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The Strange History of "All Men Are Created Equal"

Pauline Maier*

It is not altogether surprising, I think, that authors learn a great deal while writing a book. Who has enough information at the top of his or her mind to fill hundreds of pages? Instead we figure out much of what we say as we go along – and then rewrite, and rewrite, and rewrite to make our manuscripts sound as if we knew what we were doing from the beginning.

It is, however, remarkable – at least to me – how much an author can learn by publishing a book, particularly a book like *American Scripture*,¹ which was widely reviewed and brought invitations to appear on talk shows, in book series at museums, and at other events where members of "the educated public" have an opportunity to express their thoughts. What I learned is of some relevance here. It concerns the ways Americans think about the nation's revolutionary origins and, more exactly, the Declaration of Independence and also the Constitution and the Bill of Rights, which are the most enduring statements of the Revolution's heritage.

What exactly did I learn? For one thing, I learned how much Thomas Jefferson and the Declaration of Independence have become inseparable. I should have expected, I suppose, people to describe my book on the Declaration of Independence as my "Jefferson book" even though it does not focus on Jefferson and, indeed, downplays his role in the creation of the Declaration. But why do so many knowledgeable, intelligent people repeatedly speak of my "book on the Constitution"? If I corrected them, which I no longer do, and said that the book was in fact about the Declaration of Independence, they often would wave their hands as if to say "don't bother me with academic distinctions. The Constitution, the Bill of Rights, the Declaration of Independence – they're basically all the same thing." At first, however, those documents were not at all "basically the same thing." How, then, did they come to seem that way?

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

There is, however, at least one regard in which people think differently about the Constitution and the Declaration of Independence. Most Americans are aware that interpretations of the Constitution have changed over time, perhaps because Supreme Court decisions are so often in the news. However, they often do not extend that insight to the Declaration, which doesn't seem to have changed at all since 1776. The men who wrote and signed the document understood it, people assume, exactly as we do. And another tendentious academic's suggestion that, in fact, the Declaration has a history is about as welcome to some Americans as Darwinism was to fundamentalist Christians a century ago.

Occasional reviews in newspapers insisted, for example, that the members of the Second Continental Congress knew exactly what power the Declaration would have for future generations. No need to sift the evidence for or against that view; the argument was based on pure faith. Then there was the woman at Boston's Kennedy Library who asked, with obvious irritation, "Do you really mean to say the Declaration wasn't inspiring in 1776?"

This view is not confined to "ordinary people." Paul Johnson stated it in his *History of the American People*.² In adopting the Declaration of Independence, Johnson asserted, members of the Second Continental Congress "wanted to give the future citizens of America a classic statement of what their country was about, so that their children and their children's children could study it and learn it by heart."³ And, in the most critical scholarly review that *American Scripture* received, a professor of political science at Notre Dame University went so far as to misquote an eighteenth-century source in an impassioned effort to show that the Declaration of Independence "was always taken to be a guide for 'an established society.'⁴ Among such people one can witness the "original understanding" doctrine in a pure and uncompromised form, "original understanding" with a vengeance.

2. PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* (1997).

3. *Id.* at 154.

4. Michael Zuckert, *A Work of Our Own Hands*, 60 REV. POL. 355, 359 (1998). Zuckert misquoted a Nov. 1, 1787, essay by "Brutus," an Antifederalist writer, in an effort to show that the Declaration did not fall into oblivion between 1776 and the 1790s. "Brutus" did not refer to the Americans' "most solemn declaration," as Zuckert says, *id.* at 359, but to their "most solemn declarations," a broad category that clearly included the state declarations of rights, whose importance "Brutus" emphasized in the rest of the essay. Indeed, one of the principles "Brutus" cited from those "declarations," that "all men are by nature free," echoed not the Declaration of Independence but the final version of the Virginia Declaration of Rights, which said that "all men are by nature equally free and independent." See Brutus II (Nov. 1, 1787), in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 524, 524-29 (John P. Kaminiski & Gaspare J. Saladino eds., 1981); Declaration of Rights, 9 VA. STAT. 109 (1776). Most of the other evidence Zuckert cites shows the continuing importance of the principles in the second paragraph of the Declaration of Independence, whose significance *American Scripture* affirms, not of the Declaration of Independence itself. See Zuckert, *supra*, at 358-59.

The "understanding" to which they are so committed is not, to be sure, stated throughout the Declaration of Independence. It does not include even the entire second paragraph, the one that begins "we hold these truths to be self-evident."⁵ The importance of the document today rests on that paragraph's opening lines, which say that "all men are created equal," that they have "certain unalienable rights," among which are "life, liberty, and the pursuit of happiness," and that "to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."⁶ Those are about the only lines most people remember of the Declaration, and memory often fades after "life, liberty, and the pursuit of happiness." But the parts we recall lead to an assertion that "whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."⁷ They lead, that is, to an affirmation of the right of revolution – which is not among the rights most dear to twentieth-century Americans. And what follows the second paragraph – the long list of grievances against the King, the attack on the British people for failing to support the colonists, the concluding paragraph, which contains the "declaration" that gave the document its name – is generally forgotten (except perhaps, for the signers' pledge of "our lives, our fortunes, and our sacred honor"⁸). Our selective memory alone strongly suggests that the document once had meanings that are no longer altogether meaningful for us – that it has a history.

