⁴ As Mantena observes, “African Americans’ primary antagonist was neither a distant foreign power nor an aloof, elite state apparatus. Instead, they would be ‘living tomorrow with the very people against whom [they were] struggling today.’”¹⁰⁵ Non-violent revolution was therefore both a religious obligation and a democratic imperative.¹⁰⁶

On March 7, 1965, Bloody Sunday, the march across Edmund Pettus Bridge in support of voting rights cemented the historical meaning of this strategy. Civil rights workers had been scrupulous about removing any visible threat of violence in their political campaigns in the previous months. Bernard Lafayette had convinced farmers in Wilcox County, Alabama—where no African American had registered to vote in over half a century—to leave their rifles at home and

100. TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63*, at 138–39 (1988).

101. *Id.* at 140.

102. *Id.*

103. Karuna Mantena, *Showdown to Nonviolence: The Theory and Practice of Nonviolent Politics*, in *TO SHAPE A NEW WORLD: THE POLITICAL PHILOSOPHY OF MARTIN LUTHER KING, JR.* 78, 84 (Tommie Shelby & Brandon M. Terry eds., 2018).

104. *Id.* at 85–91.

105. *Id.* at 90 (quoting MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 64 (2010)).

106. *Id.* at 91. For a discussion of the murky area between personal self-defense and political violence, see Nicholas J. Johnson, *Private Armies and Civil Unrest: Lessons From the Black Freedom Movement* 25 (Fordham Law Legal Studies Research Paper No. 3723039, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3723039 [<https://perma.cc/6TTL-VTTQ>].

brave the trek to Camden to register.¹⁰⁷ In St. Augustine, Florida, Hosea Williams had passed around a box to his hundred and fifty student volunteers to collect anything that could be mistaken for a weapon—knives, rocks, rulers, pens and pencils—before they marched down to the Old Slave Market to protest segregation.¹⁰⁸

This march was no different. Williams and John Lewis led approximately five hundred unarmed supporters to the bridge. Alabama state troopers led by Major John Cloud gave them two minutes to disperse, and when they held fast, ordered his troopers to advance with tear gas and batons. ABC interrupted its broadcast of *Judgment at Nuremberg* to televise the attack. Viewers who had moments before been watching scenes of Nazi atrocity and civilian complicity in Europe were suddenly confronted with images of Alabama law enforcement clubbing peaceful civil rights workers right here in America. “The juxtaposition struck like psychological lightning in American homes.”¹⁰⁹

A week later, President Lyndon Johnson introduced the Voting Rights Act of 1965 in an address to Congress. His speech captured the historical gravity of the event: “At times history and fate meet at a single time in a single place to shape a turning point in man’s unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.”¹¹⁰

IV

ESTOPPEL BY NON-VIOLENCE

“Martin Luther King, Jr. . . . must be looked upon as one of the Founding Fathers of the New America.”¹¹¹

The Declaration of Independence is a political document; but it is also a legal one. The litany of abuses reads as a bill of particulars against a tyrannical monarch. The court rendering judgment in this case is not a sovereign tribunal, but one of international and *inter-generational* opinion. The Founders must explain themselves, and they do. But Jefferson’s appeal is wanting.

Frederick Douglass recognized the Founder’s shortfalls in his 1852 speech:

What, to the American slave, is your 4th of July? I answer: a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciations of tyrants, brass fronted impudence; your shouts of liberty

107. TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963–65*, at 66 (1998).

108. *Id.* at 279–80.

109. GENE ROBERTS & HANK KLIBANOFF, *THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION* 386 (2006).

110. Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965), in *LBJ PRESIDENTIAL LIBR.*, <https://www.lbjlibrary.org/object/text/special-message-congress-american-promise-03-15-1965> [<https://perma.cc/QG5A-UJP8>].

111. John Robert Lewis, *The King Legacy*, 30 *VT. L. REV.* 349, 360 (2006).

and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parade, and solemnity, are, to him, mere bombast, fraud, deception, impiety, and hypocrisy — a thin veil to cover up crimes which would disgrace a nation of savages.¹¹²

Or, in Samuel Johnson's contemporaneous, tart summation in 1775: "[H]ow is it that we hear the loudest yelps for liberty among the drivers of negroes?"¹¹³

Most importantly, the Declaration of Independence—Jefferson's successor to a "Declaration of the Causes of Taking Up Arms"—is an appeal to equity. It's even modeled, in structure and content, on a bill of equity of the kind Jefferson "might have used to plead . . . before the General Court of Virginia."¹¹⁴ The Founders are resorting to violent resistance; law is no refuge for them—they are committing treason under the law, so they are appealing to justice. The court of opinion sits as a court of equity.

