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SYMPOSIUM

THE DECLARATION OF
INDEPENDENCE AS INTRODUCTION TO
THE CONSTITUTION

ALEXANDER TESIS*

Throughout the course of United States history, the Declaration of Independence has played an outsized role in constitutional development. For each generation of Americans, the document has reflected the historical reason for independence and the idyllic statement of representative government. On the one hand, it is not part of the formal Constitution, on the other, it informs constitutional interpretation. For a time, until ratification of the Fourteenth Amendment, it was the nation's only formal acknowledgment of human equality. Justice Goldberg put the point succinctly in a concurrence: "The Declaration of Independence states the American creed," which "was not fully achieved with the adoption of our Constitution."¹ The values and ideals it espouses do not include the compromises the framers included in the original Constitution, which contains several clauses that protected slavery. Some of the clauses of the 1787 Constitution "reflected a fundamental departure from the American creed."²

Goldberg's conception of the Declaration of Independence was remarkably close to one expressed by Samuel Adams, the renowned revolutionary, more than 150 years before. Speaking to the Massachusetts legislature, while serving in the role of acting governor, Adams asserted that when "the Representatives of the United States of America" averred that "all men are created equal, and are endowed by their Creator with certain

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1. *Bell v. Maryland*, 378 U.S. 226, 286 (1964) (Goldberg, J., concurring).

2. *Id.*

unalienable rights,” they proclaimed “the doctrine of liberty and equality” to be the “political creed of the United States.”³ The creed was a guiding force in constitutional theory even though it did not grant any office of government specific powers.

The Constitution’s departures from the ideals of independence were partly rectified, as I point out in my article contribution to this Symposium, after the Civil War with the addition of amendments to the Constitution securing universal freedom, birthright citizenship, due process, equal protection, privilege or immunities of citizenship, and manhood suffrage. Even then, the country was a long way from universal equality in its legal treatment of women as well as various national and racial groups. The ideals of unalienable rights, innate equality, and representative democracy, all of which appear in various paragraphs of the Declaration of Independence, remain, almost two-and-a-half centuries after independence, the highest aspirations of nationhood.

The Supreme Court has paid scant attention to the Declaration’s overarching statement on national governance and its mandates to protect individual rights while securing the people’s “Safety and Happiness.”⁴ Those relatively rare cases that do make mention of the founding document often give no more than a nod to the Declaration’s statement of national independence.⁵ These passing statements often demonstrate only a glimpse into the document’s importance to the framers. For instance, in *Faretta v. California*, a case dealing with pro se defendants, the Court discussed early state constitutions, passed shortly after the Declaration of Independence’s adoption, which contained the right to represent oneself at trial.⁶ Another case discussed the creation of the postal service the year before the Declaration.⁷ The historical record was far richer than the Court’s few passing examples. In fact, some of the earliest state constitutions adopted the Declaration into their bills of rights.

The early records of lawmaking in the United States demonstrate the influence of the Declaration’s normative statement from the country’s inception. The day after adopting the Declaration, the President of the Continental Congress, John Hancock, dispatched the typeset text of the Declaration of Independence to states in the newly formed United States of

3. Samuel Adams, Lieutenant Governor, Speech to the Massachusetts House of Representatives and Senate (Jan. 17, 1794), in MASS. MAG., Jan. 1794, at 59, 63.

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

5. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 65 (1932).

6. *Faretta v. California*, 422 U.S. 806, 828–29 (1975).

7. *Ware v. United States*, 71 U.S. (4 Wall.) 617, 630 (1867).

America. Philadelphians, who had the good fortune of living in the city where the Continental Congress deliberated, were the first to hear the reading of the text on July 8, 1776.⁸ Within two months, the residents of all thirteen states could read about independence in their newspapers and hear the Declaration read in their city squares.⁹

Recently, several historians have erroneously argued that the Declaration's normative statements had little influence on the revolutionary generation.¹⁰ Their claims are typically based on the misstatement of an earlier historian who claimed that Americans did not begin using the Declaration for ideological purposes until the War of 1812.¹¹ But this claim is belied by the record.

