
CONTINUITY AND THE DECLARATION OF INDEPENDENCE

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INTRODUCTION

The Declaration of Independence's moral calculus is simple; indeed, it is "self-evident." If law insufficiently protects freedom and equality, then revolution is justified. If $L < (F + E)$, then R . This is the mathematics of heaven, of "Nature and Nature's God."¹

But as a matter of American legal practice, the Declaration's moral calculus predicts little and proves nothing. It is a description of a political crisis, an expression for an act of creation; it is not an algorithm for governance. It is a formula, in the original sense: "a set form of words for use in a ceremony or ritual."²

This Article explores the use of the Declaration as a law-making ritual, an example of what Richard Primus calls a "continuity tender": "[A]n inherited ritual formula that one repeats to affirm a connection to one's predecessors," but not necessarily "to endorse the content of that statement as one's predecessors originally understood it."³ This Article progresses in three parts: Part I explains why the Declaration is not law in a positive sense. Part II suggests that the Declaration is not law, but is rather a continuity tender. Building on the work of Primus, this Part introduces the concept of continuity tenders and explains their operation during periods of consensus and conflict. Part III explains how the Declaration

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

2. *Formula*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/formula> (last visited Apr. 16, 2016).

3. Richard Primus, *Why Enumeration Matters*, 114 MICH. L. REV. (forthcoming 2016) (manuscript at 8), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2471924##.

functions as a continuity tender in American legal culture. This Part concludes that the Declaration is frequently invoked as a way of breaking with deeply entrenched social and legal institutions in a way that makes the break appear, not a break at all, but the natural extension of the previous legal order. As example, this Part discusses the Declaration as a continuity tender with respect to the Thirteenth and Fourteenth Amendments. It explains that while freedom and liberty—the *F* and *E* values of the Declaration’s moral calculus—can and have been incorporated (with various levels of success) into the Thirteenth and Fourteenth Amendments, those values are disciplined by the enforcement structures of those amendments.

By contrast, the revolutionary aspect of the Declaration, the *R* value, cannot be expressed in anything resembling law. This Part explains why advocates who attempt to use the Second Amendment to make the revolutionary value as judicially enforceable as the freedom and equality values are mistaken. This Article concludes with an alternative explanation for the Declaration’s role in asserting rights to alter or abolish government.

I. THE DECLARATION AS LAW

The Declaration is a majestic document. But it is not law. It does not purport to be law and it was not intended to be law. Courts do not enforce it as law.

A dispassionate reading of the Declaration’s text shows that it does not frame a government, offer sufficiently concrete norms to guide behavior, or designate institutions to give form to its moral assertions.⁴ Certainly the moral equation it articulates is not a legal prescription. The Declaration is a lawyers’ brief offered to an international court of political opinion.⁵ The entire first two paragraphs of the Declaration—eloquent and soaring—are prefatory.⁶ They are claims about why it is necessary to even make this argument. They have the ring of an opening statement.

The bulk of the Declaration is a list of grievances: “facts” introduced to “prove” to “a candid world” why a confederation of slaveholders has a

4. See generally Lee Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413 (2006) (examining the Declaration from an originalist perspective to conclude that the Declaration is not law).

5. MORTON KELLER, *AMERICA’S THREE REGIMES: A NEW POLITICAL HISTORY* 32 (2007) (observing that while the “preamble was an eloquent declaration of independence . . . the bulk of the document was a lawyers’ brief.”).

6. *Id.*

moral right to resist its oppressors.⁷ Indeed, as Frederick Douglass remarked seventy years later, to the slave, the colonists' explanation for violent revolution appears at best trite and at worst a "mockery."⁸ Gabriel Prosser, Denmark Vesey, and Nat Turner needed no written declaration; the moral calculus of their rebellions was apparent.⁹

Nor does the Declaration appear intended, either by its signers or those who agreed with its sentiments, to be treated as law.¹⁰ The Declaration of Independence, as indicated by its name, is an assertion of separation, but it is not an act of constituting a government.¹¹ The "we" of the Declaration defines who we are *not*, unlike the "we" of the Constitution of the United States, who defines who we *are*. In fact, according to some historians, the Declaration seems to have been mostly forgotten, except as a memorial of independence, for at least a decade and a half after its adoption.¹²

H.L.A. Hart described law as norms that officials, typically judges, recognize as law through a rule of recognition.¹³ The Declaration fails as law in these terms. Yes, the Declaration is included among "the Organic Laws of the United States of America" in the United States Code—along with the Articles of Confederation, the Northwest Ordinance, and the United States Constitution.¹⁴ But that ministerial act does not transform the

7. THE DECLARATION OF INDEPENDENCE. *Accord* KELLER, *supra* note 5, at 32.

8. Frederick Douglass, What to the Slave is the Fourth of July? (July 5, 1752), in *AGAINST SLAVERY, AN ABOLITIONIST READER* (Mason Lowance ed., 2000). Samuel Johnson's acid remark in *Taxation No Tyranny* bears repeating: "How is it that we hear the loudest yelps for liberty among the drivers of negroes?" 3 JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON LL.D.* 372 (1878) (emphasis omitted).

9. See A. Leon Higginbotham & Greer C. Bosworth, "Rather Than the Free": Free Blacks in Colonial and Antebellum Virginia, 26 *HARV. C.R.-C.L. L. REV.* 17, 32 (1991) ("[I]f any people were ever justified in throwing off the yoke of their tyrants, the slaves are that people." (quoting abolitionist David Walker) (internal quotation marks and citations omitted)). *But see* Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 *HOW. L. J.* 983, 994 (1987) ("The original Constitution's guarantee clause [Art. IV, § 4] read in light of the Declaration of Independence, points in the direction of abolition, though not through violent means.").