Equity will not rescue the wrongdoer. One must seek equity with—as they say—clean hands. Those that do not are estopped. And it's hard to imagine hands more begrimed than those of the Founding Fathers. At the time the Constitution was drafted, 700,000, or roughly one in six, of the American population was enslaved. By the 1860s, that number had swelled to roughly four million;¹¹⁵ and property in human chattel equaled over half of the American GDP.¹¹⁶ After Reconstruction, terrorists operated to suppress Black political power through officially-acquiesced violence. Penal systems were transformed into racial repression and slave-labor tools. In the ensuing decades, in ways profound and petty, African Americans were subjected to a train of abuses.

African Americans have had over four hundred years of justification to use violence as an organizing principle for political change. The balance of the equities at the turn of the twentieth century clearly favored force against oppression. But instead of a guerilla campaign against oppressors; instead of assassinating segregationists and besieging the seats of white supremacy; African Americans turned the other cheek; not in resignation—but in defiance. This requires a reckoning for anyone who claims entitlement from first principles to resort to political violence. The group with most warrant to use it, didn't.

112. Frederick Douglass, *The Meaning of July Fourth for the Negro*, in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 188, 196–97 (Philip S. Foner ed., 1999).

113. Samuel Johnson, *Taxation No Tyranny: An Answer to the Resolutions and Address of the American Congress*, in 8 THE WORKS OF SAMUEL JOHNSON 155, 204 (1816).

114. PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 71 (1990). According to Jefferson, his contributions to the Declaration of the Causes of Taking Up Arms were rejected. *Id.* at 70.

115. See Aaron O'Neill, *Black and Slave Population of the United States from 1790 to 1880*, STATISTA (Mar. 21, 2021), <https://www.statista.com/statistics/1010169/black-and-slave-population-us-1790-1880> [<https://perma.cc/6JZF-93AP>]; J. David Hacker, *From '20. and Odd' to 10 Million: The Growth of the Slave Population in the United States*, 41 SLAVERY & ABOLITION 840, 841 (2020).

116. See Claudia Dale Goldin, *The Economics of Emancipation*, 33 J. ECON. HIST. 66, 74 (1971) (noting that America's GDP in 1860 was \$4.2 billion and the capital value of all enslaved persons was \$2.7 billion).

The Declaration of Independence in American political life functions as what is known as a “continuity tender.” “A continuity tender,” as Richard Primus describes it, “is an inherited ritual formula that one repeats to affirm a connection to one’s predecessors, not to endorse the content of that statement as one’s predecessors originally understood it.”¹¹⁷ Every appeal to fundamental constitutional change in America performs the ritual of tracing its origin to the Declaration.

However, the Civil Rights Movement, and its commitment to peaceful revolutionary change, rather than violent insurrection, provides a fundamentally different moral baseline than the Founders for anyone invoking this tender. The figures of Martin Luther King, Jr. and the patriots for non-violent constitutional change exposed the moral bankruptcy of violent segregationists like Bull Connor and John Cloud. But they simultaneously exposed the moral bankruptcy of the claims to justified violence by Thomas Jefferson and George Washington. Their bravery discredits the January 6 insurrectionists, who claim they had no other choice; their struggle shames pundits who claim that political violence is fundamental, essential, to the American constitutional character. And their sacrifice acts as a warning, for all those who would tear down the true monuments to America’s commitment to non-violent constitutional revolution: the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

The metric for justifying political violence in America is the African American experience. African Americans have had four centuries of reason to give up on the American experiment; to take up arms to throw off this government and start anew; but they have not. Instead, they have committed to “bring those words, in our founding documents, to life.”¹¹⁸ And so long as we continue to honor that choice of our ancestors, to protect what they suffered for, and to foreswear violence in favor of non-violent confrontation and peaceful political solutions, “then that grace continues to expose the lie of any lesser claim.”¹¹⁹

117. Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1, 13 (2016).

118. German Lopez, *Obama’s Democratic Convention Speech Gave a Clear Warning: Democracy Is at Stake in 2020*, VOX (Aug. 20, 2020), <https://www.vox.com/2020/8/20/21377118/obama-dnc-speech-trump-democracy-voting-rights> [<https://perma.cc/LDW6-7WNE>].

119. Miller, *supra* note *, at 8.