I want to talk about that history today, giving particular attention to the phrase "all men are created equal," which, with the Declaration's subsequent affirmation of "unalienable rights," is now the essence of the document. When did those phrases, with the Declaration that stated them, come into prominence, and why? The story, I think, also helps explain why the Declaration of Independence, the Constitution, and the Bill of Rights so often are confused with each other. That story is strange because of the twists and turns it took; it is strange, too, in that it is so little known.

Much of what I will say is in my book, but I did not stop thinking about its subject when *American Scripture* went to press in the fall of 1996. What follows is, in short, a recasting of the book's final section, one I wrote after the book was published, in part as a response to my audiences out there on the book-tour circuit.

Was the Declaration important, and even inspiring, in 1776? Of course. Unless the members of the Second Continental Congress considered the docu-

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5. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
 6. *Id.*
 7. *Id.*
 8. *Id.* at para. 32.

ment of significance, it is difficult to imagine why they would have taken two days to edit the text that Jefferson and the drafting committee submitted.⁹ The Second Continental Congress was the entire government of the United States – the legislative, judiciary, and executive, all in one. And it made time for its remarkable exercise of group editing just as hundreds of British ships, sails aloft, were arriving off Manhattan, opening one of the greatest military crises of the war.¹⁰ The Congress would not have done that unless its members considered the task to be of considerable consequence.

As the Congress understood it, the Declaration served two critical functions: it both justified and announced Congress's decision on July 2, 1776, to end the rule of George III over thirteen of his North American colonies. During the previous five centuries, the colonists' British ancestors had ended the reign of living kings seven times,¹¹ but they never did so casually. Always they explained and justified what they'd done, and in time those explanations became precedents that limited and constrained the changing of established regimes. The English could dethrone a king only if he was conspicuously inept (*rex inutilis*)¹² or, as the English said of James II in 1689, evil in the sense of violating "the knowne Laws and Statutes and freedome of this Realme."¹³ Through the Declaration of Independence the colonists said, in effect, that George III was for them a king of the evil sort. Congress's sense of obligation to "declare the causes" of its action, and even to supply a detailed list of grievances that can seem so unbearably long when read aloud on a hot July afternoon, remains of significance to us. It helps explain why the United States, like other countries in the British tradition, has constitutional crises while some other nations have *coups d'état*.

The Declaration was also something of a press announcement of this important event at a time when newspapers were still an inadequate means of reaching the people, about ninety-five percent of whom remained spread over an extensive agricultural countryside. After finally approving the Declaration on July 4, 1776, Congress ordered copies of the document – the printing of which John Dunlap undertook¹⁴ – and then distributed them throughout the colonies so Independence could be "proclaimed" in each of the states and at the

9. See MAIER, *supra* note 1, at 143-50 (discussing Congress's editing of original draft).

10. *Id.* at 15, 45-46 (reflecting Congress's reaction to events of July 1776).

11. See William Huse Dunham, Jr. & Charles T. Wood, *The Right to Rule in England: Depositions and the Kingdom's Authority, 1327-1485*, 81 AM. HIST. REV. 738, 738-39 (1981) (noting that decision to end English monarch's reign always followed detailed explanations).

12. See *id.* (discussing justifications for deposing rulers in England).

13. English Declaration of Rights of 1688-89, in LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689*, at 295, 296 (1981).

14. See A RISING PEOPLE: THE FOUNDING OF THE UNITED STATES 1765 TO 1789, at 70-73 (1976) (discussing Dunlap's broadside).

head of the army.¹⁵ Once in possession of the Dunlap broadside, the states arranged for public readings of the Declaration when and where their people congregated – on court days in Virginia, at places where elections were about to be held, or, in Massachusetts, after Sunday services. Those occasions were accompanied with appropriate ritual: the shouting of "huzzah"s, a parading of militiamen, the ripping down and destruction of public symbols of royalty.¹⁶

But it was Independence, not the Declaration, that the people celebrated.¹⁷ And when they quoted that document, they cited the last paragraph, the one that proclaimed that "these united colonies are and of right ought to be free and independent states."¹⁸ Those were the words of the resolution, drafted by Virginia's Richard Henry Lee, that Congress had adopted on July 2 and subsequently inserted into the Declaration in place of a passage proposed by Jefferson and the drafting committee.¹⁹ There was comparably little attention – indeed, so far as I can tell, none at all – to the document's second paragraph, with its assertions, recalled so fondly today, that "all men are created equal" and possess "unalienable rights."