The Declaration's inclusion in several state statute books that were printed prior and shortly after the 1789 ratification of the United States Constitution indicates that many early American statesmen conceived the document of independence to be a proto-constitutional statement, rather than as a glinting generality. The 1782 Continental Congress publication of *The Constitutions of the Several Independent States of America*, which was reprinted in London, featured the Declaration of Independence at the very front—the first document in the tome—as a statement of national legal commitment, even ahead of any state laws.¹² The first paragraph of the Pennsylvania Declaration of Rights, included in that state's September 28, 1776 constitution, contained a clause almost identical to the second paragraph of the Declaration of Independence.¹³ The lightning rod of the American Revolution, Thomas Paine, wrote similarly in a letter addressed to the citizens of Pennsylvania, commending them for the 1776 Pennsylvania

8. *Declaring Independence: Drafting the Documents: Timeline*, LIBRARY OF CONG., <http://www.loc.gov/exhibits/declara/declara2.html> (last visited Feb. 21, 2016).

9. ALEXANDER TESIS, *FOR LIBERTY AND EQUALITY* 25–32 (2012).

10. See DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 3, 16–17 (2007); PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 160–64, 175–77, 213–15 (Vintage Books 1998).

11. Philip F. Detweiler, *The Changing Reputation of the Declaration of Independence: The First Fifty Years*, 19 WM. & MARY Q. 557, 571–72 (1962).

12. THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA; THE DECLARATION OF INDEPENDENCE; THE ARTICLES OF CONFEDERATION BETWEEN THE SAID STATES; THE TREATIES BETWEEN HIS MOST CHRISTIAN MAJESTY AND THE UNITED STATES OF AMERICA (1782).

13. PA. CONST. of 1776, art. I, http://avalon.law.yale.edu/18th_century/pa08.asp (“[A]ll men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”).

Constitution being “conformable to the Declaration of Independence.”¹⁴ Even more powerful evidence of the Declaration’s influence on constitutional thought is apparent in the New York Constitution of 1777, which reproduced the entire Declaration of Independence.¹⁵

The prologue of the 1780 Massachusetts Constitution also contained a bill of rights, drafted by John Adams, which dramatically proclaimed:

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.¹⁶

This statement reflected the radical formula of universal equality and unalienable rights of the Declaration of Independence; in part, the connection between the two documents is readily understood because of Adams’s role in editing Jefferson’s first draft of the document, while they were both members on the Declaration of Independence drafting committee. In an 1841 letter published in an abolitionist paper, John Adams’s son and former president, John Quincy Adams, wrote:

The virtuous principle of the Revolution of American Independence was human liberty—universal human liberty. This was emphatically the principle of the Declaration of Independence. It was the paramount principle of the Declaration of Rights forming the foundation of the Constitution of the Commonwealth of Massachusetts¹⁷

Other early state constitutions also imbedded the founding documents’ principles.

Acts and Laws of the State of Connecticut in America, published in 1796, reprinted the Declaration immediately after the *Charter of the Antient* [sic] *Colony of Connecticut*, ahead of the Constitution of the United States, and before any laws passed by Connecticut’s General Assembly.¹⁸ *The Laws of the State of New-Hampshire* of 1792 contained the Declaration before all

14. Letter from Thomas Paine to the Citizens of Pennsylvania, on the Proposal for Calling a Convention (Aug. 1805), in 2 THE POLITICAL AND MISCELLANEOUS WORKS OF THOMAS PAINE 161, 169 (London, R. Carlile 1819).

15. N.Y. CONST. of 1777, http://avalon.law.yale.edu/18th_century/ny01.asp.

16. MASS. CONST. of 1780, art. I, <http://www.nhinet.org/ccs/docs/ma-1780.htm>.

17. John Quincy Adams, *Letter to the Editors of the Old Colony Memorial, the Hingham Patriot, and the Quincy Patriot, in the Twelfth Congressional District of Massachusetts, July 23 1841*, LIBERATOR, Aug. 20, 1841, at 134.

18. ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 9 (Hartford, Hudson & Goodwin 1796).

state laws.¹⁹ And *A Digest of the Laws of the State of Georgia* of 1800 also led off with the Declaration.²⁰ Placement differed somewhat in *Laws of the State of New Jersey* of 1800. In that work, the Declaration appeared immediately after the Constitution of New Jersey, nevertheless making clear that state's commitment to the creed of independence.²¹

Beyond the official adoption of the Declaration into state constitutional law, some of the revolutionary generation demonstrated a clear understanding of its universalist implications. Their sentiments are noteworthy, albeit not shared by all of their generation, many of whom perpetuated slavery, religious particularism, and sex discrimination. Proto-abolitionists were first to recognize the document's relevance to their effort to end slavery and the slave trade.²² An orator at an 1800 Independence Day celebration indicted her generation, calling them out for subjecting Africans to "murders, robberies, and burnings" and the punishment of "endless" slavery in United States.²³ "Declaration of Independence!" she exclaimed, "Where art thou now?"²⁴ From the nation's founding, Americans' constitutional understandings have been shaped by the Declaration of Independence's statements on human rights and mandates for just government. The judiciary has not adequately followed the will of the people to rely on the Declaration in developing constitutional interpretation.

The live component of the Symposium was held at the National Constitution Center, and video of it is available on YouTube.²⁵ I organized

19. THE LAWS OF THE STATE OF NEW-HAMPSHIRE, TOGETHER WITH THE DECLARATION OF INDEPENDENCE: THE DEFINITIVE TREATY OF PEACE BETWEEN THE UNITED STATES OF AMERICA AND HIS BRITANNIC MAJESTY: THE CONSTITUTION OF NEW-HAMPSHIRE; AND THE CONSTITUTION OF THE UNITED STATES, WITH ITS PROPOSED AMENDMENTS 9 (Portsmouth, John Melcher 1792).

20. ROBERT & GEORGE WATKINS, A DIGEST OF THE LAWS OF THE STATE OF GEORGIA FROM ITS FIRST ESTABLISHMENT AS A BRITISH PROVINCE TO THE YEAR 1798, INCLUSIVE, AND THE PRINCIPAL ACTS OF 1799 I (Philadelphia, R. Aitken 1800).

21. WILLIAM PATERSON, LAWS OF THE STATE OF NEW JERSEY, at x (New Brunswick, Abraham Blauvelt 1800).

22. See, e.g., ANTHONY BENEZET, SHORT OBSERVATIONS ON SLAVERY: INTRODUCTORY TO SOME EXTRACTS FROM THE WRITING OF THE ABBE RAYNAL, ON THAT IMPORTANT SUBJECT 1-2 (Philadelphia, Joseph Crukshank 1781); Crito [Stephen Hopkins], *Essay on the African Slave Trade*, in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787-1788, at 446 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

23. AN ORATION DELIVERED ON THE FOURTH DAY OF JULY 1800, at 5 (Springfield, Henry Brewer 1808).

24. *Id.*

25. National Constitution Center, *Is the Declaration's Value Literary or Constitutional?*, YOUTUBE (Apr. 14, 2015), <https://www.youtube.com/watch?v=EHIFjWlp6js>; National Constitution Center, *Social Conventions, Contemporary Understandings, and Future Directions*, YOUTUBE (Apr. 14, 2015), <https://www.youtube.com/watch?v=K5oMbRnSOTY>; National Constitution Center, *The Declaration of Independence and Historical American Understandings*, YOUTUBE (Apr. 14, 2015),

that event and this written Symposium in order to explore the multifarious ways the Declaration influenced the past and continues to be relevant to our times. The essays in this volume demonstrate a breadth of understandings.

