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Alexander Tsesis

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THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION

ALEXANDER TSEISIS*

ABSTRACT

This Article argues that the Reconstruction Amendments incorporated the human dignity values of the Declaration of Independence. The original Constitution contained clauses, which protected the institution of slavery, that were irreconcilable with the normative commitments the nation had undertaken at independence. The Thirteenth, Fourteenth, and Fifteenth Amendments set the country aright by formally incorporating the Declaration of Independence's principles for representative governance into the Constitution.

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.

* Professor of Law, Loyola University, Chicago, School of Law. Thanks to Samuel Dykstra, Amanda Frost, Darrell Miller, Elizabeth Sepper, Jonathan Sheffield, and Evan Zoldan.

INTRODUCTION: THE DECLARATION OF INDEPENDENCE AS
THE NORMATIVE AND STRUCTURAL STATEMENT OF
CONSTITUTIONAL LAW

The Declaration of Independence is often regarded as a historical relic—one that the American public celebrates on the Fourth of July but typically leaves out of its constitutional discourse. This perspective dismisses the many clauses of the Declaration that overlap with those of the Constitution. The two texts, in fact, establish complementary constitutional values. Several of the Declaration's paragraphs clarify the founding generation's meaning. The document is therefore a constructive tool for parsing the meaning of the Constitution. Furthermore, the Declaration contains fundamental principles for fulfilling the aims, duties, and functions of government. Those principles place limits and impose obligations on public officials, rendering unconstitutional any actions, policies, or laws to the contrary. Its statements about human rights, equality, and self-government establish what Senator Charles Sumner called a "sovereign rule of interpretation."¹

By declaring independence, the people announced their sovereignty and the government's duty to constitute institutions in order to secure inalienable rights. A constitutional state is one that must abide by normative and written limits on its uses of power for the people's safety and happiness. Both the Declaration and Constitution establish mandates of government, violations of which constitute arbitrary rule. Both set the normative terms for limited government. The original Constitution contained clauses, which protected the institution of slavery, that were irreconcilable with the moral commitments the nation undertook at independence. The Reconstruction Amendments were meant to set the country aright by formally incorporating the Declaration's principle of representative governance into the Constitution. That principle had been foundational to the nation's ethos from its founding in 1776, but by protecting slavery, the 1787 Constitution violated the Declaration's mandate that government secure liberal equality for the common good. The Reconstruction Amendments were a major step forward because they empowered Congress to enact legislation conducive to a society of free and equal individuals.²

1. CONG. GLOBE, 42d Cong., 2d Sess. 828 (1872) (statement of Sen. Charles Sumner).

2. Even the Reconstruction Amendments proved to be insufficient during the nineteenth century for wiping out inequalities based on characteristics such as sex and national origin. See ALEXANDER TSEIS, WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW 164–67 (2008) (discussing anti-immigrant sentiments during the Gilded Age); Alexander Tseis, *Gender Discrimination and the*

In this Article, I demonstrate the Declaration's interpretive value as a substantive statement of rights and representative structures. Part I parses paragraphs of the Declaration in relation to analogous normative and structural clauses of the Constitution. That Part also analyzes how Supreme Court Justices have adopted portions of the Declaration into constitutional interpretations about privacy, human dignity, and self-governance. Part I ends by demonstrating the commensurability between the Declaration's and Constitution's statements about self-government and representative democracy. Part II evaluates how the Constitution fell short of the Declaration's ideals. That Part also explains, however, that after the Civil War, ratification of the Reconstruction Amendments firmly incorporated the Declaration's values, which has broad-ranging interpretive implications.

I. TEXT, NORMS, AND STRUCTURE

The text of the Constitution plays an incontrovertibly important role in adjudication. It is, in fact, tautological to say that courts draw on specific clauses of the Constitution to decide cases. This proposition applies to judicial evaluations of Article III powers, cases concerned with legislative powers under Article I, and cases involving executive powers under Article II. There is rarely, however, any reflection on, and even more rarely any analysis of, whether the Declaration of Independence has ought to say about the legitimacy of a policy, government decision, or resolution of case or controversy. This is most unfortunate because, as this Part demonstrates, there are a significant number of clauses in the Declaration that are precisely on point. They yield not only historical insights, valuable no doubt to originalist and other historical forms of interpretation, but also provide a normative framework for a living constitutional interpretation.

A variety of passages from the Declaration sound in the lexicon of constitutional interpretation. This Part considers the historical and structural aspects of the Declaration that make it closely related to and, arguably, indispensable to constitutional interpretation. Later in the Article,

Thirteenth Amendment, 112 COLUM. L. REV. 1641, 1672-79 (2012) (detailing the effects of the word "male" being used in Section 2 of the Fourteenth Amendment, and First Wave Feminists' responses and activism to undermine its negative impact on women's rights efforts). For a discussion on the original federalist meaning of the Fourteenth Amendment and congressional powers, see Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 263 (2005) ("[T]he framers of the Fourteenth Amendment . . . understood the Fourteenth Amendment, at a minimum, as a delegation to Congress of the plenary power to define and enforce in the federal courts the substantive rights of U.S. citizens that they had just exercised in enacting the Civil Rights Act of 1866.").

I examine whether the Declaration's statements of national purpose influenced the founding and reconstruction generations' understandings of core national commitments to liberty and equality.

Constitutional clauses carry meaning that can readily be discerned by ordinary people.³ Textual interpretation of the Constitution and the Declaration provides a starting point for identifying whether they are related. As it turns out, there are many overlapping and complementary passages of the Declaration and the Constitution. When its text is understood in the context of history and social mores, the Declaration contains a wealth of substantive provisions for lawmaking, adjudication, and enforcement of constitutional principles.

A. NORMATIVE AND STRUCTURAL OVERLAP

The Declaration is both a statement of national independence and a foundational guarantee of individual rights and popular self-government. The document is the country's original written statement of national principle, purpose, and sovereignty. The framers later sculpted the detailed powers to carry out the purposes of the Declaration, first by the ratification of the Articles of Confederation and then by the Constitution. Inclusion of broadly understood natural rights principles in the Declaration may help to explain why the original Constitution lacked a bill of rights. James Madison, for example, initially opposed its inclusion in the Constitution because he was concerned that it might be interpreted to only protect enumerated rights and thereby leave other natural rights unprotected against government overreaching.⁴ Alexander Hamilton, in his *Federalist No. 84*, likewise cautioned against trying to provide an exhaustive list of constitutionally protected rights.⁵ He explained that while in the past kings had granted bills of rights to their subjects, the power of American government came from the people, who did not need to reserve rights

3. I accept here, without analyzing, Philip Bobbitt's assertion that textual modality of constitutional interpretation can be "attributed to arguments" that an "average person" would understand from "the text of the Constitution." PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 14 (1991). Unlike Larry Solum, I do not think, at least in difficult cases, that interpretation of text can, nor should be, done separately from constructing its meaning. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 456–57, 459, 472 (2013). While space limitations do not permit me to deal with this issue in this Article, for more information, see ALEXANDER TESIS, *CONSTITUTIONAL ETHOS* (forthcoming 2016) (manuscript at chapter 7).

4. See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 *THE PAPERS OF JAMES MADISON* 295, 297 (Robert A. Rutland & Charles F. Hobson eds., 1977) ("My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration.").

5. *THE FEDERALIST NO. 84*, at 510–15 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

explicitly because they “surrender nothing” by ratifying the Constitution.⁶ That is, they surrendered none of those rights already asserted to be inalienable in the Declaration.

This is not to say that the Declaration was itself a substitute for the Bill of Rights, but rather that Thomas Jefferson, who drafted the document, and the Second Continental Congress, which voted for it, regarded the Declaration to be an official statement of the national government’s obligation to secure the people’s inalienable rights. In modern language, we might say that rights are not grants of the government as in England, where rights had been endowed by the King,⁷ but intrinsic to human dignity. When the Bill of Rights was ratified, fifteen years after the adoption of the Declaration, the decision to include the Unenumerated Rights Clause of the Ninth Amendment demonstrated the framers’ persistent belief that inalienable, natural human rights were not the creation of the state, but the birthright of the people.

One of the best-known phrases of American culture, taught to students from their formative years in grammar school, parses the rights retained by the people against the abuses of government. The Declaration unequivocally asserts that all people are “endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”⁸ The clause creates no explicit rights but makes clear that from the nation’s independence, the people imposed on government the obligation to safeguard human dignity.

By referring to the “pursuit of Happiness,” Jefferson erected a broad platform for future generations to advance civil rights and civil liberties, even though he and his contemporaries were unable to fathom all of its implications. That phrase embodied a variety of guarantees, including those for the protection of personal safety, public security, and private property.⁹ Jefferson worked in the milieu of eighteenth century political philosophers who understood “Happiness” in the context of the benefits enjoyed by

6. *Id.* at 513.

7. THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, PENNSYLVANIA 383–84 (Merrill Jensen ed., 1976) (recounting statements made by James Wilson during the debates of the Pennsylvania Convention on November 28, 1787 and published in the *Pennsylvania Herald*) (stating that while the Magna Carta regarded the declared liberties to be “the gift or grant of the king,” the Constitution, on the other hand, was a grant of power to government from the people, who retained their natural liberties).

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

9. See PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 134 (1997).

members of constitutional societies.¹⁰ For example, the right to quiet possession of property has, from the nation's founding, been regarded as necessary for people to pursue happiness. It was, therefore, understood that protection and enjoyment of property required regulations against infringements.¹¹ The Bill of Rights and Reconstruction Amendments do not precisely adopt the Declaration's phrasing, but rather a subset of the ideal. The Due Process Clauses of the Fifth and Fourteenth Amendments guarantee that no person shall be deprived "of life, liberty, or property, without due process of law."¹² Yet the property guaranteed is just one aspect of the "pursuit of Happiness."¹³ While the Fifth and Fourteenth Amendments' guarantees are more narrowly worded than the Declaration's abstract mandate of national governance, they by no means renounce the broad concept of government's obligation to safeguard people's ability to pursue happiness, and as we will see in Part II.B, the Supreme Court has expanded the relevance of due process to a broad range of pursuits of happiness.

Both the Constitution and Declaration also secure the right of free speech, which is intrinsic to human dignity and essential to the interactive community of equals.¹⁴ One aspect of free expression that the First Amendment protects is the right to "petition the Government for a redress of grievances."¹⁵ This safeguard is meant to prevent the types of abuses against which the Declaration states: "[i]n every stage of these Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury."¹⁶ The two

10. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.")

11. See, e.g., *Charge Delivered by the Honourable Judge Campbell, to the Grand Jury, at the Beginning of the Superior Court of Washington District, at September Term, and to the Grand Jury of Hamilton District, at the Commencement of the Session in October Last*, N.C. J., Dec. 14, 1795, at 1 ("The end of civil society is procuring for the citizens whatever their necessities require, the conveniences and accommodations of life, and in general, whatever constitutes happiness, with the peaceful possession of property, a method of obtaining justice with security, and a mutual defence against all violence from without."); *Extract from the Charge of the Hon. Judge Sullivan to the Grand Jury, at the Session of the Federal Court for the District of Newhampshire on the 13th Instant*, SALEM GAZETTE, July 27, 1790, at 2 (asserting that people constitute governments to pursue happiness, which "consists in promoting, increasing and securing the felicity of all and ensuring to the peaceable and industrious, the quiet possession of the property which they have acquired").

12. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

13. THE DECLARATION OF INDEPENDENCE para. 2.

14. See *Herbert v. Lando*, 441 U.S. 153, 183 n.1 (1979) (Brennan, J., dissenting in part) ("Freedom of speech is itself an end because the human community is in large measure defined through speech; freedom of speech is therefore intrinsic to individual dignity.")

15. U.S. CONST. amend. I.

16. THE DECLARATION OF INDEPENDENCE para. 30.

documents are clearly not identical. The First Amendment deals with the rights of the press, free exercise of religion, and assembly, as well as prohibiting the establishment of an official religion. None of these appear in the Declaration. The constitutional value of the latter should not, however, be dismissed. The Declaration's statement on petitioning clarifies the meaning of the First Amendment phrase. The Declaration makes evident that merely allowing people to petition their leaders is not the sole interest the people sought to protect through independence. Instead, the Petition Clause of the First Amendment should be understood to mean the right to effective petition, where effectiveness of petitioning is measured by the degree of government commitment to seriously responding to the people's demands for the redress of public grievances. And the responsiveness of government to the people's petitions of grievances is a judicially reviewable predicate of the Preamble's mandate that government act for their general welfare.

Guarantees of rights are not the only similarities between the Constitution and Declaration. They also contain several overlapping structural features of government, although the Constitution fleshes those out in greater detail than its predecessor.

In their basic forms, both documents establish mandates for representative governance. The Constitution and Declaration announce a system of government in which policies and practices should be judged against the normative public mandate to protect human dignity and the common good of constitutional society.

From the nation's founding, thirteen years before the ratification of the Constitution, the people asserted their sovereignty, equality, and inalienable rights to "Life, Liberty, and the pursuit of Happiness."¹⁷ The political philosophy of self-government, adopted into the Constitution, advances the Declaration's demand that authority be used for the public good. This can be done only where the individual is respected as a political and private actor who can effectively participate in public policy through elections and lobbying efforts. The Declaration makes clear the centrality of self-government to nationhood. The very act of adopting the Declaration was done in the name of "the Representatives of the united States of America" under the "Authority of the good People of these Colonies,"¹⁸ not, as the Confederate government wrongly claimed, by the authority of the states. The Declaration explains that part of the cause for revolution was the

17. *Id.* para. 2.

18. *Id.* para. 32.

King's refusal "to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature."¹⁹ The legislature was thought to be a protector of the people's rights, which the King violated by, betimes, dissolving colonial houses of representatives.²⁰

The Declaration committed the country to a republican government, where people from all segments of the population could participate in self-governance,²¹ empowered to create institutions for public safety and happiness.²² That statement of purpose translated into a variety of clauses in the Constitution elaborating on the three branches' powers to operate for the general welfare.²³ The later document was no mere restatement, but a development and elaboration born from the experiences with the faulty Articles of Confederation and the need for more robust national government,²⁴ the powers of which extended to matters like interstate commerce and taxing and spending for the general welfare.²⁵

Both the Declaration and Constitution assert that the fundamental power of governance resides in the people. The cornerstone of government provides the people with power over their destinies by retaining innate individual entitlements and community standards for public actions.²⁶ The Declaration posits that the people retain authority to organize government according to principles most likely to secure their safety and happiness.²⁷ Contemporaries understood that the same "[s]ages, who penned the

19. *Id.* para. 5.

20. *Id.* para. 7.

21. See Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 40–42, 74 (1986) (associating self-government with citizen participation in political activity).

22. See Edmond N. Cahn, *Madison and the Pursuit of Happiness*, 27 N.Y.U. L. REV. 265, 265 (1952) ("The thesis is that Madison's *political* philosophy of republicanism corresponds to the *ethical* doctrines and convictions which are epitomized in a single phrase of the Declaration of Independence. And the phrase is 'the pursuit of happiness.'").

23. U.S. CONST. pmb1.

24. See William P. Marshall, *National Healthcare and American Constitutional Culture*, 35 HARV. J.L. & PUB. POL'Y 131, 145 (2012) ("One of the primary motivating concerns animating the adoption of the Constitution was . . . that the Articles of Confederation created a national government with insufficient authority to meet the demands of a burgeoning nation.").

25. U.S. CONST. art. I, § 8, cls. 1, 3.

26. See *Speer v. Sch. Dirs.*, 50 Pa. 150, 160 (1865) ("The pursuit of happiness is our acknowledged fundamental right, and that, therefore, which makes a whole community unhappy, is certainly a social evil to be avoided if it can be.").

27. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[W]henever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to 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.").

Declaration of Independence, laid it down, as a fundamental principle, that government derives its just powers from the *consent of the people* alone.”²⁸ One author, writing for a Philadelphia newspaper, asserted what had in short order become common lore: “[i]t is a general maxim that government was instituted for the protection and happiness of the people.”²⁹ The Constitution was actually a greater application of popular sovereignty than the Declaration, since the public at large had not weighed in on the 1776 document before its passage, while constitutional conventions made up of ordinary citizens, debated the text of the Constitution from 1787 to 1789.³⁰ The Preamble to the Constitution asserts that government is created by the people and is given authority to “promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”³¹

The Declaration also announces the importance of an independent judiciary. Take, for instance, the Declaration’s condemnation of the British monarchy for depriving Americans “of the Benefits of Trial by Jury.”³² The Sixth and Seventh Amendments guarantee trial by jury.³³ This entitlement was so important that the colonists asserted jury trials to be essential even before the Revolution.³⁴ In 1776, after the Declaration was issued, ordinary commentators understood that trial by jury was a key component of the unwritten Bill of Rights.³⁵ Independence from Great Britain, therefore, meant much more than national sovereignty; to Americans, it implied the ability to be judged by and to serve on a jury of their peers. The Sixth and Seventh Amendments then adopted that concept and, adding to the Declaration, made clear that the right to a jury trial applied to both civil and criminal cases.

Judicial independence also appears in the Declaration. The colonists

28. *American Intelligence*, FREEMAN’S J. (Phila.), Aug. 24, 1791, at 2.