10. Mark Tushnet, *Politics, National Identity, and the Thin Constitution*, 34 *U. RICH. L. REV.* 545, 563 (2000) ("[T]he Constitution's adopters did not think that the Preamble and, more broadly, the principles enunciated in the Declaration of Independence were law in the conventional sense.").

11. See Louis Henkin, *Revolutions and Constitutions*, 49 *LA. L. REV.* 1023, 1036 (1989) ("The Constitution is not the direct descendant of the Declaration, but is at best only a collateral heir.").

12. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 168–69 (1997).

13. See Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 *NW. U. L. REV.* 719, 720–21 (2006).

14. These documents appear in the front matter of the *United States Code* (2012) beginning at page XLV.

Declaration into law, much less the supreme law of the land, as generations of pro se litigants have discovered.¹⁵ Most judges regard the Declaration as expressing some “general statements about inalienable rights or ‘fundamental fairness’” but saying “little about the prerogatives of an individual in concrete factual situations.”¹⁶ Instead, the overwhelming consensus of judges is that the Declaration alone, in whole or in part, contains no enforceable norms.¹⁷

II. THE DECLARATION AS A CONTINUITY TENDER

Despite the Declaration’s failure as law, it undeniably plays a significant role in American political and legal culture. When backwoods distillers took up arms against President George Washington in the Whiskey Rebellion, they marched to the natural-law strains of the Declaration.¹⁸ When the states that formed the Confederacy voted to secede from the Union, they asserted the Declaration as authority.¹⁹ When Lincoln

15. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (“The Declaration of Independence . . . is not a legal prescription conferring power upon the courts.”); *Schifanelli v. United States*, 1988 U.S. App. LEXIS 21107, at *1 (4th Cir. Dec. 22, 1988) (per curiam) (“The Declaration of Independence is a statement of ideals, not law.”); *Swepi, LP v. Mora Cty.*, 81 F. Supp. 3d 1075, 1173 (D.N.M. 2015) (“[C]orporations have constitutional rights that inferior law cannot infringe, regardless of the Defendants’ interpretation of the Declaration of Independence.”); *Rondeau v. Rogers*, 2010 U.S. Dist. LEXIS 78932, at *7–8 (D.N.H. July 8, 2010) (“The Declaration of Independence does not give rise to a private right of action to enforce the ‘unalienable rights’ it describes.”); *Bowler v. Welsh*, 719 F. Supp. 25, 26 (D. Me. 1989) (“We have no jurisdiction over claims allegedly arising under the Declaration of Independence.”). See also Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 710 (2001) (“Pro se litigants turn to the Declaration with disturbing regularity, invoking it as a palliative for almost every conceivable injury.”)

Some state court opinions cite the Declaration’s listing in the United States Code as evidence of the Declaration’s source as a legally enforceable document, but to date, those opinions remain outliers. E.g. *Patel v. Tex. Dept. of Licensing and Regulation*, S.W.3d, 2015 WL 3982687, at *37 & n.200 (Tex. 2015) (Willett, J., concurring) (“The might of the majority, whatever the vote count, cannot trample individuals’ rights recognized in both our federal and state Constitutions, not to mention in our nation’s first law, the Declaration.”). See also *Ex Parte T.M.*, 160 So. 3d 10, 15 (Ala. 2014) (Moore, C.J., dissenting from denial of certiorari).

16. *Derden v. McNeil*, 978 F.2d 1453, 1456 n.4 (5th Cir. 1992) (Jones, J.).

17. See, e.g., *Coffey v. United States*, 939 F. Supp. 185, 191 (E.D.N.Y. 1996) (the Declaration “does not grant rights that may be pursued through the judicial system”). The sentiment is as old as the nation, as illustrated by *Calder v. Bull*: “If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.” 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring).

18. THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION* 37, 178 (1986).

19. See, for example, the secession statement of South Carolina:

“We, therefore, the People of South Carolina, by our delegates in Convention assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, have solemnly declared that the Union heretofore existing between this State and the other States of North America, is

and the Radical Republicans pushed Congress to pass the Thirteenth Amendment to the United States Constitution, they invoked the truth that “all men are created equal.”²⁰ Martin Luther King, Jr. trumpeted the Declaration in the March on Washington;²¹ Tea Party leaders plastered it in blog postings two generations later.²²

How is it that people as different in time and temperament as mid-twentieth-century civil rights marchers and nineteenth-century Southern revanchists seek authority in its few paragraphs? Why are judges of all ideological stripes compelled to cite it, when almost none would strike down a single law based solely upon its text? A facile answer is that the Declaration makes good rhetoric. The document can be summarized in a handful of aphorisms, or tweets. Overlay the prestige of the Founding Fathers and naturally the Declaration will find its way into everything from judicial opinions to Fourth of July sales.

But the rhetorical power of the Declaration is easily overstated. It’s good, but it’s not flawless. It’s not as impassioned as Patrick Henry’s “Give Me Liberty or Give Me Death” speech. It’s neither as concrete nor as sophisticated as *Common Sense* or *The Federalist*. It doesn’t have the moral clarity of the Sermon on the Mount or the Ten Commandments. It can’t even claim originality; its most memorable passages are paraphrases of John Locke’s *Second Treatise*.²³ And then, there’s the stench of

dissolved, and that the State of South Carolina has resumed her position among the nations of the world, as a separate and independent State; with full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do.” *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_scarsec.asp. Jefferson Davis, upon assuming the presidency of the Confederacy, declared:

“[W]hen, in the judgment of the sovereign States composing this Confederacy, it has been perverted from the purposes for which it was ordained, and ceased to answer the ends for which it was established, a peaceful appeal to the ballot box declared that, so far as they are concerned, the Government created by that compact should cease to exist. In this they merely asserted the right which the Declaration of Independence of July 4, 1776, defined to be ‘inalienable.’” *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.