Why not? Because the people objected to those lines? On the contrary, they went unnoticed because the ideas in the Declaration's second paragraph were so broadly shared that their statement seemed commonplace, even a kind of "boilerplate" that preceded what was, for Americans of 1776, new and remarkable, that is, their independence from Britain. The Declaration was meant, as Jefferson later testified, to provide "an expression of the American mind, and to give that expression the proper tone and spirit called for by the occasion,"²⁰ and its summary of fundamental political principles helped it fulfill those purposes. Several other documents also asserted men's fundamental equality and possession of natural rights, often with similar words. But only the Declaration of Independence officially proclaimed the American nation's assumption of a "separate and equal station" among the "powers of the earth."

Of the documents that asserted equality and rights, moreover, the Declaration of Independence apparently did not seem particularly eloquent or remarkable to Americans of the 1770s and 1780s. Americans read it seldom if ever, even on Fourth of July celebrations, and remembered it mainly for its associa-

15. See 5 JOURNAL OF THE CONTINENTAL CONGRESS 516 (July 4, 1776) (reflecting order to copy Declaration and read it publicly).

16. See MAIER, *supra* note 1, at 156-58 (reflecting merriment surrounding colonies' declaration of independence from England).

17. *Id.*

18. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

19. See MAIER, *supra* note 1, at 160 (noting that Continental Congress inserted oft-cited clause into Jefferson's draft).

20. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in 10 THE WRITINGS OF THOMAS JEFFERSON 342, 343 (Paul Leicester Ford ed., 1899).

tion with independence. The preferred document by far was a draft of the Virginia Declaration of Rights that the planter George Mason wrote for a drafting committee appointed by the Virginia Convention in the middle of May, 1776. It said

that all men are born equally free and independant [sic], and have certain inherent natural rights, of which they cannot, by any compact, deprive or divert their posterity; among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.²¹

That early version of the Virginia Declaration of Rights was republished widely in colonial newspapers in early June, soon after Congress called on the states to establish new governments founded on the authority of the people.²² Several states, including Pennsylvania, Vermont, Massachusetts, and New Hampshire, as well as Virginia, modeled their Declarations, or Bills, of Rights on the Mason draft, or on some earlier state Declaration of Rights that echoed Mason's words.²³

Indeed, in composing the second paragraph of the Declaration of Independence Thomas Jefferson probably worked from the Mason draft, which appeared in the *Pennsylvania Gazette* on June 12, 1776, the day after Congress appointed a drafting committee and perhaps the day that committee first met.²⁴ Did Jefferson do so on instructions of the committee, which, John Adams said, discussed the Declaration's contents and essentially outlined it before appointing a draftsman? Or did Jefferson do so on his own initiative? In either case, surviving drafts suggest that he began with Mason's statement that "all men are created equally free and independant [sic]," but changed it to say "created equal & independent." Then he crossed out "& independent," which left "all men are created equal."²⁵ He proceeded in a similar way with Mason's next words, compressing Mason's language so it fit into an eighteenth-century rhetorical form by which a series of phrases are combined in a single long

21. *A Declaration of the Rights Made by the Representatives of the Good People of Virginia*, reprinted in PENNSYLVANIA GAZETTE, June 12, 1776 [hereinafter *A Declaration*].

22. See George Mason, The Virginia Declaration of Rights (May 20-June 12, 1776), in 1 THE PAPERS OF GEORGE MASON, 1725-1792, at 274, 276 (Robert A. Rutland ed., 1970) (discussing publication of Mason draft).

23. See MAIER, *supra* note 1, at 165-67 (describing evolution of states' declarations in 1777). For the complete documents, see THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Newton Thorpe ed., 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS].

24. See MAIER, *supra* note 1, at 126 (discussing first committee meetings).

25. See Carl Becker, The Declaration of Independence 142, 161 (1948) (comparing subsequent drafts of Declaration to initial writings); *A Declaration of Rights Made by the Representatives of the Good People of Virginia*, *supra* note 21.

sentence whose meaning becomes clear only at the end.²⁶ And Jefferson ended his series with an assertion of the right of revolution. After all, unlike Mason, Jefferson was not writing a Declaration of Rights to guide and to limit an established government. He was writing a revolutionary document to announce and justify the ending of the old regime, and so to clear the way for new governments that would better serve the "safety and happiness" of the people.

Eighteenth-century Americans knew the difference between a Declaration of Independence and a Bill of Rights, and in writing their state bills of rights they obviously preferred Mason's more detailed and, if you will, "lawyerly" statement to Jefferson's abridgement of it. One state Declaration of Rights after another said, for example, that all men were "born" equally free and independent, not that they were "created equal." And in describing man's "inalienable rights," they bypassed Jefferson's brief statement that "among these are life, liberty, and the pursuit of happiness." Instead they adopted some version of Mason's assertion that among men's "inherent natural rights" were "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."²⁷ That left no ambiguity over whether "the pursuit of happiness" included the right to acquire and possess property because, unlike the Declaration of Independence, the draft Virginia Declaration of Rights mentioned both.