29. A Ploughman, *To the People*, INDEP. GAZETTEER (Phila.), Oct. 5, 1782, at 1.

30. *See American Intelligence*, SALEM MERCURY, Apr. 7, 1789, at 2.

31. U.S. CONST. pmbi.

32. THE DECLARATION OF INDEPENDENCE para. 20.

33. U.S. CONST. amends. VI, VII.

34. Even before the Declaration was drafted, the First Continental Congress had asserted that the right to trial by jury was a colonial right. David L. Ammerman, *The Tea Crisis and Its Consequences, Through 1775*, in A COMPANION TO THE AMERICAN REVOLUTION 195, 198 (Jack P. Greene & J. R. Pole eds., 2000). *See also* William Gordon, *For the Independent Chronicle, Letter V. to the Inhabitants of the Massachusetts-Bay*, INDEP. CHRON. (Bos.), Oct. 3, 1776, at 1 (asserting that “Trial by Jury has ever been deemed by Britons the palladium of liberty”). The Supreme Court, in *Jones v. United States*, 526 U.S. 227, 246 (1999), recognized that jury trials are woven into the fabric of U.S. citizenship.

35. *See, e.g.,* Casca, *To the Freemen of Pennsylvania*, PA. EVENING POST, Oct. 31, 1776, at 546 (stating that the unwritten Bill of Rights should “include the natural rights of every freeman, and the essential principles of free government, such as liberty of conscience—annual elections—freedom of the press—trial by jury—rotation of offices—equality of representation, &c.”).

accused King George III of diminishing judicial authority to prevent abuses of power by making “Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.”³⁶ This abuse, as Chief Justice John Roberts explained in a case that dealt with the scope of bankruptcy court jurisdiction, encroached on judicial independence.³⁷ While the Declaration discusses this issue in the negative, as it does with trial by jury, the Constitution addresses it in the positive. Under the Constitution, judges are not subject to the will of the legislature or president; rather, they “shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”³⁸ The Constitution creates an entitlement for Article III judges to prevent the wrongs identified in the Declaration. The prohibition against diminishing compensation prevents the “master of the purse”³⁹ from reducing judges’ compensations and thereby preserves their independence against encroachment by the other two branches of federal government.⁴⁰

B. JUDICIAL INTERPRETATION

Until recently, the Supreme Court has shied away from the Declaration in its constitutional interpretations.⁴¹ However, the Court has periodically signaled the relevance of the Declaration to constitutional interpretation.⁴² Except for a few forays into the subject, Justices’ references to it remain rare, somewhat ambiguous, and often relegated to concurring or dissenting opinions. Nevertheless, those rare invocations have betimes been powerfully framed. For instance, in a concurring opinion, Justice Arthur J. Goldberg asserted, “[t]he Declaration of Independence states the American creed.”⁴³ That conception places the Declaration at the very center of constitutional normativity. In this framework, it is not only hortatory, but also a mandate for government to safeguard the people’s inalienable rights, human equality, and the dignified opportunity to safely pursue personal happiness.

36. THE DECLARATION OF INDEPENDENCE para. 11.

37. *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011).

38. U.S. CONST. art. III, § 1.

39. *O’Donoghue v. United States*, 289 U.S. 516, 531 (1933).

40. *See id.* (stating that the Declaration “foreshadowed” the constitutional prohibition against diminishing judicial compensation).

41. Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 699 (2012).

42. *See, e.g., Missouri v. Illinois*, 180 U.S. 208, 219–20 (1901).

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

Clearer and more expositive judicial statements on the Declaration are necessary to connect the document to a variety of precedents that recognize human dignity has a substantive constitutional value.⁴⁴ Because “human dignity” is not used in the Constitution, some commentators have attacked holdings relying on that principle for lacking textual anchors.⁴⁵ The Unalienable Rights Clause of the Declaration offers the logical locus for a response. Relying on it in future opinions would help anchor dignity as a constitutional entitlement.

The constitutionality of the Declaration’s Pursuit of Happiness Clause is on even firmer ground. The Court has explicitly—albeit rarely and in passing—found it to be a substantive safeguard of liberty, holding, for example, that it encompasses the right to parental autonomy.⁴⁶ In a different opinion, which struck down a neutrally drafted municipal ordinance that a city was administering in a discriminatory manner against Chinese immigrants,⁴⁷ the Court recognized the Declaration’s statement of rights to be constitutionally protected: “fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws.”⁴⁸

44. Of late, the Supreme Court has relied on, although never fully parsed, the relationship between dignity and constitutional rights. Most recently, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Court discussed human dignity without noticing that the Declaration of Independence provides a clear guarantee of that interest. In a case dealing with procreation rights, Justice Sandra Day O’Connor stated that “marriage, procreation, contraception, family relationships, child rearing, and education” involve “choices central to personal dignity and autonomy.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). Concurring in part in the case, Justice John Paul Stevens asserted that “[t]he woman’s constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature.” *Id.* at 915 (Stevens, J., concurring in part and dissenting in part). In a separate case, in which the majority struck a state statute prohibiting intimate homosexual contact, the Court reasoned that the statute had detrimental effects on human dignities. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). Expounding on the dignity of marriage, the Court held that the history and text of a federal statute defining marriage to be only between a man and a woman “demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute.” *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013). Even limits on personal mobility, including legitimate prison regulations, cannot violate “the essence of human dignity inherent in all persons.” *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

45. See, e.g., Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL’Y 875, 882 (2008).

46. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that parental rights are among those “essential to the orderly pursuit of happiness by free men”).

47. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

48. *Id.* at 370.

The “pursuit of Happiness” is not an empty phrase, but carries meaning for those seeking to vindicate their rights.⁴⁹ Lower state and federal courts have generally understood the pursuit of happiness to refer to a slew of fundamental rights, including the right to marry,⁵⁰ “to try to earn a living,”⁵¹ and privacy.⁵² Travel is also critical to a person’s enjoyment autonomy and happiness. The Court has recognized that

[the Privileges and Immunities Clause] gives [citizens] the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and *in the pursuit of happiness*; and it secures to them in other States the equal protection of their laws.⁵³

During the twentieth century, the Court developed an expansive substantive due process doctrine that went well beyond “property.”⁵⁴ In a

49. See Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1115 (1986) (“In a constitutional universe admitting serious attention to the Declaration of Independence, a malnourished child is not enjoying a ‘right to the pursuit of happiness.’”).

50. Campaign for S. Equal. v. Bryant, 64 F. Supp. 3d 906, 924 (S.D. Miss. 2014); State v. Thompson, 782 N.E.2d 688, 691 (Ohio Ct. App. 2002).

51. Habron v. Epstein, 412 F. Supp. 256, 266 (D. Md. 1976) (Watkins, J., dissenting) (“[T]he right to try to earn a living is a fundamental right, associated with the right to the pursuit of happiness.”).

52. Winfield v. Div. of Pari-Mutuel Wagering, Dep’t of Bus. Regulation, 477 So. 2d 544, 546 (Fla. 1985) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

53. *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (emphasis added) (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869)). In a concurrence, Justice Joseph P. Bradley reversed this argument, asserting that “property” encompassed the “pursuit of happiness.”

By that portion of the fourteenth amendment by which no State may make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, or take life, liberty, or property, without due process of law, it has now become the fundamental law of this country that life, liberty, and property (which include “the pursuit of happiness”) are sacred rights, which the Constitution of the United States guarantees to its humblest citizen against oppressive legislation, whether national or local, so that he cannot be deprived of them without due process of law.

Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 136 (1873) (Bradley, J., concurring). In a dissent in a different case, he equated “property” with “pursuit of happiness,” noting that “[r]ights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property.” *Slaughter-House Cases*, 83 U.S. (18 Wall.) 36, 116 (1872) (Bradley, J., dissenting).

54. In developing a dynamic understanding of substantive due process, the Supreme Court has examined “our Nation’s history, legal traditions, and practices.” *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997). Elsewhere, the Court spoke of the “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives.” *Lawrence v. Texas*, 539 U.S. 558, 572 (2003). The Court has further explained the balancing intrinsic to court proceedings to identify substantive liberties: “[i]n determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance ‘the liberty of the individual’ and ‘the demands of an organized society.’” *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

notable case, the Court identified the liberty to marry to have “long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁵⁵ The pursuit of happiness is taken to be an axiomatic right that was a component of the decision. Likewise, in a landmark case adopting the right of substantive due process, the Court identified that

the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁵⁶

As the Court came to understand the values encompassing substantive due process, it found an axiomatic connection between the Declaration’s Pursuit of Happiness Clause and the Fifth and Fourteenth Amendments’ guarantees of liberty.