20. HAROLD M. HYMAN & WILLIAM W. WIECEK, *EQUAL JUSTICE UNDER LAW* 278 (1982); MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 108 (2001).

21. Martin Luther King, Jr., *I Have a Dream*, Speech at the March on Washington (Aug. 28, 1963), <http://www.archives.gov/press/exhibits/dream-speech.pdf>.

22. Alex Pappas, *Tea Party Activists Circulate ‘Declaration of Independence’ and Distance Selves from Republicans*, DAILY CALLER (Feb. 24, 2010, 3:14 PM), <http://dailycaller.com/2010/02/24/tea-party-activists-circulate-declaration-of-independence-and-distance-selves-from-republicans>.

23. See ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION* 72 (1997)

hypocrisy that clings to it, given that its principal author was a life-long slave holder. Rhetoric alone does not explain why the Declaration—unique among America’s founding documents—generates such a long legal penumbra.

An alternative explanation is that the Declaration offers what Lawrence Solum has called “linguistic facts” or “contextual enrichment” for unclear constitutional language.²⁴ What does the “judicial power” mean in Article III? Consult the Declaration.²⁵ What does “Legislature” mean in the Elections Clause? Consult the Declaration.²⁶ But this explanation, too, seems incomplete for much the same reason as the rhetorical explanation. If linguistic facts or contextual enrichment are mostly an exercise in linguistic anthropology, why does the Declaration supply any better evidence of meaning than the private letters of Abigail Adams,²⁷ a contract for horseshoes,²⁸ or the poems of Phillis Wheatley?²⁹

One may argue that the Declaration is not just evidence of linguistic practice, but an expression of the American “ethos,” “the shared values of the American people.”³⁰ That is almost certainly true, but it suffers from some serious question-begging. What makes the Declaration such an important, even *primary* expression of the American ethos? Age? Aspiration? Authority? How do we know it expresses the American ethos? Is that a political or sociological conclusion? One can imagine nontrivial arguments that Roosevelt’s Four Freedoms or the Social Security Act are equally or more expressive of the American ethos than the Declaration.³¹

These questions about the place of the Declaration in America’s

(“The Declaration of Independence reads like a paraphrase of Locke’s influential *Second Treatise of Civil Government*.”).

24. Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1973–4.

25. *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (citing the Declaration as why Article III judges are politically insulated).

26. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2675 (2015).

27. Solum, *supra* note 24, at 1974 (noting that “nonpublic documents like diaries [and] private letters” can provide evidence of linguistic facts).

28. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 770–71 (2009).

29. See Solum, *supra* note 25, at 1974.

30. *Id. Accord* PHILIP BOBBITT, CONSTITUTIONAL FATE 94–95 (1982) (describing ethos as those arguments that depend on claims about the character of the American people).

31. See Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 416 (2007) (identifying Social Security, the Clean Water Act, and Medicare as texts that appear “to embody the basic aspirations and values of [our] society”).

“Unwritten Constitution”³² cannot be resolved in this short Article. Instead, I want to offer an additional, not an alternative, explanation for the unique role of the Declaration in American law. The Declaration has developed in American legal culture into a type of “continuity tender.” A continuity tender, according to Richard Primus, is “an inherited statement that members of a community repeat in order to affirm their connection to the community’s history, even though they may no longer hold the values or face the circumstances that made the statement sensible for their predecessors.”³³ Henry, the Bible, or Roosevelt may be better rhetoric, more reliable evidence of usage, or a closer expression of the true American character, but only the Declaration has the ability to link a given norm to the American creation story. Invocations of the Declaration predicate certain types of law-making in the United States, just as invocations of the Queen’s authority predicate certain types of law-making in the United Kingdom. In both cases, the function of the invocation is to generate acceptance that the new norm is the natural and unbroken successor to the ancient legal order.

Parliamentary lawmaking in Britain begins with a ritual. As Primus observes, all laws passed by Parliament in the United Kingdom begin with the phrase “Be it enacted by the Queen’s Most Excellent Majesty.”³⁴ The rule of recognition among Britons is “what the Queen in Parliament enacts is law.”³⁵ This phrase, which expresses the Queen’s consent, is how the Queen-in-Parliament separates law-making from other kinds of norm generation.³⁶ But the phrase is a formula. As Primus notes, the “Queen” part of the Queen-in-Parliament must give her assent to any bill Parliament submits to her. Theoretically, she could refuse her assent³⁷—but she never does. In fact, no monarch has done so since 1708.³⁸ Practically no one, not the majority in Parliament, not the minority in Parliament, not even the

32. See generally AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* (2012).

33. Primus, *supra* note 3, at 3.

34. *Id.* at 18.

35. H.L.A. HART, *THE CONCEPT OF LAW* 108 (1961). See also Michael Steven Green, *Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order*, 83 N.C. L. REV. 331, 355–56 (2005). I will assume for purposes of this Article Parliamentary sovereignty, putting aside the many complications. See NICHOLAS J. MCBRIDE & SANDY STEEL, *GREAT DEBATES IN JURISPRUDENCE* 46–47 (2014).