Jack Balkin and Sanford Levinson's article argues that the Declaration's assertion of a right to alter or abolish government has been more important to world history than its claims about equality and inalienable rights. Balkin and Levinson argue that the Declaration's language, taken seriously, raises a host of theoretical and practical problems that, to this day, have never been resolved. These range from whether there is a right to secession to the question of when violence is permissible to affect a change in government. Because the Declaration specifies neither the contours nor the limits of the principles it announces, social groups have opportunistically invoked the document in many different contexts. The Declaration of Independence has proved to be more of an inspiration for political action than a coherent doctrine of rights to alter or abolish government.

Katie Eyer demonstrates the role of the Declaration of Independence in shifting constitutional discourse. Adopting a popular constitutionalism template, she argues that invocations of the Declaration may be a bellwether for those popular sentiments that identify and mold constitutional meaning. As an example of this phenomenon, she examines affirmative action discourse. In that context, dominant invocations of the Declaration have shifted from the proponents of affirmative action to its opponents. She finds this to be part of a more systemic shift on equality discourse with broader implications about the popular understanding of what the Declaration's promises of equality and liberty represent.

Daniel Farber explains that while the Declaration of Independence was written to explain a specific historical moment, it became an icon for American ideals. Historical and idealistic modes of debate, as Farber points out, are relevant to contemporary constitutional interpretations, and the Declaration of Independence is relevant to both types of analyses. As an example of the use of iconic meaning, Farber parses *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), for which originalist Justices, who might have been expected to only use historical method, relied on iconic interpretation to formulate a dynamic interpretation of monuments. The people's sense of allegiance to constitutional interpretation, Farber argues, is

<https://www.youtube.com/watch?v=-rPK2Hl4bcc>; National Constitution Center, *The Declaration's Aspirational and Enumerated Values*, YOUTUBE (Apr. 14, 2015), <https://www.youtube.com/watch?v=xkyu5Y7Htfl>.

not solely based on historic pedigree. Farber finds value in the Declaration's generalities for providing originalists the abstractions needed to bridge historic understandings with contemporary social views. As for the non-originalist, the Declaration offers a historical anchor to dynamic interpretation.

Amanda Frost examines whether the Declaration of Independence has value for interpreting the Constitution in the specific context of immigration law. The Declaration articulates principles about the colonists' act of choosing to leave one polity to take up citizenship in another, and thus has special significance for immigration law—an area in which the Constitution itself is nearly silent. She finds that the Declaration's universalist rhetoric has persuaded courts to find that the Constitution protects noncitizens living within the United States, and that it is also slowly influencing the courts' approaches to rules regulating the admission and removal of noncitizens.

Mark Graber seeks to rejuvenate pedagogical attention of the Declaration of Independence. He argues that the document's neglect is unfortunate because, while the Declaration is not a direct source of federal constitutional rights, it has played critically important roles in constitutional interpretation and public debate. Graber demonstrates the document's relevance by canvassing state and federal courts' frequent reliance on it and attorneys' court filings' many references to it. Even more commonly, the document has played many important roles outside the courtroom. Citizens have relied on the Declaration of Independence as a statement of national principles that should guide elected representatives. The document has been important partly because the American people recognize its ideals. Reliance on the Declaration ranges from matters as diverse as the Elections Clause and the Due Process Clause of the Constitution. All this demonstrates, as Graber perceptively argues, that the Declaration is "the core text of the political constitution" that structures constitutional debate outside the judicial system. Law professors can play a pivotal role in students' professional development by teaching the Declaration's significance to political constitutionalism.

In her article, Bernadette Meyler points out how perspectives on the Declaration evolved from the time of its signing to the 1850s. She tackles the complex problem of whether the Declaration's signing history indicates that the document is a work of the people or the states. Meyler demonstrates that the Declaration emerged as a consensus document of the representatives of the several states, but in time, starting at the end of the first decade of the nineteenth century, the Declaration became a political document to be harnessed to score points by both the advocates of individual and state rights.