Elsewhere, the Court has recognized that the right to privacy is not a property right but is necessary for securing “conditions favorable to the pursuit of happiness.”⁵⁷ A heretofore unidentified link can be traced between the unenumerated right of privacy, the Declaration, and the Bill of Rights; the Declaration condemns the King for “quartering large Bodies of Armed Troops among us,”⁵⁸ and the Third Amendment of the Constitution adopts the condemnation into an injunction against the quartering of soldiers in any house at a time of peace without an owner’s consent, or “in time of war, but in a manner to be prescribed by law.”⁵⁹ The implications of these two prohibitions against abuses of authority and the preservation of personal space run deep. In *Griswold v. Connecticut*, the majority found that the prohibition against quartering is a “facet of that privacy” that runs throughout penumbras of the Bill of Rights.⁶⁰ Other provisions of the Bill of Rights, such as the Fourth Amendment’s prohibition against illegal

55. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

56. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). See also *Schwarzman v. Schwarzman*, 388 N.Y.S.2d 993, 997 (Sup. Ct. 1976) (citing *Meyer*, 262 U.S. at 399–400).

57. *Rakas v. Illinois*, 439 U.S. 128, 166 (1978) (White, J., dissenting) (internal quotation marks omitted) (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting) (arguing that *Katz v. United States*, 389 U.S. 347 (1967), was based on the Pursuit of Happiness Clause). See also *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting) (“The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.”).

58. THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776).

59. U.S. CONST. amend. III.

60. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

searches and seizures,⁶¹ add to the penumbral source of the unenumerated right to privacy that is implied in both documents.

The significance of this underlying commitment to preserve the right to make characteristically volitional choices against intrusion by official powers cannot be overstated. Beginning with the implied right to privacy, the Court inductively inferred the right to privacy in matters of reproductive autonomy⁶² and sexual liberty.⁶³ The full implication of these implied privacy statements was not evident to the framers; however, later generations understood that the specific injunctions against certain uses of governmental power, powerfully protected by the Unalienable Rights Clause of the Declaration⁶⁴ and the Unenumerated Rights Clause of the Ninth Amendment,⁶⁵ implied something deep about the enumerated powers. The specifics in both documents were starting points; the more general provisions gave each succeeding generation the space to construct constitutional meaning with greater refinement.

In its most recent term, the Supreme Court demonstrated a greater willingness to draw on the Declaration for meaning of constitutional self-government. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, writing for the majority, Justice Ruth Bader Ginsburg recognized that sovereignty over representative legislation remains in the hands of the people.⁶⁶ “Our Declaration of Independence, ¶ 2, drew from Locke in stating: ‘Governments are instituted among Men, deriving their just powers from the consent of the governed.’”⁶⁷ This potentially important interpretive development was dulled, however, because the opinion lacked any clear statement about how lower court judges should regard the Declaration in future cases.

Justice Ginsburg relied on the quoted historical point to support her holding that the people are guaranteed a role in lawmaking, including the ability to check abuses by legislators and to participate in drawing the borders of federal congressional districts.⁶⁸ One of the most important unanswered questions is whether the Declaration can be used to help judges arrive at substantive holdings or only to develop reasoning in dicta. A more

61. U.S. CONST. amend. IV.

62. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

63. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (recognizing a right to sexual privacy for adults in same-sex relationships).

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

65. U.S. CONST. amend. IX.

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

67. *Id.*

68. *Id.*

robust message is needed from the Court, one that recognizes the Declaration as part of our constitutional law and relevant in matters involving government structures, civil rights, representative democracy, and the public trust.

Justice Ginsburg's opinion leaves uncertain how and whether the Declaration can be distinguished from other historical documents such as John Locke's *Two Treatises of Government*, which she cited alongside the Declaration.⁶⁹ The duty to safeguard the liberty and equality of persons is not simply a philosophical construct but a constitutional obligation. Violation of that principle renders any law—be it the Three-Fifths Clause⁷⁰ or a state segregation law—violative of the foundational structure of U.S. democracy. The Declaration's statements about individual rights place certain obligations on government to create institutions and regulations likely to empower the people to pursue their unique visions of happiness. The Declaration is not merely idealistic, but pregnant with heuristic value for decisionmakers. Moreover, unlike historical treatises by influential theorists like Locke, the Declaration was officially adopted by an organ of the United States as a statement of national purpose and independence. The specific and general terms of the Declaration establish certain mandates that are so binding on public servants that the people retain the right to abolish despotic governments.⁷¹ There is certainly no similar right to abolish a government that is committed to Lockean social contract ideas.

Just as Justice Ginsburg recognized the structural value of the Declaration to democratic self-representation, Justice Clarence Thomas, writing a dissent to a different case, added an understanding about the Declaration's mandate of human dignity. He disagreed with the Court's ruling in *Obergefell v. Hodges* that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."⁷² Justice Thomas believed the majority had rejected "the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government."⁷³

Justice Thomas was certainly correct that the foundations of rights in the Constitution are predicated on the innate human dignity asserted in the

69. *Id.*

70. U.S. CONST. art. I, § 2, cl. 3.

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

72. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

73. *Id.* at 2631 (Thomas, J., dissenting).

Declaration.⁷⁴ As he stated, those held in slavery certainly retained their dignities despite their torments.⁷⁵ The same could be said about Japanese citizens retaining their dignity rights, despite the oppression of World War II internment.

Much as Justice Thomas was correct about the normative value of the Declaration, he failed to notice that James Obergefell's claim to the dignity to marry could have been based on the Declaration's statement of innate rights, incorporated through the Due Process and Equal Protection Clauses. Had Justice Thomas reflected on the relevance of the Declaration to Obergefell's claim for marriage equality, he might have balanced Obergefell's interests against other dignitary interests involved, which he seems to think are the dignities of persons who voted against marriage equality,⁷⁶ and also scrutinized the strength and fit of public interests in legally secure marriages. This type of balanced scrutiny would have likely identified the invidious discrimination of refusing to recognize Obergefell's claim of equal rights as the surviving spouse. Instead, Justice Thomas's opinion curiously ignored the clear pertinence of the Declaration's general statement of innate rights to the equal enjoyment of marriage. Even though the Declaration's protection of human dignity is squarely on point with Obergefell's constitutional claim, Justice Thomas paid it no attention.

The Supreme Court's uses of the Declaration have, therefore, been uncommon and irregular. When the Court has found it relevant to constitutional interpretation, the document has only provided some preliminary guidance; further expansion is necessary to reflect more fully the Declaration's interpretive value.

C. NORMS AND A REPRESENTATIVE DEMOCRACY

The normative and structural similarities between the Constitution and Declaration indicate the extent to which the earlier document influenced the cultural, political, and legal memes about just government within which

74. While the term "human dignity" is not used in the Declaration, it is certainly an accurate statement of present-day meaning, given international human rights instruments. Furthermore, while it was unfortunate that Justice Thomas used the term to defend gender inequality in marriage, he probably captured the correct understanding of original meaning because, by 1776, "human dignity" had been in common use for over a century, appearing in well-known works such as John Milton's 1645 *Tetrachordon*. See, e.g., JOHN MILTON, *TETRACHORDON: EXPOSITIONS UPON THE FOURE CHIEF PLACES IN SCRIPTURE, WHICH TREAT OF MARIAGE, OR NULLITIES IN MARIAGE* 32 (London, s.n. 1645). The term was also in common use in colonial writings. See, e.g., *Entertainment*, N.Y. MERCURY, Jan. 1, 1753, at 1.

75. *Obergefell*, 135 S. Ct. at 2639 (Thomas, J., dissenting).

76. *Id.*

the framers worked. The documents are congruous in their presentation of a structure of government beneficial to the people and aimed at the public good. As the foundational statement of national principle, the Declaration speaks of “all Men” being “created equal, . . . endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”⁷⁷ Integrating this statement with the safeguard in the Constitution’s Preamble for the general welfare creates a dual obligation of private and public mindedness: government is instituted by the people to safeguard individual and public efforts to live freely and happily. It constitutes a full-throated condemnation of oppression against equal, natural liberties.