Jefferson's text remains, however, so reminiscent of Mason's that even a very distinguished legal scholar recently identified Judge Bushrod Washington's summary, in *Corfield v. Coryell*,²⁸ of the "privileges and immunities" of citizens, which included a statement of "the right to acquire and possess property,"²⁹ as inspired by the Declaration of Independence.³⁰ His mistake is another sign of the way we read our sense of the Declaration's prominence back into the past. For Americans of the late eighteenth and early nineteenth centuries, in short, the Declaration of Independence was not the "ur" document of American liberty, the text that stated most satisfactorily the "unalienable and personal rights of men, without the full, free and secure enjoyment

26. See Stephen E. Lucas, *Justifying America: The Declaration of Independence as a Rhetorical Document*, in *AMERICAN RHETORIC: CONTEXT AND CRITICISM* 67, 84 (Thomas W. Benson ed., 1989) (considering use of "Style Periodique" in Jefferson's rhetoric (citing HUGH BLAIR, *LECTURES ON RHETORIC AND BELLES LETTRES* 206-07 (London, 1783))).

27. MAIER, *supra* note 1, 165-67 (commenting on Mason's draft and early state declarations of rights); see also MASS. CONST. of 1780, art. I, reprinted in 3 *THE FEDERAL AND STATE CONSTITUTIONS*, *supra* note 23, at 1888, 1889 (showing Massachusetts's language assuring peoples' rights); PA. CONST. of 1776, art. I, reprinted in 5 *THE FEDERAL AND STATE CONSTITUTIONS*, *supra* note 23, at 3081, 3082 (reflecting language in Pennsylvania constitution).

28. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

29. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

30. See CHARLES L. BLACK, *A NEW BIRTH OF FREEDOM* 49-50 (1997) (discussing Washington's decision in *Corfield* case).

of which there can be no liberty," as Pennsylvania Antifederalists put it in 1787.³¹ That honor goes instead to George Mason's 1776 draft of the Virginia Declaration of Rights.

If the ideas that both Mason and Jefferson stated were accepted so universally in the eighteenth century, you might ask, why do they not appear in the federal Constitution or Bill of Rights? Not because no one thought of it. In the final days of the Philadelphia convention, Mason, who served as a delegate from Virginia, proposed that the delegates add a bill of rights to the Constitution.³² That would quiet the fears of the people, he said, and a bill of rights could be composed quickly using the state documents as models.³³ Not one state delegation supported him.³⁴ But Mason was right: The Constitution's lack of a bill of rights was one of the most powerful arguments raised against its ratification.

Indeed, the Antifederalists' insistence on a bill of rights was so strong that James Madison, who had argued against Mason's proposal, moved in the first Federal Congress that one be added to the Constitution.³⁵ Madison would have made several changes to the body of the Constitution and added a "prefix" that was, in short, a watered down version of the opening provisions of the Virginia Declaration of Rights.³⁶ Madison's "prefix" asserted that "all power is originally vested in, and consequently derived from the people" and that government was instituted for their benefit.³⁷ It described "the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety" as among the benefits of government, not preexistent "natural" rights.³⁸ Madison's "prefix" also said the people had a right to "reform or change" a government – not to replace it – if it failed to fulfill that purpose.³⁹

Even in its diluted form, the "prefix" was too much for Congress. Among Congress's reasons for rejecting the "prefix" was perhaps a perception by

31. The Dissent of the Minority of the Convention, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 617, 630 (Merrill Jensen ed., 1976).

32. See MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 185 (1913) (noting that Mason proposed adding to Constitution bill of rights similar to Virginia's measures).

33. See *id.* (containing Mason's idea that delegates could draft bill of rights quickly).

34. See *id.* at 186 (reflecting that delegates unanimously defeated Mason's proposal).

35. See James Madison, Amendments to the Constitution (June 8, 1789), in 13 THE PAPERS OF JAMES MADISON 196, 196-97 (Charles F. Hobson et al eds., 1979) (recalling Madison's effort to attach amendments to original Constitution).

36. See *id.* at 200 (reflecting Madison's proposed amendments to assure rights to all citizens).

37. *Id.*

38. *Id.*

39. *Id.*

certain slave states that assertions of universal human equality and rights were a recipe for trouble. Virginia, in fact, already recognized the problem in June of 1776, and, before officially enacting the state's Declaration of Rights, amended Mason's draft so it imposed no obligation on the state to honor and protect the rights of enslaved blacks.⁴⁰ Then, as if to confirm slave holders' fears, in the 1780s, Massachusetts courts granted freedom to slaves who argued that slavery violated a provision in the state's Declaration of Rights that said "all men are born free and equal" with "natural, essential, and unalienable rights" to life and liberty.⁴¹ Madison's "prefix" was probably designed in part to calm Antifederalists without provoking the opposition of slave holders. Congress instead eliminated the "prefix" altogether.