36. Or King-in-Parliament, if the sovereign is male.

37. HART, *supra* note 35, at 108 (suggesting that the Queen’s inability to refuse assent is a “convention” but not a “legal duty” because “courts do not recognize [the convention of assent] as imposing a legal duty” upon the Queen).

38. Primus, *supra* note 3, at 9 n.32.

Queen herself, thinks she can veto legislation by withholding her assent.³⁹ Parliament can only make law with the Queen's permission and the Queen cannot withhold her permission from Parliament.⁴⁰ The *theater* of Queen-in-Parliament "enacting" is what makes law, law.⁴¹

Further, laws of Queen Elizabeth I in Parliament, unless abrogated, are as much law as those made by Queen Elizabeth II in Parliament.⁴² The continuity tender helps bridge the centuries. When the Queen-in-Parliament says "Be it enacted," it triggers a rule of recognition that is "connect[ed] to generations of British subjects" who lived both before and after Magna Carta, the English Civil War, the Glorious Revolution, and the extinction of the royal veto.⁴³ Through this performance, the Queen-in-Parliament "locates itself as part of *their* tradition," creating continuity between those British who never thought the Queen could refuse her assent, and those that did.⁴⁴

In times of consensus, continuity tenders are comforting rituals that bind a legal order to its people and to its history.⁴⁵ Stated at a sufficiently high level of abstraction—say a right to "life, liberty and the pursuit of happiness" or a right "to alter or to abolish" government—the performance is relatively cost-free.⁴⁶ The tender is so cheap, in fact, that some may be emboldened to say that the right is inalienable. In these circumstances, the ritual truly is theater: it "signal[s] loyalty to the constitutional tradition," but it has minimal impact on governance.⁴⁷

Consider that few Americans who lived from 1776 to the early nineteenth century thought that enslaved Africans were "created equal," or

39. Primus cites the pithy quote that "the Queen 'must sign her own death-warrant if the two Houses send it up to her.'" *Id.* at 9 (quoting WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 96 (1867)).

40. That is, unless Parliament asks her to withhold her assent, which was the source of a recent constitutional "kerfuffle." *Id.* at 28.

41. *Id.* at 10 ("Parliament *enacts* (that is, *performs*) its continuity with all of those chapters in British history.").

42. See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 840 (2015) ("We regularly treat unrepealed statutes as law, for example, whether they were passed a century ago or in the last legislative session."). See also HART, *supra* note 35, at 63 ("For Victorian statutes and those passed by the Queen in Parliament today surely have precisely the same legal status in present-day England.").

43. Primus, *supra* note 3, at 9.

44. *Id.*

45. *Id.* at 27.

46. *Id.* at 12.

47. *Id.* at 13.

that they possessed “unalienable rights” to life and liberty.⁴⁸ Those that did, or were unsure, certainly did not supply much legal force to that sentiment. The Declaration and the Revolution fought under its banner “had no immediate impact on the struggle to deny slavery its legitimacy as an institution.”⁴⁹ Northerners and Southerners could celebrate the Declaration on the Fourth of July and reaffirm their commitment to the American Republic⁵⁰ without the ceremony materially affecting the central legal and political issue of the time.⁵¹ Anyone who stood up and demanded immediate nationwide abolition on the authority of the Declaration was considered a lunatic, a radical, or a person wholly ignorant of American legal practice.⁵²

In times of conflict, however, continuity tenders can become “weaponized.”⁵³ One group insists the formula imposes material obligations on the legal order. Someone demands immediate emancipation of all enslaved Africans based on the Declaration alone,⁵⁴ another rallies troops to resist Congress because of a right to alter or abolish government.⁵⁵ “[T]he weapon is potent,” according to Primus, “because it

48. WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 264 (1977) (“Before 1840, Americans viewed the Declaration as being rhetorical or hortatory, rather than as a substantive and operative component of the constitution.”).

49. A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 372 (1978).

50. See Thomas Jefferson’s letter declining an invitation to come to the District of Columbia to celebrate the 50th Anniversary of the Declaration of Independence: “For ourselves, let the annual return of this day forever refresh our recollections of these rights, and an undiminished devotion to them.” SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 87 (1995) (quoting Letter from Thomas Jefferson to Roger Weightman (June 24, 1826), in *The Portable Thomas Jefferson* 584, 585 (Merrill D. Peterson, ed., 1975)); Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1023 (1993) (noting that some slave masters gave slaves the Fourth of July off as a holiday).

51. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 410 (1856) (“[I]t is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration”); *State v. Post*, 20 N.J.L. 368, 376 (N.J. 1845) (“[I]t has been often adjudged, both by the State and Federal courts, that slavery still exists; that the master’s right of property in the slave has not been affected either by the declaration of independence, or the constitution of the United States.”).

52. *Cf. Primus*, *supra* note 3, at 10 (“[T]o stand up in Parliament and oppose a bill on the basis of the Queen’s views would be just as alien to the commitments of British politics as it would be to refuse the gesture of continuity that the enacting clause embodies.”).

53. *Id.* at 27.

54. See Ronald R. Garet, “Proclaim Liberty,” 74 S. CAL. L. REV. 145, 152–53 (2000) (discussing arguments of abolitionist William Lloyd Garrison); Alexander Tsesis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679, 705 (2009) (citing the arguments of other radical abolitionists).