The doctrine of inalienable rights continues to be a constructive ideation of national government because of the value of humanity it espouses, not because the framers adopted it. Their own prejudices need not weigh down the construction of its text. The recognition of inalienable human rights is not confined to any particular group, but asserted in universal terms. Being members of the human family, each person is an equal in relation to others and in the eyes of the law. This doctrine comprises the essential facet of American republicanism. The *sine qua non* of state power is the maintenance of a legal scheme that is “likely to effect [the people’s] Safety and Happiness.”⁷⁸

By 1776, Americans generally believed that a republican government was necessary to safeguard natural rights. The Declaration provides a simple catalogue of some of those natural rights—life, liberty, and the pursuit of happiness—that were thought to be equally and innately shared by all humans.⁷⁹ To the civic world in the period between adoption of the Declaration and ratification of the Constitution, “a truly Republican empire” meant, “[a]ll mankind should by their natural rights, enjoy equal liberty, except in such cases which tend to the injury of their neighbours; therefore they should have a government endued with sufficient power, to check the progress of the wicked and to protect the virtuous.”⁸⁰ The commitment to republican government conceived of a people with mutual interests, linked by the desire to achieve a common good by constituting government.⁸¹ Put into historical relief, the Declaration is a mixed

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

78. *Id.*

79. See FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY 37–38 (John J. Patrick ed., 1995).

80. Foreigner, *To the Opposers of the Federal Constitution, Number I*, INDEP. GAZETTEER (Phila.), Nov. 2, 1787, at 2.

81. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 57–58 (1969) (“What made the Whig conception of politics and the republican emphasis on the collective

statement guaranteeing inalienable rights and the people's authority, and prohibiting illegitimate uses of authority. Even before the Constitution came into operation, contemporaries understood that independence had created a republican form of government, the legislators of which were obligated to abide by principles conducive to constituents' liberties.⁸² The close relationship between country and structure of government was clearly stated by the selectmen of Marblehead, New York to the visiting George Washington: "The blessings of independence and a republican government must ever excite our gratitude and affection to so eminent a supporter of the public liberty, whose wisdom and valor have so successfully defended the rights of his country."⁸³

II. CONSTITUTION AND RECONSTRUCTION

A. ILLEGITIMATE COMPROMISE

If the premise is correct that the Declaration set the mandatory aspiration for national government and the Constitution set the mechanisms for its administration, then the earlier document retained its authority, even after ratification. Yet contrary to the Declaration's premises, the Constitution set express barriers against the universal enjoyment of innate human rights. What is more, as the great abolitionist Frederick Douglass pointed out, the Constitution was internally contradictory because the clauses protecting slavery violated the Preamble;⁸⁴ that evil institution was incompatible with the Preamble's general statement of the "Blessings of Liberty" for which "We the People" ordained and established a Constitution for the United States.⁸⁵

Several clauses of the Constitution structurally protected the institution of slavery. The Importation Clause prohibited Congress from abolishing international slave trading prior to 1808.⁸⁶ The Three-Fifths Clause enabled the South to increase its political power beyond the persons

welfare of the people comprehensible was the assumption that the people . . . were a homogenous body Since everyone in the community was linked organically to everyone else, what was good for the whole community was ultimately good for all the parts.").

82. See, e.g., *Copy of a Letter from Frederick, March 14, 1787*, MD. J. & BALT. ADVERTISER, Mar. 30, 1787, at 2; *Philadelphia, April 22*, N.Y. DAILY GAZETTE, Apr. 30, 1789, at 422.

83. Selectmen of Marblehead, *United States*, N.Y. PACKET, Dec. 15, 1789, at 2.

84. Frederick Douglass, *Oath to Support the Constitution*, N. STAR (Rochester), Apr. 5, 1850, reprinted in GLENN M. LINDEN, VOICES FROM THE GATHERING STORM: THE COMING OF THE AMERICAN CIVIL WAR 40, 40-41 (2001).

85. U.S. CONST. pmbl.

86. U.S. CONST. art. I, § 9, cl. 1.

capable of voting in elections or truly represented in Congress.⁸⁷ Congress's power to call up the militia in order to "suppress insurrections" granted legislators the power to put down slave rebellions.⁸⁸ The Fugitive Clause was understood to empower Congress to pass necessary and proper laws for the return of runaway slaves.⁸⁹ And Article V, which requires two-thirds of both congressional houses to propose an amendment and three-fourths of state legislatures or conventions to ratify it,⁹⁰ made it impossible prior to the Civil War to propose any changes to the Constitution adverse to slavery.

Slavery was the original Constitution's greatest downfall because it violated the constitutional principle of inalienable, equal human rights. Clauses meant to shield slavery were at odds with the most basic concept of republican government. So internally incongruous were the nation's binding ideals from slavery-protecting portions of the original Constitution that the friction eventually led to the Civil War, which became a battle for the unity of constitutional values. In 1787, a foreign observer remarked, "Though the federal power should not interfere in the internal-management of the states; yet some extraordinary affairs demand an exception."⁹¹ He referred specifically to maintenance of "negro slavery," arguing that bringing about its demise should be "a federal object . . . A man who exercises absolute power over some hundred fellow creatures, although he should not abuse it, cannot easily have a heart-felt sensibility of the equal rights of mankind, the moderation of a republican, and a genuine love of liberty."⁹²

Contrary to the claims of a variety of historians,⁹³ many in the revolutionary generation understood that slavery was incompatible with the maxims of the Declaration. Writing in 1776, a British attorney condemned slavery for being "inconsistent with all ideas of justice" and a

87. U.S. CONST. art. I, § 2, cl. 3. Article II, Section 1, Clause 2 granted each state presidential electors whose numbers were equal to the state's combined number of senators and representatives. U.S. CONST. art. II, § 1, cl. 2. Those added electors were essential in securing Thomas Jefferson's election over John Adams in the 1800 presidential election. Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937, 971 (1993) (reviewing ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992)).

88. U.S. CONST. art. I, § 8, cl. 15.

89. U.S. CONST. art. IV, § 2, cl. 3.

90. U.S. CONST. art. V.

91. *An Essay on the Means of Promoting Federal Sentiments in the United States, by a Foreign Spectator*, INDEP. GAZETTER (Phila.), Sept. 17, 1787, at 2.

92. *Id.*

93. See, e.g., DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 17 (2007); MAIER, *supra* note 9, at 160–64, 213–15.

“crime . . . [that is] monstrous against the human species.”⁹⁴ Continuing in words closely resembling the Declaration, he asserted that slavery was “no little, indirect attack upon the safety and happiness of our fellow creatures, but one that boldly strikes at the foundation of all humanity and justice.”⁹⁵ Five years after the adoption of the Declaration, the great American abolitionist Anthony Benezet relied on the Declaration’s statement that “all Men are created equal” and endowed with the rights to “Life, Liberty, and the pursuit of Happiness”⁹⁶ when he stated that the Declaration established national moral commitments that “apply to human nature in general, however diversified by colour and other distinctions.”⁹⁷ Even earlier, in 1778, Benezet wrote that the Declaration was a binding resolution of the national recognition of rights and should be read as a condemnation “against the slavery of the Negroes.”⁹⁸ In April 1787, a month before the Constitutional Convention met, a Pennsylvanian abolitionist society petitioned for the end of slavery on the basis of the “truth” founded by “the Act of Independence.”⁹⁹ A pastor in New Haven, Connecticut relied on the second paragraph of the Declaration in a sermon condemning racial slavery.¹⁰⁰ A similar idea appears in a 1793 petition by a Delawarean Quaker, Warner Mifflin. Quoting the same portion of the document, he condemned the “despotic tyranny” of augmenting power by suppressing “helpless victims” by means of “enslaving and exercising an imperious lordship.”¹⁰¹

Later abolitionists picked up this theme but were more adamant in their condemnation of the Constitution for adopting provisions directly opposed to the principles of 1776. Theodore Parker, who hid fugitive slaves but did not live to see constitutional abolition, noted that the Declaration’s

94. Letter from Thomas Day (1776), in *Fragment of an Original Letter on the Slavery of the Negroes*, FREEMAN’S J. (Phila.), Sept. 8, 1784, at 2.

95. *Id.*

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

97. ANTHONY BENEZET, SHORT OBSERVATIONS ON SLAVERY 2 (Phila., Joseph Crukshank 1781).

98. ANTHONY BENEZET, SERIOUS CONSIDERATIONS ON SEVERAL IMPORTANT SUBJECTS 28 (Phila., Joseph Crukshank 1778).

99. PA. ABOLITION SOC’Y, THE CONSTITUTION OF THE PENNSYLVANIA SOCIETY, FOR PROMOTING THE ABOLITION OF SLAVERY, AND THE RELIEF OF FREE NEGROES, UNLAWFULLY HELD IN BONDAGE 21 (Phila., Francis Bailey 1788).

100. James Dana, Pastor, First Cong. Church in New Haven, *The African Slave Trade: A Discourse, Address Before the Connecticut Society for the Promotion of Freedom* (Sept. 9, 1790), in DOCTOR DANA’S SERMON ON THE AFRICAN SLAVE TRADE 28 (New Haven, Thomas & Samuel Green 1790).