Nor was Congress willing to change the body of the Constitution as Madison proposed, altering the provision on representation, inserting additional restrictions on Congress and on the states at appropriate points in the document. As a result, Congress tacked its amendments to the end of the Constitution, a move that made them look like the afterthought they were. In content, too, Congress's proposal was unlike the state declarations or bills of rights: The twelve amendments it sent to the states began with provisions on the apportionment of representation and limiting Congressmen's capacity to raise their own salaries.⁴² Nowhere did Congress include any remnant of Madison's "prefix."⁴³

It makes some sense, then, that in the 1790s – when neither the original Constitution nor the Constitution as amended acknowledged the existence of the people's "inherent natural rights" – the Declaration of Independence was first rescued from the obscurity into which it had so quickly sunk. Or that then attention began to shift from its final paragraph – after all, Independence was no longer hot news in the 1790s – to the second paragraph, and particularly to the lines that are most familiar today. The Declaration stood as the only federal document that affirmed the fundamental equality of the people and the responsibility of government to secure their "unalienable rights" to

40. See Final Draft of the Virginia Declaration of Rights (June 12, 1776), in 1 PAPERS OF GEORGE MASON, *supra* note 22, at 287, 287, 289 (describing provisions addressing slavery in Virginia); MAIER, *supra* note 1, at 193 (recording debate in Virginia Convention over slaves' rights).

41. See WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 345 & n.6 (1968) (stating that Massachusetts courts concluded that slavery was unconstitutional under state law); see also ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 112-16 (1967) (discussing Massachusetts's history addressing slavery).

42. See CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 3-5 (Helen E. Veit et al. eds., 1991) (reflecting original Bill of Rights sent to states).

43. For more detailed history on Congress's proceedings, see *id.* and see generally JACK N. RAKOVE, DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS (1998).

life, liberty, and the pursuit of happiness. As a result, those who found those ideas useful in national politics had to cite the Declaration. It was perhaps not ideal for their purposes; a legally binding and thus judicially enforceable provision in the Constitution or its amendments no doubt would have been better. But they had no alternative.

Members of the "Jeffersonian" Republican Party of the 1790s were the first to describe the Declaration of Independence as a "deathless instrument" and attribute its timeless elegance to their leader, the "immortal Jefferson."⁴⁴ And it was above all the second paragraph, with its declaration of human equality and rights, that they emphasized.⁴⁵ Those words, reminiscent as they were of the French Declaration of the Rights of Man, fit the Republicans' affection for revolutionary France, just as the Declaration's condemnation of British policy fit the party's anglophobia.⁴⁶ Meanwhile, the Federalists, who despised the French Revolution and sought a certain rapprochement with Britain, downplayed the document's distinction⁴⁷ and insisted that the Declaration could not have been the work of Jefferson alone, that their man John Adams, who was also on the drafting committee, must have had some say in its composition.⁴⁸

The generation of Americans who came to maturity after the War of 1812, when the Federalist Party had been discredited, built further on the Republican precedent and began regarding the Declaration of Independence as a sacred document.⁴⁹ Its assertion of the right of revolution was not forgotten at a time when revolutionaries in Latin America, Greece, and elsewhere seemed to be imitating the Americans of 1776 by overthrowing their old governments and establishing republics. Indeed, for Jefferson, even in the final days of his life, the Declaration remained first and foremost a means of "arousing men to burst the chains" that bound them and to "assume the blessings and security of self-government."⁵⁰ But younger Americans increasingly identified the document as a "Declaration, by a whole people, of what before existed, and will always exist, the native equality of the human race, as the true foundation of all political, of all human institutions."⁵¹ And so, now empowered with a quasi-

44. Philip F. Detweiler, *The Changing Reputation of the Declaration of Independence: The First Fifty Years*, 19 WM. & MARY Q., 3d 557, 565, 569 (1962).

45. See *id.* at 570 (commenting on Republicans' increased attention to human rights aspect of Declaration).

46. See *id.* at 566-68 (discussing pro-French, anti-British posture of Republicans).

47. See *id.* (reflecting Federalists' anti-French stance).

48. See Charles Warren, *Fourth of July Myths*, 2 WM. & MARY Q. 3d 237, 269-70 (1945) (offering Federalists' arguments that Adams too helped draft Declaration).

49. See Detweiler, *supra* note 44, at 571-74 (showing enthusiasm for Declaration after War of 1812).

50. Letter from Thomas Jefferson to Roger C. Weightman (June 24, 1826), in 10 JEFFERSON WRITINGS, *supra* note 20, at 391, 391.

51. Peleg Sprague, Eulogy, Pronounced at Hallowell, Maine (July 24, 1826), in A SELEC-

religious authority, the Declaration of Independence became an extremely useful text for contenders struggling against the "tyranny" of husbands, factory owners, and other supposed agents of oppression. But the words of the Declaration were cited most appropriately by the opponents of slavery, and it was during the antebellum debate over that "peculiar institution" that "all men are created equal" took on its modern meaning.