55. See SLAUGHTER, *supra* note 18 (explaining how early citizens banded together to resist the

uses a proposition that everyone affirms.”⁵⁶ Those who understood the ritual as a continuity tender must then decide whether to expose the ritual as empty rhetoric (thus undermining its continued effectiveness as a continuity tender), treat the formula as consequential to governance (surrendering to its use as a weapon), or find some way to fit the tender within the existing legal order. This is precisely what happened with the question of slavery and the Declaration. As the next part explains, the Thirteenth and Fourteenth Amendments resolved the weaponized use of the Declaration by folding its aspirations into the Constitution. But, despite the impassioned arguments of some, the Second Amendment did not—and cannot—do the same.

III. DECLARATIONS, CONSTITUTIONS, AND WEAPONIZED CONTINUITY TENDERS

Various movements in American history have used the formula of the Declaration as a weapon against the established legal order. Agrarian revolutionaries, abolitionists, Marxists, laissez faire capitalists, women’s suffragists, and gun rights advocates have all found ammunition in the natural law generalities of the Declaration. These groups cite the Declaration to argue that the contemporary legal order is unfaithful to constitutional tradition, and that some other legal order would be more faithful.⁵⁷ In the same way that believers in a royal negative may cite “Be it enacted” as evidence that legal practice must conform to the ritual, those that believe in racial equality, libertarian economic policy, or private military power, each have a passage of the Declaration to support *their* vision of the Founding. Otherwise, they say, the Declaration—and by implication the nation—is founded upon a lie.⁵⁸

As mentioned previously, when continuity tenders are weaponized, the existing legal order has three options: it can reject the continuity tender as merely symbolic, effectively destroying its future use for continuity; it can submit to the use of the tender, conforming its behavior to those who understand the ritual as binding; or it can sublimate the tender into the existing legal order. The Thirteenth and Fourteenth Amendments opt for the third route: they take the poetry of the Declaration and turn it into

federal government in the Whiskey Rebellion).

56. Primus, *supra* note 3, at 33.

57. See, e.g., JACK M. BALKIN, CONSTITUTIONAL REDEMPTION; POLITICAL FAITH IN AN UNJUST WORLD (2011).

58. See HIGGINBOTHAM, *supra* note 49, at 371.

prose.⁵⁹ This translation is possible because the concept of “liberty” and “equality,” abstract though they are, are capable of being enforced as positive law. They can be measured; they can be administered; they can be controlled. Some advocates have argued that the “right to alter or to abolish” government, as expressed in the Declaration, stands in the same position, and that the primary expression for this value is the Second Amendment right to keep and bear arms.⁶⁰ But, as I will argue in this Part, the revolutionary value of the Declaration cannot be transformed into positive law through the Second Amendment in this way. A right to alter or to abolish government through force of arms is an output, not an input. It is always, and ineluctably, the dependent variable.

A. THE THIRTEENTH AND FOURTEENTH AMENDMENTS

The Thirteenth Amendment does not echo the Declaration. It does not use terms like “equal” or “liberty.” Notwithstanding, the Declaration’s role in the drafting and ratification of the Thirteenth Amendment is well-documented. Congressman Godlove Orth stated that the Thirteenth Amendment was designed to fix into the Constitution the natural law principles of the Declaration.⁶¹ Senator Lyman Trumbull stated that the Thirteenth Amendment, and in particular its enforcement through the Civil Rights Act of 1866, would assure “the liberty which was intended to be secured by the Declaration of Independence and the Constitution of the United States originally.”⁶² Senator Reverdy Johnson expressed hope that the Amendment would illustrate “the truth of the principles incorporated into the Declaration of Independence, that life and liberty are man’s inalienable right.”⁶³ Charles Sumner asserted that the Amendment would bring “the Constitution into avowed harmony with the Declaration of Independence.”⁶⁴

59. Cf. A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT’L L. 3, 15 (2009) (“Thomas Jefferson turned Locke’s prose into poetry in penning the Declaration of Independence.”).

60. See generally Brent J. McIntosh, *The Revolutionary Second Amendment*, 51 ALA. L. REV. 673 (2000) (exploring some of these arguments).

61. Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 409 n.126 (2012).

62. See Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40, 44 n.24 (2011) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (internal quotation marks omitted)).

63. *Id.* at 44 n.23 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1424 (1864) (internal quotation marks omitted)).

64. VORENBERG, *supra* note 20, at 108 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1482 (1864) (internal quotation marks omitted)).

The supporters' serial appeals to the Declaration betray a profound anxiety to show continuity between their constitution and the Founders' constitution. The Civil War was fought to end slavery but to end it within a constitutional order that strongly presupposed slavery's existence.⁶⁵ Any outside observer of American legal practice up to 1865 would have recognized that the ability to own another person as property was legal. Any outside observer would have understood that, as a matter of legal practice, no judge had the power to abolish slavery throughout the United States on the naked dictates of natural law, even if the judge thought those dictates were expressed in the Declaration.⁶⁶ And that was because almost no one administering the antebellum legal order thought that the Declaration contained norms that were enforceable on behalf of the enslaved in defiance of the written Constitution. To radical abolitionists, like William Lloyd Garrison, the choice was simple: scrap the Constitution.

However, for those who wanted to save the Constitution, but abolish slavery, the issue was not as simple as an emancipation amendment. Opponents of the Thirteenth Amendment understood federalism and private property rights to be so foundational that they were immune from amendment under Article V.⁶⁷ Advocates of immediate universal abolition could not simply assert the amendment lawful because it complied with Article V because the legal limits of amendment was the very nature of the dispute. As Michel Zukert put it: "[T]he debate posed the question of whether the [Thirteenth Amendment] was fundamentally consistent with . . . the Constitution . . . or whether it overturned the Constitution."⁶⁸

65. Slavery in the United States Constitution would be an example of "implicature," that is a legal norm derived not from the text, but based upon assumptions that go beyond the text. John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature and Implied Powers*, 101 VA. L. REV. 1063, 1078–79 (2015) (using the "Fugitive Slave Clause" (U.S. Const. Art. IV, § 2, cl. 3) as one such example).