101. WARNER MIFFLIN, A SERIOUS EXPOSTULATION WITH THE MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 9–10 (Poughkeepsie, Nicholas Power 1794).

assertion of the people's right to create a government "which shall secure their safety and happiness" never mentioned color.¹⁰² William Lloyd Garrison, an uncompromising advocate of immediate abolition, famously branded the Constitution "a covenant with death, and an agreement with hell."¹⁰³ In contrast, Garrison praised the Declaration of Independence's statement about "human equality and freedom."¹⁰⁴ Contrary to the banner of "the self-evident truths of the Declaration of Independence," Garrison asserted in another speech, "to swear to support the Constitution of the United States, *as it is*, is to make 'a compromise between right and wrong,' and to wage war against human liberty. It is to recognize and honor as republican legislators, *incorrigible men-stealers*, MERCILESS TYRANTS, BLOODTHIRSTY ASSASSINS . . ." ¹⁰⁵ Remaining true to his message, Garrison time and again charged that "the present national compact . . . was formed at the expense of human liberty, by a profligate surrender of principle."¹⁰⁶ The American Anti-Slavery Society, of which he was president, argued that it was "unlawful for freemen to take the oath of allegiance" to the Constitution because it favored slavery and oligarchy.¹⁰⁷ He was certainly not the only one to hold that sentiment; many abolitionists spoke of the Declaration in the context of republican governance and the "cruel, unjust and unreasonable distinction" made "against the color of the skin."¹⁰⁸ Abolitionists built on a tradition of debate consistent with the Declaration's assertion that government must be adapted to the people's safety and happiness,¹⁰⁹ but added to it, condemning slaveholding on the

102. Theodore Parker, *The Relation of Slavery to a Republican Form of Government*, Address Before the New England Anti-Slavery Convention (May 26, 1858), in *THE RELATION OF SLAVERY TO A REPUBLICAN FORM OF GOVERNMENT: A SPEECH* 13 (Boston, William L. Kent & Co. 1858).

103. *The Meeting at Framingham*, *LIBERATOR* (Bos.), July 7, 1854, at 106 (internal quotation marks omitted). The assertion that the Constitution was "a covenant with death, and an agreement with hell" was not new to abolitionists. See, e.g., Alonzo P. Jaques, *Our Inhuman Religion*, *LIBERATOR* (Bos.), Dec. 23, 1842, at 202.

104. *The Meeting at Framingham*, *supra* note 103, at 106.

105. William Lloyd Garrison, *Address to the Friends of Freedom and Emancipation in the United States*, *LIBERATOR* (Bos.), May 31, 1844, at 86.

106. William Lloyd Garrison, President, Exec. Comm. of the Am. Anti-Slavery Soc'y, *Address to the Friends of Freedom and Emancipation in the United States* (May 20, 1844), in *12 ANTI-SLAVERY EXAMINER* 3, 4 (1845).

107. *Id.*

108. *Anecdote*, *LIBERATOR* (Bos.), Aug. 13, 1831, at 131 (quoting a letter to the editor from the editor of the *Worcester Yeoman*). See also *Constitution of the American Anti-Slavery Society*, *LIBERATOR* (Bos.), Jan. 11, 1834, at 5; *Lane Seminary: Important Anti-Slavery Document*, *LIBERATOR* (Bos.), Jan. 3, 1835, at 3.

109. See, e.g., Ass'n of Christian Ministers, *To the Public*, *PA. PACKET*, Jan. 21, 1788, at 3; John Hancock, *A Proclamation, for a Day of Public Thanksgiving*, *MASS. GAZETTE*, Nov. 2, 1787, at 2; George Washington, *By the President of the United States of America: A Proclamation*, *N.Y. PACKET*, Oct. 15, 1789, at 3.

basis of universal principles.

Another group of immediatist abolitionists, known as the Radical Abolitionists, argued that slavery was prohibited by the Declaration and unprotected by the Constitution. For instance, Lysander Spooner, in *The Unconstitutionality of Slavery*, wrote that the Constitution in no way denied the self-evident truth that all men “have a natural and inalienable right to life, liberty and the pursuit of happiness.”¹¹⁰ Because the Declaration was meant to end slavery and the Constitution nowhere specifically mentions slavery, Spooner argued that the nation’s founding documents did not create the institution, despite contrary practices.¹¹¹ Another Radical Abolitionist, Gerrit Smith, wrote that the Constitution and the Articles of Confederation could only derive their authority from the Declaration. From this premise, Smith drew the following conclusion: “[T]he Declaration of Independence is the very soul of every legitimate American Constitution—the Constitution of Constitutions—the Law of Laws [I]f there was legal slavery in this land before the Declaration of Independence was adopted, there, nevertheless, could be none after.”¹¹² He admitted that those men who had adopted the Declaration had brought the document into disrepute by allowing slavery to expand, but argued that they expected the institution to die, shrivel up, and vanish shortly after independence.¹¹³ When placed side by side with provisions of the Constitution that Southerners and Northerners regarded to protect slavery, the Radical Abolitionists’ arguments were unconvincing to the vast majority of congressmen and judges.¹¹⁴ Ending the institution and empowering the federal government to act in accordance with the universal values of the Declaration would require formal constitutional change.

B. RECONSTRUCTION OF THE DECLARATION’S IDEAL

Those who claimed that the terms of the Declaration were included in the original Constitution had to gainsay the presumption that the latter superseded the ideals of 1776.¹¹⁵ For example, it could be said that the

110. LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 44 (Bos., Bela Marsh 1845).

111. *See id.* at 66–70.

112. Representative Gerrit Smith, Speech on the Nebraska Bill (Apr. 6, 1854), in *SPEECHES OF GERRIT SMITH IN CONGRESS* 113, 130–31 (N.Y.C., Mason Bros. 1856).

113. *See id.* at 132, 135–36.

114. *See* WENDELL PHILLIPS, *REVIEW OF LYSANDER SPOONER’S ESSAY ON THE UNCONSTITUTIONALITY OF SLAVERY* 75 (Bos., Andrews & Prentiss 1847) (reviewing SPOONER, *supra* note 110) (stating that Lysander Spooner’s work claimed “the Supreme Court is authorized to set free the slaves in the several states” and concluding that his arguments were “utterly weak, fanciful and unsound”).

115. The most famous statement of this type came from Rufus Choate, a renowned conservative

Fifth Amendment's prohibition against depriving anyone of "life, liberty, or property, without due process of law"¹¹⁶ had some of the same elements as the Unalienable Rights Clause's safeguards for "Life, Liberty, and the pursuit of Happiness,"¹¹⁷ but "Happiness" is more sweeping in its implication than "property." One available reply was that the Declaration and Constitution were consistent with each other: While the "Happiness" provision was not included in the Due Process Clause of the Fifth Amendment, it was implied there.¹¹⁸ Others argued the right to pursue happiness was articulated by the Unenumerated Rights Clause of the Ninth Amendment¹¹⁹ or the General Welfare Clause of the Preamble.¹²⁰ By the time of the Civil War, however, politicians came to understand that the Declaration's principles needed to be placed on firmer constitutional ground than they had been at the nation's founding.

The ratification of the Reconstruction Amendments incorporated the second paragraph of the Declaration into the Constitution. The original Constitution's compromises with slavery had deviated from the Declaration's universal principles. Concessions the founders had made for the sake of national union delayed the possibility of forming an egalitarian republic, where every person could enjoy the pursuit of inalienable rights and the general welfare of stable government. Instead, the country became a racial oligarchy, where slavery and many forms of injustice were diametrically opposed to the nation's founding statement of purpose.

Only during the course of the Civil War did the opponents of slavery gain sufficient congressional influence to put an end to the institution

lawyer and former senator from Massachusetts, who in the 1850s derided efforts to end slavery. Choate castigated anti-slavery politics for being predicated on premises extraneous to the Constitution, dubbing them "the glittering and sounding generalities of natural right which make up the Declaration of Independence." Letter from Rufus Choate to E. W. Farley, Aug. 9, 1856, in 1 SAMUEL GILMAN BROWN, *THE WORKS OF RUFUS CHOATE WITH A MEMOIR OF HIS LIFE* (1862). For the general canon of supplementary interpretive construction, see *City of Chicago v. Evtl. Def. Fund*, 511 U.S. 328, 347 (1994) (Stevens, J., dissenting.).

116. U.S. CONST. amend V.

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

118. U.S. CONST. amend. V. See G. W. F. MELLE, *AN ARGUMENT ON THE UNCONSTITUTIONALITY OF SLAVERY* 410 (1841) (connecting the Pursuit of Happiness Clause to portions of the Constitution, such as the Due Process Clause).

119. For the nineteenth century argument that the Declaration established a beneficent government prohibited from interfering with enumerated rights, see *For the U.S. Telegraph*, reprinted in *POLITICAL REGISTER* 570, 576 (D.C., Duff Green 1832) and J. G. Hertwig, *Religious Liberty*, 3 AM. J. POL. 430, 431 (1893).