What did it mean to say all men were "created equal" in 1776? Americans of 1776, we must note, understood equality as a characteristic of their new republic that had a wide range of possible implications – equal liberty, for example, and equal opportunity, equal access to office and equal voting power.⁵² But the assertion that men were "created" or "born" equal meant that all men were originally free of subjection, and so were all on the same level, because nobody had a title from God or nature to rule others. All legitimate authority, as the Declaration of Independence went on to say, was founded upon consent. That "original understanding" is clear in texts composed without the requirement of brevity that shaped Jefferson's draft Declaration of Independence. Mason, for example, said men were born "equally free and independant [sic]."⁵³ Earlier, in *Common Sense*, Thomas Paine said that, "all men being originally equals, no one by birth could have a right to set up his own family in perpetual preference to all others for ever," coupling a statement of original equality with a rejection of hereditary authority.⁵⁴ The inconsistency between that idea and the institution of slavery was hard to deny. A slave's status was inherited. And consent had nothing to do with the authority of masters.

By the 1830s, when William Lloyd Garrison had begun denouncing the "hypocrisy" of a slave-holding nation that read the Declaration of Independence every Fourth of July and gloried in its message of equality and rights,⁵⁵ the South was ready to defend itself. Increasingly the South and its supporters, including many from the North, answered the Abolitionists by denying the literal truth of the principles stated in the opening lines of the Declaration's second paragraph. The notion that men were "created" equal was, as the Virginian John Randolph had said, "a falsehood, and a most pernicious falsehood, even though I find it in the Declaration of Independence."⁵⁶ How equal are babies to those who bear and raise them? Human beings enter life "in a state

TION OF EULOGIES, PRONOUNCED IN THE SEVERAL STATES, IN HONOR OF THOSE ILLUSTRIOUS PATRIOTS AND STATESMEN, JOHN ADAMS AND THOMAS JEFFERSON 139, 145 (1826).

52. See MAIER, *supra* note 1, at 191-92 (describing varied meanings of equality).

53. *A Declaration*, *supra* note 21.

54. Thomas Paine, *Common Sense*, in 1 THE WRITINGS OF THOMAS PAINE 4, 13 (Philip Foner ed., 1969).

55. See MAIER, *supra* note 1, at 198-99 (discussing William Lloyd Garrison's opinion about relationship between slavery and Declaration).

56. WILLIAM SUMNER JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 60 (1935) (quoting John Randolph).

of the most abject want, and a state of perfect helplessness and ignorance," utterly dependent on the care and control of others.⁵⁷

South Carolina's Senator John C. Calhoun agreed with Randolph that there was "not a word of truth" in the notion that men were "born" or "created" equal (and Calhoun mentioned both formulations).⁵⁸ Man's "natural state" and the state in which "he is born, lives, and dies," is one of subjection to authority and so a state of inequality.⁵⁹ At first the "false and dangerous" idea that men were created equal did little harm, but by the 1840s, Calhoun said, Americans had begun "to experience the danger of admitting so great an error . . . in the declaration of independence," where it had been inserted unnecessarily since independence could have been declared without it.⁶⁰ And in the Senate's 1853 debates on the Kansas-Nebraska Bill, Indiana's John Pettit pronounced that, far from a "self-evident truth," the assertion that "all men are created equal" was a "self-evident lie."⁶¹

For others, whose convictions were shaped by the reverential patriotism of the 1820s, those statements were profoundly offensive. Many such men found a home in the Republican Party of the 1850s, which wrote the principles of the Declaration of Independence – that is, equality and "unalienable rights" – into their party platforms of 1856 and 1860.⁶² Abraham Lincoln is the most remembered Republican spokesman, but many of the ideas he expressed with lasting eloquence were shared with other members of his Party who also felt the need to refute those who denied the "soul-inspiring principles" in the nation's "great declaration."⁶³ Ohio's Benjamin Wade, for example, took it upon himself to answer John Pettit in the Senate's debates of 1854.⁶⁴ What did the signers mean when they declared that all men are created equal? Not, certainly, that they were equal in physical power, or intellect; "nobody pretends it," Wade said.⁶⁵ He ignored the old definition by which men were equal because they were not born in subjection to rulers imposed by God or nature, which Calhoun and others so forcefully contested. His explanation of equality

57. *Id.*

58. Speech on the Oregon Bill (June 27, 1848), in CALHOUN, LIBERTY AND UNION: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 539, 565 (Ross M. Lence ed., 1992).

59. *Id.* at 568.

60. *Id.* at 569.

61. CONG. GLOBE, 33d Cong., 1st Sess., app. 214 (1854) (statement of Sen. Pettit).

62. See JOHN TWEEDY, A HISTORY OF THE REPUBLICAN NATIONAL CONVENTIONS FROM 1856 TO 1908, at 16, 43-45 (1910) (reflecting Republican Party's incorporation of Declaration of Independence into 1856 and 1860 election platforms).