66. See David Thomas Konig, *The Long Road to Dred Scott: Personhood and the Rule of Law in the Trial Court Records of St. Louis Slave Freedom Suits*, 75 UMKC L. REV. 53, 61 (2006) ("No frontal judicial attack on slavery was to succeed unless explicit constitutional language—or something close enough to give validity to such a doctrine—was brought to bear against it."). See also Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 183 n.64 (1992) ("It is well-established that neither the Supreme Court nor most state courts used principles of natural justice to abolish slavery."). *But cf.* *Commonwealth v. Aves*, 18 Pick. 193, 209 (Mass. 1835) ("How . . . slavery was abolished in Massachusetts, whether by the adoption of the opinion in *Sommersett's* case, as a declaration and modification of the common law, or by the Declaration of Independence, or by the constitution of 1780, it is not now very easy to determine, and it is rather a matter of curiosity than of utility; it being agreed on all hands, that if not abolished before, it was so by the declaration of rights.").

67. VORENBERG, *supra* note 20, at 109–11.

68. Michael P. Zukert, *Completing the Constitution: The Thirteenth Amendment*, 4 CONST. COMMENT. 259, 263 (1987).

By arguing that the Amendment is simply the positive expression of the Declaration, advocates of the Thirteenth Amendment were able to explain that their amendment was continuous with the original constitution without conceding the radical argument that the Declaration had superior status as law. The Declaration was a bridge between the 1787 Constitution and the 1865 Constitution, offered to show that the old order and the new one were continuous, despite the stark fact that so much was different. But, by securing Congress's emancipatory goals of the Declaration in the Constitution, it simultaneously rendered those readings of the Declaration subordinate to the constitutional text. The question was no longer what do slavery and liberty mean in light of the Declaration, but what do slavery and liberty mean in light of the written Constitution.

Drafters of the Fourteenth Amendment and its statutory precursor, the Civil Rights Act of 1866, also invoked the Declaration. As Representative Windom claimed with respect to the Civil Rights Act:

This, I believe, is one of the first efforts made since the formation of the Government to give practical effect to the principles of the Declaration of Independence; one of the first attempts to grasp as a vital reality and embody in the forms of law the great truth that all men are created equal and endowed by the Creator with the inalienable rights of life, liberty, and the pursuit of happiness.⁶⁹

The appeals to the Declaration continued in debates over the Amendment itself. Bingham introduced the Amendment with language from the Declaration.⁷⁰ Representative George Miller said that section one of the Amendment was “so clearly within the spirit of the Declaration of Independence of the 4th of July, 1776, that no member of this House can seriously object to it.”⁷¹

As with the Thirteenth Amendment, congressional Republicans used the Declaration to establish continuity between the Fourteenth Amendment and the Founders' Constitution. The need for continuity was all the more important, given the coercion that the federal government brought to bear in getting the southern states to ratify that Amendment.⁷² Invoking the

69. Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 *TEMPLE L. REV.* 361, 384 (1993) (quoting *CONG. GLOBE.*, 39th Cong., 1st Sess. 1159 (1866) (statement of Rep. Windom) (internal quotation marks omitted)).

70. See *CONG. GLOBE.*, 39th Cong. 1st Sess. 1088–89.

71. Reinstein, *supra* note 69, at 387 (quoting *CONG. GLOBE.*, 39th Cong., 1st Sess. 2510 (1866) (statement of Rep. Miller) (internal quotation marks omitted)).

72. See generally Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 *NW. U. L. REV.* 1627, 1643–47 (2013).

Declaration provided a way to show that, notwithstanding the unorthodox manner of its adoption and ratification, the Fourteenth Amendment was as much the law of the land as the Tenth Amendment or the original 1787 Constitution.

The Framers had sedulously avoided incorporating the Declaration for fear of stirring up the slavery issue.⁷³ With slavery abolished by the Thirteenth Amendment, the Reconstruction Congress had all the room it needed to fully incorporate the Declaration into the written Constitution of the United States.

Except that it didn't. The Fourteenth Amendment shares a textual similarity to the Declaration—so much so, in fact, that many Americans mistakenly think the phrase “all men are created equal” is in the Constitution.⁷⁴ But neither “all men are created equal” nor “unalienable rights” to “life, liberty, and the pursuit of happiness” appear in the Constitution. Not in the Fourteenth Amendment nor anywhere else. Unsurprisingly, the lines concerning a right “to alter or to abolish” government—so recently used by the Confederacy⁷⁵—aren't in the Constitution either. The Declaration may express generally agreed upon values with which to implement ambiguous constitutional terms, but it is a mistake to think that the Fourteenth Amendment thereby makes the Declaration law.⁷⁶

The Declaration offers context to the Constitution, but it cannot contradict the Constitution.⁷⁷ As a result, invocations to the Declaration tend to predicate certain types of law-making in American legal practice. When original meaning, history, doctrine, or practice seem to defy a specific reading of the Constitution, the tender is offered to show that the new reading of the text is consistent with the American tradition—even in the face of contrary precedent, longstanding practice, contradictory history, or when it is inconceivable that the drafters or the ratifiers of that text would have ever contemplated such a meaning.

For example, the idea of “one person, one vote” in political primaries

73. See GORDON LLOYD & MARGIE LLOYD, *THE ESSENTIAL BILL OF RIGHTS* 344 (1998) (observing that Madison was unable to have the principles of the Declaration incorporated into the preamble to the Constitution). See also Reinstein, *supra* note 69, at 385–87.