Eventually, beginning in the 1830s and naturally flowing into the *Dred Scott* opinion of 1857, states' rights proponents grafted the Declaration to their political agenda.

Frank Michelman's article considers the implications of the Declaration of Independence for the work of lawyers, judges, and lawmaking. As he makes clear, the Declaration has long been part of the American political discourse, serving as a touchstone for progressive social movements and for visionary leaders such as Abraham Lincoln. Michelman is skeptical about suggestions that the Declaration might have acquired the force of law controlling congressional or judicial action, but not about referrals to it as a historical document that can inform constitutional interpretation. Advocates relying on such uses might argue that the Declaration embodies a principle of equal access for citizens of such services as basic healthcare, although of course that would today be a controversial reading. Michelman's article invites lawyers for progressive-redistributive causes to consider how they might best bring the Declaration to the support of their work.

Darrell Miller argues that the Declaration of Independence is not law in the conventional sense, but is instead what Richard Primus has termed a "continuity tender." Invoking the Declaration is a ritual practice that connects the American people to the framing generation, and thereby predicates significant legal changes that may depart from other deeply entrenched American traditions and norms. Miller draws on Thirteenth and Fourteenth Amendment history to illustrate how the Declaration's use as a continuity tender enabled those Amendments to take values of equality and liberty in the Declaration and turn them into positive law. However, the Declaration as a continuity tender cannot make all moral claims of the Declaration into positive law. For instance, despite efforts by some, the Declaration cannot be submitted as a tender to transform the right to alter or abolish into positive law through the Second Amendment because a right to alter or abolish government is not capable of legal administration and contradicts the very purpose of the tender, which is to signal continuity between past and future legal regimes.

Frederick Schauer explores the question of the Declaration of Independence's legality. He argues that its status as a binding statement of law lies in "contingent empirical and sociological facts" about legal comprehension. Before turning to the document, Schauer provides background about the positivist tradition that forms the backbone to his argument. Using comparative examples from Europe, Canada, and Asia, Schauer defines the "ultimate rule of law," which identifies specific sources to be constitutional. The task of deciding whether the Declaration is law rests

on the empirical determinations of whether judges reach conclusions on the basis of its precepts and whether lawyers rely on it in their written or oral arguments. On the basis of these predicates, Schauer concludes that although the Declaration of Independence has either no current force of law or only a weak force of law, the evolution of social fact and social convention could amend the Constitution, even outside the Article V process, to include at least some of the Declaration's provisions.

Lee Strang takes issue with scholars who regard the Declaration as part of the actual Constitution. Approaching the question through an originalist prism, Strang argues that the Declaration is not part of the Constitution. He develops the article by arguing that originalism's own conceptual commitments graft only to the written Constitution, explaining how this originalist form of constitutionalism fits U.S. legal practice, and suggesting that limiting the Constitution to the written Constitution comports with the natural law tradition's conception of law.

To the contrary, in my article, I demonstrate the many overlapping features of the Declaration and the Constitution. Various clauses of both documents are closely related and similarly worded. There are multiple textual indications that the text of the Constitution did adopt portions of the Declaration; besides, there is ample early American legal documentary evidence that the revolutionary generation adopted normative ideals of the Declaration. The two documents, nevertheless, differed in some significant ways; in particular, the original Constitution, unlike its independence predecessor, contained clauses protecting slavery.

In my article, I argue that after the Civil War, through Article V constitutional amendments, the nation's founding principles became enforceable through the Reconstruction Amendments. The Declaration of Independence provides valuable insights into matters of human dignity, privacy, and self-government. Its statements about human rights, equality, and popular sovereignty establish a foundational rule of interpretation. While the Supreme Court has rarely parsed the significance of the Declaration of Independence, several judicial predicates exist to provide guidance to courts and scholars for developing constitutional doctrines arising from the founding values of independence. The principles espoused by the document should inform substantive constitutional interpretation in matters of pressing legal concern, such as voting and marriage equality.