63. See CONG. GLOBE, 33d Cong., 1st Sess., app. 310 (1854) (recording Sen. Wade's defense of Declaration of Independence).

64. *Id.*

65. *Id.*

elided the Declaration's assertion of equality with the next, on unalienable rights. All men are created equal, he said, in that they are "equal in point of right," so "no man has a right to trample upon another."⁶⁶

A few years later, Lincoln said much the same thing. The men who signed the Declaration did not mean to say that men were "equal in all respects." They did not mean to say," he said, that "all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal."⁶⁷ Men were equal in having "certain inalienable rights, among which are life, liberty and the pursuit of happiness." This they said, and this [they] meant."⁶⁸

Lincoln once claimed that he "never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence."⁶⁹ And the sentiments he meant included, above all, the document's assertion that men were created equal, which was for him not only a "moral sentiment"⁷⁰ but "the great fundamental principle upon which our free institutions rest . . ."⁷¹ He cared so much, I suspect, because he saw his rights and those of many other Americans at stake. If, as Stephen Douglas and other defenders of slavery argued, the equality proclaimed in the Declaration of Independence was for whites only or, worse, for English and American white people in 1776, what of those who arrived in later times? What of the Germans, Irish, and other immigrants, many of whom were among Lincoln's constituents, who held the Declaration's statement of human equality as "the father of all moral principle," one which they could claim "as though they were blood of the blood, and flesh of the flesh" with the founding generation?⁷²

The assertion of universal human equality and rights in the Declaration of Independence proved for Lincoln, as for Wade and other Republicans, that the Revolution was fought for personal rights, for "the individual rights of man."⁷³ Indeed, it was those opening lines in its second paragraph that gave the document lasting importance. Had the Declaration only asserted the Americans' right to throw off British rule and establish their own governments, tasks

66. *Id.*

67. The Dred Scott Decision: Speech at Springfield, Illinois (June 26, 1857), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 352, 360 (Roy P. Basler ed., 1946).

68. *Id.* at 360-61.

69. Address in Independence Hall, Philadelphia (Feb. 22, 1861), in ABRAHAM LINCOLN, *supra* note 67, at 577, 577.

70. Speech in Reply to Douglas at Chicago, Illinois (July 10, 1858), in ABRAHAM LINCOLN, *supra* note 67, at 385, 401.

71. Letter from Abraham Lincoln to J.N. Brown (Oct. 18, 1858), in ABRAHAM LINCOLN, *supra* note 67, at 478, 479.

72. Speech in Reply to Douglas at Chicago, Illinois, *supra* note 70, at 401-02.

73. The Dred Scott Decision: Speech at Springfield, Illinois, *supra* note 67, at 363.

accomplished "some eighty years ago," it would be no more than "an interesting memorial of the dead past,"⁷⁴ a statement "of no practical use now – mere rubbish – old wadding left to rot on the battle-field after the victory is won."⁷⁵ Lincoln was, however, no more ready than Wade to pretend that the revolutionaries had in fact given all men, even all men within the United States, the actual exercise of the rights that lay at the heart of their equality. The signers meant, Lincoln said, to set a standard or agenda for the future –

to declare the *right*, so that the *enforcement* of it might follow as fast as the circumstances should permit. They meant to set up a standard maxim for free society, which could be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.⁷⁶

That was radical. Lincoln went far beyond Jefferson, who doubted that free blacks and whites could live together in peace, much less on a basis of equality.⁷⁷ Lincoln's conception of the Declaration as a statement of principles to be realized "as fast as the circumstances should permit" gradually pushed him toward ever more radical policies.⁷⁸ In 1858 Lincoln said that the Declaration mandated the end of slavery but did not require political and social equality for free black Americans.⁷⁹ But before his death six years later, he urged the military governor of Louisiana to give the vote at least to "some of the colored people," including "the very intelligent," and, above all, those who had "fought gallantly" in the Union ranks.⁸⁰

After Lincoln's death, as if to confirm that he spoke not only for himself, members of the Republican Party worked to ratify the Thirteenth Amendment, which ended slavery and involuntary servitude in the United States, fulfilling Lincoln's agenda of 1858, and then enacted the Fourteenth and Fifteenth Amendments. By precluding the states from abridging the "privileges or immunities" of citizens of the United States, depriving "any person of life, liberty, or property, without due process of law,"⁸¹ or denying such persons

74. *Id.*

75. *Id.* at 362.

76. *Id.* at 361.

77. See Thomas Jefferson, *Notes on the State of Virginia* (1785), reprinted in *THE COMPLETE JEFFERSON* 567, 661 (Saul K. Padover ed., 1943) (stating Jefferson's reservations on racial coexistence).