74. See Katie R. Eyer, *The Declaration of Independence as Bellwether*, 89 S. CAL. L. REV. 427, 428 (2016) (citing a press release from the National Constitution Center showing that 84 percent of Americans think that “all men are created equal” is in the constitution).

75. See Davis, *supra* note 19.

76. See generally Strang, *supra* note 4.

77. AMAR, *supra* note 32, at 247–48 (“Where the terse [constitutional] text is clear, it trumps.”).

was, according to Justice Douglas, premised on a “conception of political equality from the Declaration of Independence”⁷⁸ even though dissenting Justice Harlan observed that such a notion “surely flies in the face of history.”⁷⁹ President Johnson’s speech to the nation when he signed the Civil Rights Act of 1964 weaved references to the Declaration in nearly every paragraph. Johnson acknowledged that discrimination was “deeply imbedded in history and tradition and the nature of man.” Notwithstanding, the Founders had “pledged their lives, their fortunes, and their sacred honor . . . to forge an ideal of freedom—not only for political independence, but for personal liberty.”⁸⁰ Johnson’s rhetorical invocation was response to opponents of the Civil Rights Act, who raised non-trivial private property, takings, federalism, and Ninth Amendment objections.⁸¹

In both the Thirteenth Amendment and Fourteenth Amendment, the Declaration supplies the continuity between a world that the Framers’ could not imagine (or could imagine, and feared), and the world the contemporary generation wants to create. Unlike questions asked of the Constitution, few seriously ask whether the drafters of the Declaration *intended* their words to have such an effect. Furthermore, the Declaration is cited as more than an expression of political morality concerning freedom or equality. Other forms of evidence are more reliable in that regard. The Declaration is offered as a continuity tender because it supplies a common platform upon which to build consensus around the new norm—a platform that other texts, or other forms of evidence, are less capable of providing.

Without the tender of the Declaration, people are left wondering whether some kind of legal revolution has occurred. With it, people can say that the basic structure of the American legal order is the same, even if the legal products of that order are different. Precisely because of the formulaic quality, precisely because—if accepted—no one challenges the new rule on the basis that “the Declaration doesn’t mean that.” Precisely for these

78. See *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

79. See *id.* at 384 (Harlan, J., dissenting).

80. Lyndon B. Johnson, U.S. President, Radio and Television Remarks Upon Signing the Civil Rights Bill (July 2, 1964), <http://www.lbjlibrary.net/collections/selected-speeches/november-1963-1964/07-02-1964.html>.

[O]ur generation of Americans has been called on to continue the unending search for justice within our own borders. We believe that all men are created equal. Yet many are denied equal treatment. We believe that all men have certain unalienable rights. Yet many Americans do not enjoy those rights. We believe that all men are entitled to the blessings of liberty. Yet millions are being deprived of those blessings—not because of their own failures, but because of the color of their skin.

Id.

81. See Joel K. Goldstein, *Constitutional Dialogue and the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1095, 1127–29 (2005) (explaining examples of opposition).

reasons, the tender enables lawmakers to effectuate substantial, one may even say revolutionary change, without disturbing the basic understanding of what makes American law, law.⁸²

B. THE SECOND AMENDMENT

The Declaration's power to link past to present is recognized and used by all types of social movements. I want to focus on one salient group. Gun-rights advocates and scholars have steadily built arguments that the Second Amendment derives its moral authority from the Declaration in a way similar to the Thirteenth and Fourteenth Amendments. Some advocates appear to argue that a right "to alter or to abolish" government through the right to keep and bear arms is as much an enforceable legal norm as a right to equality or liberty.⁸³ Even as others (who may otherwise be sympathetic to gun rights) express skepticism.⁸⁴

The Declarationist reading of the Second Amendment has some powerful allies. Prior to *District of Columbia v. Heller*, four judges of the Ninth Circuit stated that the "core value protected by the Second Amendment for 'the people' was 'the Right of the people to alter or abolish' tyrannical government."⁸⁵ Judge Alex Kozinski once referred to the right to keep and bear arms as a "doomsday provision."⁸⁶ The late Justice Scalia, in his more heady passages in *Heller*, seemed to revel in the idea of armed resistance to tyranny.⁸⁷ It is no wonder that modern gun-rights advocates frequently make these Declaration-based arguments in their briefs post-*Heller*.⁸⁸

While these arguments have deep political resonance, it is difficult to understand how they could be expressed as law. In the calculus of the

82. See Green, *supra* note 35, at 335 ("A legal revolution occurs when chains of legal justification are broken.")

83. Cf. Brent J. McIntosh, *The Revolutionary Second Amendment*, 51 ALA. L. REV. 673 (2000).

84. Glenn H. Reynolds & Brannon P. Denning, *How to Stop Worrying and Learn to Love the Second Amendment: A Reply to Professor Magarian*, 91 TEX. L. REV. SEE ALSO 89, 93 (2012) ("The Second Amendment does *not* guarantee a right to revolution, to armed resistance, or even the right to 'alter or abolish' government if it becomes tyrannical.")

85. *Silveira v. Lockyer*, 328 F.3d 567, 576 (9th Cir. 2003) (Kleinfeld, J.) (dissenting from denial of rehearing en banc).

86. *Id.* at 570 (Kozinski, J., dissenting from denial of rehearing en banc)

87. See *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008) ("[W]hen able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.")