120. U.S. CONST. pmbl. For an example of a nineteenth century statement connecting the Declaration and the Preamble to the Constitution, see THOMAS POWER, *AN ORATION DELIVERED BY REQUEST OF THE CITY AUTHORITIES, BEFORE THE CITY OF BOSTON ON THE SIXTY FOURTH ANNIVERSARY OF AMERICAN INDEPENDENCE*, JULY 4, 1840, at 24 (Bos., John H. Eastburn 1840).

through constitutional amendment. Advocacy for passage of the Thirteenth Amendment began to build after Lincoln issued his Emancipation Proclamation on January 1, 1863. That same year, the National Convention of German Radicals announced their chief aim to be the “[a]bolition of slavery . . . [and r]evision of the Constitution in the spirit of the Declaration of Independence.”¹²¹ They considered the “[p]roclamation of equal human rights by the Declaration of Independence” to be “the only true fundamental law of republican life.”¹²² Similarly, about two months after the Thirteenth Amendment had been introduced in Congress by Representative James M. Ashley of Ohio,¹²³ the Freedom Convention met in Louisville and adopted a resolution on the need to amend the Constitution to end slavery in order “to secure freedom to every person” in keeping with “the principles of freedom announced by the Declaration of Independence and the Federal Constitution.”¹²⁴ Garrison’s *Liberator* asserted that by superseding the proslavery clauses of the Constitution, “[s]uch an amendment . . . will give completeness and permanence to emancipation, and bring the Constitution into avowed harmony with the Declaration of Independence.”¹²⁵

The Abolitionists’ sentiments were shared by many in Congress, who understood the Reconstruction Amendments to incorporate the Declaration’s fundamental principle of equal inalienable rights. Senator John P. Hale of New Hampshire called on his fellow citizens to “wake up to the meaning of the sublime truths” that the nation’s “fathers uttered years ago and which have slumbered dead letters upon the pages of our Constitution, of our Declaration of Independence, and of our history.”¹²⁶ “Our ancestors,” asserted Senator John B. Henderson of Missouri, had paved the way to civil war by hypocritically preserving their own “inalienable right of liberty unto all men,” and “came to refuse it to others” under the guise of expedience.¹²⁷

Participants in the debates on the Thirteenth Amendment made clear

121. *The German Radical Convention*, CLEVELAND DAILY HERALD, Oct. 24, 1863, at 3.

122. *Id.*

123. Representative Ashley introduced the proposal for the Thirteenth Amendment on December 14, 1863. CONG. GLOBE, 38th Cong., 1st Sess. 19 (1863). Representative John Henderson of Missouri introduced the proposal on January 13, 1864. CONG. GLOBE, 38th Cong., 1st Sess. 145 (1864).

124. *The Eastern News: To-day's Dispatches*, DAILY EVENING BULL. (S.F.), Feb. 25, 1864, at 2.

125. *Universal Emancipation*, LIBERATOR (Bos.), May 6, 1864, at 1 (reprinting an extract from an April 8, 1864 speech delivered in the United States Senate by Senator Charles Sumner of Massachusetts).

126. CONG. GLOBE, 38th Cong., 1st Sess. 1443 (1864) (statement of Sen. John P. Hale).

127. *Id.* at 1461 (statement of Sen. John B. Henderson).

that the modification to the Constitution would grant Congress the power to pass civil rights legislation in keeping with the principles of the Declaration. The Head of the House Judiciary Committee, Representative James F. Wilson of Iowa, believed the Thirteenth Amendment would create power in the federal government that would be inspired by the revolutionary proclamation of “human equality” drawn from the “sublime creed” of the Declaration.¹²⁸ In the reformed nation, “*equality before the law* [was] to be the great corner-stone” that the states and the judiciary would be unable to undermine.¹²⁹ Representative Isaac N. Arnold of Illinois called for “incorporating into our organic law the glorious prohibition of slavery” directly from the Declaration.¹³⁰ Likewise, a meeting of the Southern Loyal Convention called for the South and North to unite “under the roof of the time-honored hall, in which the Declaration of [I]ndependence . . . inspires us with the animating hope that the principles of just and equal government which were made the foundation of the republic at its origin, shall become the cornerstone of the Constitution.”¹³¹

A common thread among many groups supporting constitutional abolition was how it would more clearly incorporate the Declaration’s humanistic principles into the Constitution. While most debates occurred on the stage of national politics, the significance of the Thirteenth Amendment was not lost on an international audience. An attorney from Manchester, England wrote a friend in support of ratifying the constitutional amendment to abolish slavery: “Then will your first great Declaration of Independence become indeed a solid, enduring, noble REALITY, securing freedom as the birthright of all men.”¹³² He continued that returning to the nation’s founding principles would help secure liberty as the human birthright to go hand-in-hand with “the precious heritage of liberty—equal rights and privileges of citizenship.”¹³³ The great philosopher John Stuart Mill wrote a letter from England to a friend calling for ratification of the Thirteenth Amendment and the necessity “to break altogether the power of the slaveholding caste” as necessary for “the opening words of the Declaration of Independence” to no longer be “a

128. *Id.* at 1319 (statement of Rep. James F. Wilson).

129. *Id.* at 2989 (statement of Rep. Isaac N. Arnold).

130. *Id.* (statement of Rep. Isaac N. Arnold).

131. *Resolutions of the Southern Loyal Convention*, VT. WATCHMAN & ST. J., Sept. 14, 1866, at 1.

132. Letter from Thomas H. Barker to William Lloyd Garrison (Mar. 4, 1865), in *Letter from Thomas H. Barker, Esq.*, LIBERATOR (Bos.), Mar. 31, 1865, at 50.

133. *Id.*

reproach to the nation founded by its authors.”¹³⁴

Congressional supporters for ending slavery by amendment had no doubt about the need for constitutional change. For them, Chief Justice Roger B. Taney’s claim that the Declaration applied only to whites was a figment of his erroneous account of history and emaciated view of national citizenship in *Dred Scott*.¹³⁵ Contrary to Chief Justice Taney, Republican leaders, especially those in the Radical Republican camp, believed the Declaration “must be heeded,” having been “whispered into the ears of this nation since first we pronounced life, liberty, and the pursuit of happiness to be the inalienable rights of all men.”¹³⁶ Awakening to “true and real life the moral sense of the nation,” the people would undo those sections of the Constitution that were “anti-republican.”¹³⁷ A Maryland representative to the House, speaking in Chicago, saw constitutional abolition to be a critical step in formulating a government under which “colored people” would have access to the ballot box and stated that “[t]hen all the principles of the Declaration of Independence will be executed; this government will rest on the rights of individual liberty and the right of every man to bear a share in the government of the country.”¹³⁸

The connection between abolition and representative government was also clearly stated in contemporaneous statutes enabling the people of the territories of Nevada and Colorado to adopt a constitution and join the Union. Congressional conditions for the states to gain admission included

134. *John Stuart Mill*, BOS. DAILY ADVERTISER, June 8, 1865, at 2 (reprinting an excerpt of a letter written by John Stuart Mill) (internal quotation marks omitted).

135. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). In his judgment, Chief Justice Taney brazenly claimed that when the Declaration was adopted and the Constitution was ratified, persons of the “negro African race” were “considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race.” *Id.* at 404–05, 406. Blacks were so unfit for association with whites that “they had no rights which the white man was bound to respect.” *Id.* at 407.

Abraham Lincoln regarded *Dred Scott* as a departure from the nation’s core values. Lincoln proclaimed that Chief Justice Taney’s judgment did “obvious violence to the plain, unmistakable language of the Declaration.” ABRAHAM LINCOLN, From His Speech on the Dred Scott Decision, Springfield, Illinois (June 26, 1857), in SPEECHES AND LETTERS OF ABRAHAM LINCOLN, 1832–1865, at 61, 66 (Merwin Roe ed., 1919). He further asserted that the framers’ structural outline was still binding:

I think the authors of that notable instrument intended to include *all* men, but they did not intend to declare all men equal *in all respects* . . . They meant to set up a standard maxim for free society, which should be familiar to all and revered by all,—constantly looked to, constantly laboured 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 colours everywhere.

Id.

136. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (statement of Rep. James F. Wilson).

137. *Id.* at 1200 (statement of Rep. James F. Wilson).