78. The Dred Scott Decision: Speech at Springfield, Illinois, *supra* note 67, at 361.

79. See Letter from Abraham Lincoln to J.N. Brown, *supra* note 71, at 479.

80. Letter from Abraham Lincoln to Gov. Michael Hahn (March 13, 1854), in *ABRAHAM LINCOLN*, *supra* note 67, at 745, 745.

81. U.S. CONST. amend. XIV, § 1.

persons the equal protection of the laws, and by declaring that the right to vote could not be denied or abridged because of "race, color, or previous condition of servitude,"⁸² those amendments finally read into the Constitution the principles of the Declaration of Independence as the Republicans understood them.

This history, I think, helps explain why Americans so often confuse the Declaration of Independence with the Constitution and the Bill of Rights. Not only did the Declaration of Independence state basic principles in words taken from a bill of rights – or, more exactly, an early draft of Virginia's Declaration of Rights – but, with the enactment of the Reconstruction amendments, the Republicans of the 1860s and 1870s in some considerable measure made equality and rights part of the Constitution.

The Republicans might also have given us, at last, a federal Bill of Rights. Before 1868, Yale legal historian Akhil Reed Amar recently discovered, the Supreme Court never – "not once" – spoke of the first ten amendments to the Constitution as a "bill of rights," although it did refer to "the bill of rights of Virginia" or "the Pennsylvania bill of rights."⁸³ Only after the enactment of the Fourteenth Amendment did the Court begin to suggest that the federal Constitution, not just those of the states, included a "bill of rights."⁸⁴ By the 1940s – after the Court had begun using the Fourteenth Amendment to enforce rights protected in the first eight amendments from state interference – the Bill of Rights had gained sufficient status to win a place on the freedom train and, ultimately, on the "altar" in the National Archives.⁸⁵ Is it too much to say that the Bill of Rights made its way there by piggy-backing on the Declaration of Independence, which had been rescued from the "dead past" some 150 years earlier?

Clearly neither the "fundamental charters" of the United States on view in Washington or the American tradition of equality and rights were simple gifts from the eighteenth century. What they are today is the result of struggles to understand and apply their principles in circumstances unanticipated at the time of the revolution, often in the face of powerful opposition, through one generation after another. But even Lincoln, who, with his Republican fellows, played so critical a role in that process, understood the American story in a way not altogether unlike the lady at the Kennedy Library, the

82. U.S. CONST. amend. XV, § 1.

83. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 284-85 (1998) (discussing Supreme Court's failure to refer to federal bill of rights).

84. See *id.* at 285-88 (charting Court's change in reference to original amendments to Constitution).

85. See MAIER, *supra* note 1, at xv (noting when Bill of Rights found place in pantheon of American documents).

British writer, Paul Johnson, or the political scientist at Notre Dame University. "All honor to Jefferson," Lincoln said,

to the man who, in the concrete pressure of a struggle for national independence . . . had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all men and all times, and to embalm it there, that to-day, and in all coming days, it shall be a rebuke and a stumbling block to the very harbingers of re-appearing tyranny and oppression.⁸⁶

Why would Lincoln, who made so much history, have understood the story of American freedom as he did? And why do so many people today persist in "flattening" history by attributing all that Americans have achieved over two centuries to the vision of Jefferson and the "Founders"? Perhaps because it is easier to reconcile ourselves to change if we conceive of it as working out a pre-established plan. And to redefine the Declaration as something other than a Declaration of Independence, as a document that committed the American people to enhance "as fast as circumstances should permit" the "happiness and value of life to all people of all colors everywhere,"⁸⁷ was to make it the manifesto of a continuing revolution with social implications beyond anything the revolutionaries anticipated. George Washington, for example, never lost an hour's sleep over gay rights. Nor, I suspect, did Lincoln. That's an issue of our time, one closely bound up with our understanding of equality and rights.

Myth, however, comes at a cost. By attributing to Jefferson and the Founders a knowledge of the future that they did not claim, we underplay the astounding achievements of those later generations who saved the Declaration of Independence from oblivion, made it into a quasi-legal bill of rights to compensate for the failure of the eighteenth century to supply a more appropriate document, and then discovered a way to read its principles into the Constitution. We deny that the Declaration as we know it and, for that matter, the Bill of Rights are creations not of the founding generations alone but of the American people over time.

Could it be that the tendency to attribute superhuman foresight and other God-like powers to the nation's founders denigrates the capacity of later Americans to extend the Revolution's promise of freedom? Does it cast into doubt our ability, in adapting our institutions to unforeseen circumstances, to carry on the work of founding, which, as the Founders understood, must be a continuing act of creation? If so, the question is not so much whether we "need" myths, but whether we can afford them.

86. Letter from Abraham Lincoln to Henry L. Pierce and Others (April 6, 1859), in ABRAHAM LINCOLN, *supra* note 67, at 488, 489.

87. The Dred Scott Decision: Speech at Springfield, Illinois, *supra* note 67, at 361.

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