88. See Brief Amicus Curiae of Gun Owners Foundation, et al., in Support of Plaintiffs-Appellees and Affirmance at 8-9, *Woollard v. Gallagher*, 134 S. Ct. 422 (2013) (No. 12-1437) (making similar arguments). See also Amicus Curiae Brief of Mountain States Legal Foundation in Support of Respondent at 9, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

Declaration, equality, liberty, and law are subject to computation and adjustment. Equality can be measured. One can say the law makes a person a little more or a little less equal, and so the law needs to change.⁸⁹ Liberty can be measured. One can say the law makes a person a little more or a little less free, and therefore the law needs to change.⁹⁰ Even “happiness” is becoming capable of quantification.⁹¹ How does one measure a right “to alter or to abolish” government through violent revolution?

One could say that a population must have arms sufficient to change government through violent means. But this leads to bizarre and seemingly injudicious (if not completely non-justiciable) questions, such as whether allowing private possession of armament *x* actually deters the United States military.⁹²

One could say that any law that tends towards government entrenchment, or makes it more difficult to challenge that entrenchment, undermines the right to alter or to abolish government. But a fundamental purpose of any constitution is “to entrench certain legal arrangements against change.”⁹³ An ostensibly unamendable entitlement of two senators in Congress for each state tends to decrease the ability to alter or to abolish government.⁹⁴ Supermajority requirements for amending the constitution frustrate the ability to alter or to abolish government.⁹⁵ A standing army, the President’s role as Commander in Chief,⁹⁶ the power to suppress insurrections,⁹⁷ and the constitutionally specified crime of Treason,⁹⁸ all impose substantial—perhaps insuperable—hurdles to alter or to abolish government.⁹⁹ A right to alter or to abolish government—at least as contemplated by armed revolution—may simply be a “constitutional

89. Cf. World Bank, GINI INDEX (2015), <http://data.worldbank.org/indicator/SI.POV.GINI>.

90. Cf. FREEDOM HOUSE, 2015 FREEDOM IN THE WORLD, https://freedomhouse.org/sites/default/files/01152015_FIW_2015_final.pdf; Heritage Foundation, *2015 Index of Economic Freedom*, <http://www.heritage.org/index/>.

91. See MATTHEW ADLER, WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS 297–99 (2012); John Bronsteen et al., *Welfare as Happiness*, 98 GEO. L.J. 1583 (2010).

92. See Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643 (1995) (“To suggest that civilians equipped with Second Amendment-type weapons are any match for modern security forces invites murderous confrontations that armed civilians will inevitably lose.”).

93. See Young, *supra* note 31, at 426.

94. See U.S. CONST. art. V.

95. U.S. CONST. art. V.

96. U.S. CONST. art. II, § 2, cl. 1.

97. U.S. CONST. art. I, § 8, cl. 15.

98. U.S. CONST. art. III, § 3 cl. 1.

99. See generally Dunlap, *supra* note 92.

ungovernable,”¹⁰⁰ an area of political culture that is divorced from the legal content of a written constitution.¹⁰¹

If there is no role for positive law in the right to alter or abolish government, where does that leave the Declaration as ritual and formula? If its invocation cannot predicate law making in the context of the Second Amendment, as it has done for the Thirteenth and Fourteenth Amendments, what does the formula do?

Perhaps the Declaration’s “alter or abolish” language serves the same role in America as other nations’ “right to resist” language: it is a pre-commitment device that lowers the coordination barriers to any future action, or acts as an *ex post* ratification of the legitimacy of those who successfully stage a coup, or both.¹⁰²

As Tom Ginsburg, Daniel Lansberg-Rodriguez, and Mila Versteeg have recently documented, some regimes do, in fact, include a right to resist provision in their constitutions. But, the authors hasten to add, “the constitutional text cannot really be considered the source of the right *per se*. Rather, [a right to resist] is a declaratory provision” that may “stipulate[] predicate conditions and designat[e] who has the right to invoke it.”¹⁰³ The right is stipulated as a pre-comment device. A ruler acknowledges the right as a way to demonstrate fealty to the rule of law, and the people have a norm, expressed in a text, which lowers coordination barriers to organizing a revolution.¹⁰⁴ Equally, a right to alter or abolish government may serve as a post-hoc legitimization of a coup¹⁰⁵—which, from the perspective of the British, the American Revolution undoubtedly was.

Whether the Declaration acts as a pre-commitment device or a post-hoc justification for our own revolution, its function is solely as a political matter, not subject to legal analysis. The tender offered to alter or abolish government in some senses is no longer a continuity tender, but a tender to discontinuity. It is submitted to the people, not as a predicate for law-

100. Christopher L. Eisgruber, *Property and the Unwritten Constitution*, 66 N.Y.U. L. REV. 1233, 1234 n.6 (1993) (citing I. Kant, *The Metaphysical Elements of Justice* 86 (J. Ladd trans. 1965) (discussing the concern that no constitution, written or unwritten, can specify conditions for revolution). I leave it to legal theorists to decide whether it is in fact “ungovernable” because of the inability of law to justify its own legality, or for some other reason. See generally Michael Steven Green, *Hans Kelsen and the Logic of Legal Systems*, 54 ALA. L. REV. 365 (2003).

101. See Eisgruber, *supra* note 100, at 1234.

102. See Tom Ginsburg et al., *When to Overthrow Your Government: The Right to Resist in the World’s Constitutions*, 60 UCLA L. REV. 1184, 1208–16 (2013).

103. *Id.* at 1194.

104. *Id.* at 1208–12.

105. *Id.* at 1212–16.

making within the old constitutional system, but as a way to precipitate a true legal revolution—the end of one legal regime and the creation of another.