138. *Henry Winter Davis on Negro Suffrage*, VT. WATCHMAN & ST. J., July 14, 1865, at 2 (internal quotation marks omitted).

the requirement that their constitutions be “republican, and not repugnant to the constitution of the United States, and the principles of the Declaration of Independence.”¹³⁹ This provision was further defined, in part, to require Nevada and Colorado to prohibit slavery.¹⁴⁰ It showed how ending the peculiar institution, republican governance, the values of the Declaration, and constitutional change had become interwoven after the Civil War.¹⁴¹

Radical Republicans, who in 1864 and 1865 held leadership positions on several prominent congressional committees,¹⁴² believed the freedom amendment would put into effect the “spirit of our fathers” who had been careful not to “introduce any discrimination of color” into the Declaration, Articles of Confederation, or the Constitution.¹⁴³ During congressional debates on the Fourteenth Amendment,¹⁴⁴ Representative William Windom of Minnesota argued that the Enforcement Clause of the Thirteenth Amendment granted Congress the power to pass civil rights law “to give practical effect to the principles of the Declaration of Independence.”¹⁴⁵ This sentiment left no doubt that Representative Windom considered the Declaration to be of substantive value to constitutional governance. According to Representative John L. Thomas, Jr. of Maryland, by enacting the Civil Rights Act of 1866, with its prohibitions of discrimination in contractual agreements and property ownerships, Congress had “for the first time in the history of this Government,” made “good the averment in the Declaration of Independence that—‘All men are endowed by their Creator with certain inalienable rights, among which are life, liberty, and the pursuit of happiness.’”¹⁴⁶ These and other statements, such as those of Senator Charles Sumner of Massachusetts, about the power of Congress to pass the Civil Rights Act of 1866 pursuant to Section 2 of the Thirteenth Amendment, were widely understood to increase national legislative authority to enforce laws needed “to establish equality of civil rights in all the States” in keeping with the Declaration of Independence’s universal

139. Colorado Enabling Act of 1864, Pub. L. No. 38-37, § 4, 13 Stat. 32, 33; Nevada Enabling Act of 1864, Pub. L. No. 38-36, § 4, 13 Stat. 30, 31.

140. Colorado Enabling Act § 4; Nevada Enabling Act § 4.

141. See CONG. GLOBE, 39th Cong., 1st Sess. 734 (1866) (statement of Sen. Charles Sumner).

142. Alexander Tsesis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679, 706 n.165 (2009).

143. CONG. GLOBE, 38th Cong., 1st Sess. 2246 (1864) (statement of Sen. Charles Sumner). See also CONG. GLOBE, 39th Cong., 1st Sess. 569–71 (1866) (statement of Sen. Lyman Trumbull).

144. Representative John A. Bingham of Ohio first raised the Fourteenth Amendment in Congress on January 9, 1866. CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (statement of Rep. John A. Bingham).

145. *Id.* at 1159 (statement of Rep. William Windom).

146. *Id.* at 2094 (statement of Rep. John L. Thomas, Jr.).

statements.¹⁴⁷

When it came time to debate passage of the Fourteenth Amendment, the sentiments were symmetrical with those expressed about the Thirteenth Amendment. Speaking on the floor of the House, Representative Shelby M. Cullom of Illinois advocated passing the Fourteenth Amendment to achieve the culmination of those “self-evident” truths “our fathers” included in the Declaration and the Constitution, which together proclaimed the “paramount objects of government”—being “[u]nion, justice, domestic tranquility, the general welfare, the securement of the blessings of liberty to themselves and their posterity.”¹⁴⁸ Cullom expressed the mainstream view in 1866 that the Fourteenth Amendment was meant to set the Constitution aright with the premises of the Declaration. Representative George F. Miller of Pennsylvania also spoke in this vein, contending that no one could object to Section 1’s prohibition against depriving persons of life, liberty, or property without due process of law, which was “so clearly within the spirit of the Declaration of Independence.”¹⁴⁹ The Citizenship Clause, as Indiana Lieutenant Governor Conrad Baker said in an extensive speech in favor of ratifying the Fourteenth Amendment, would entitle all citizens equally to enjoy their natural rights

which are defined . . . by our own Declaration of Independence, to be the right to life, liberty and the pursuit of happiness. And it is just because the rebels in the South and their allies in the North, destroy these natural and absolute rights of men by State legislation that this amendment has become a necessity.¹⁵⁰

Contemporaries perceived the Fourteenth Amendment to directly empower federal government to safeguard the human entitlements declared in the nation’s statement of purpose.

For many congressmen, like Representative John F. Farnsworth of Illinois, universal suffrage was needed to put in practice the Declaration’s self-evident truths about republican government.¹⁵¹ The key to self-government was that “all persons, negroes included . . . shall be admitted to a participation in the Government, to a voice in the management of public affairs” in “observance of the principles of the Declaration of

147. *Id.* at 1228 (statement of Sen. Charles Sumner).

148. CONG. GLOBE, 39th Cong., 1st Sess. app. 253 (1866) (statement of Rep. Shelby M. Cullom).

149. CONG. GLOBE, 39th Cong., 1st Sess. 2510 (1866) (statement of Rep. George F. Miller).

150. *A Great Union Meeting of Daviess and Knox Counties, at Wheatland—Speech of Lieutenant Governor Baker on the First Section of the Constitutional Amendment—It Does Not Confer the Right of Suffrage*, INDIANAPOLIS DAILY J., Aug. 15, 1866, at 2.

151. CONG. GLOBE, 39th Cong., 1st Sess. 2539 (1866) (statement of Rep. John F. Farnsworth).

Independence.”¹⁵² For those like Senator Richard Yates of Illinois, who regarded the Reconstruction Amendments to be national statements of human rights, disenfranchisement on the basis of race was illegitimate. The Fourteenth and Fifteenth Amendments were realizations of “the surest way by which we shall accomplish our purpose . . . to assert that which the Constitution of the United States meant to assert. It meant to assert the principles of the Declaration of American Independence.”¹⁵³ Senator Sumner forcefully and emotionally asserted in support of the Fifteenth Amendment that it would restore the safeguards of equal political and civil rights “which by the Declaration of Independence, and repeated texts of the national Constitution, are under the safeguard of the nation” against local prejudices.¹⁵⁴ The widespread sentiment perceived the end of racial discrimination at the ballot box to be essential “to put the great words of the Declaration of Independence in the Constitution itself.”¹⁵⁵ Incoming Vermont Governor Peter Washburn echoed national sentiments in his inaugural address to the state House of Representatives. Washburn asserted that

[adoption of] the proposed Fifteenth Amendment of the Constitution of the United States . . . [would] give reality in fact to the truth enunciated in the Declaration of Independence, and incorporated into the Constitution of Vermont, that ‘all men are created equal,’ and will preserve inviolate the public faith pledged to the National freedmen.¹⁵⁶

Incorporation of the Declaration was the only way to live up to the founding statements of republican government committed to the people’s sovereignty for the protection of their inalienable, equal rights.

152. *Id.* at 3525 (statement of Sen. Willard Saulsbury) (mocking those congressmen who believed that the Declaration was tied to universal suffrage).

153. CONG. GLOBE, 40th Cong., 3rd Sess. 1004 (1869) (statement of Sen. Richard Yates). For a similarly nationalistic understanding of the Declaration of Independence and its applicability to suffrage, see *id.* at 93 (statement of Rep. Benjamin F. Whittemore).

154. *Id.* at 902 (statement of Sen. Charles Sumner).

155. *Id.* at 725 (Statement of Rep. Glenni W. Scofield). See also *id.* at 652 (statement of Rep. Shelby M. Cullom).

156. Peter T. Washburn, Vt. Governor, Inaugural Address (Oct. 16, 1869) (transcript available at the Vermont Secretary of State website), <https://www.sec.state.vt.us/media/49078/Washburn1869.pdf> (last visited Feb. 21, 2016). The governor of Missouri made a similar statement to his state’s senate the day prior to his state’s ratification of the Fifteenth Amendment. See also JOURNAL OF THE SENATE OF MISSOURI AT THE ADJOURNED SESSION OF THE TWENTY-FIFTH GENERAL ASSEMBLY 26 (Jefferson City, Horace Wilcox 1870) (asserting that “humanity and good faith in vindicating the truth that ‘all men are created equal’” required ratification of the Fifteenth Amendment).

CONCLUSION

The Declaration of Independence set republican principles for self-governance. Those ideals existed in the American legal ethos from the nation's founding and were later interpolated into the Constitution through the Reconstruction Amendments. Even in the original Constitution, a variety of clauses are parallel to paragraphs of the Declaration. More importantly, the Constitution built institutions for achieving the representative structure set out in the Declaration. The great failing of the original Constitution was the inclusion of clauses protecting slavery, which were diametrically opposed to the universal statement of rights found in the Declaration. Section 5's supermajority requirement for amending the Constitution made it impossible until the Civil War to bring that document in line with the nation's founding mandate of human equality.

After the Civil War, the nation was reborn. Using the moral compass to reconstruct the country, Radical Republicans secured ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments. The ending of slavery, safeguarding of citizenship, due process and equal protection, and securing of franchise brought the nation more in line with its founding mandate of liberal equality for the common good. Debates on the Reconstruction Amendments make clear that the Declaration's second paragraph is incorporated into the reconstructed Constitution. The values of innate rights and self-government mandated by the Declaration for the nation as a whole are constitutionally binding by this incorporation and should be used as deciding values in cases involving human dignity, such as *Obergefell* and *Arizona Independent Redistricting Commission*.