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THE DECLARATION OF INDEPENDENCE IN CONSTITUTIONAL INTERPRETATION: A SELECTIVE HISTORY AND ANALYSIS

*Charles H. Cosgrove**

. . . it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.¹

I. INTRODUCTION

In 1845, antislavery constitutionalist Lysander Spooner argued that the Declaration of Independence was originally a legal constitution with a direct bearing on how one ought to interpret the status of slavery under the Constitution of 1787.² In 1889, the congressional act establishing the states of North Dakota, South Dakota, Montana, and Washington required that their state constitutions “not be repugnant to the Constitution of the United States and the Declaration of Independence,”³ as if the two documents were of a piece.⁴ In 1995, attorney Christopher Darden argued to the jury in the O.J. Simpson criminal trial that slain victims Nicole Brown Simpson and Ronald Goldman had rights to “life, liberty, and the pursuit of happiness” as stated in the Constitution,⁵ which is perhaps where

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1. *Gulf, Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 160 (1897).

2. See LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 36-39 (1847).

3. *Washington v. Confederated Bands and Tribes of the Yamika Indian Nation*, 439 U.S. 463, 479 n.23 (1979).

4. *See id.*

5. In his rebuttal argument at the close of *People v. Simpson*, Christopher Darden told the jury the following story:

I also looked back at the Constitution last night, I sent my clerk to go get it for me, and I looked through the Constitution, and you know what I saw? I saw some stuff in the Constitution about Ron and about Nicole, and the Constitution said that Ron and Nicole had the right to liberty. It said they had the right to life. It said that they had the right to the pursuit of happiness.

many Americans think this famous phrase is found.⁶ Darden's "mistake" reflects a widespread perception that in some way the Declaration of Independence does embody the principles to which Americans are constitutionally committed. Moreover, that perception is shared by some legal scholars. In fact, throughout American political history, there have been legal scholars, judges, and other interpreters of our Constitution who have contended that the Declaration of Independence has (or deserves) a privileged place in constitutional interpretation.⁷

This study provides a representative history of appeals to the Declaration of Independence in the interpretation of the Constitution, together with a survey and critique of theories about the jurisprudential relationship between these two founding documents. Part II of this article presents examples of appeals to the Declaration of Independence in judicial interpretation. Part III examines three theories of the relation of the Declaration to the Constitution. Part IV proposes that literary critic Frank Kermode's theory of two kinds of "classics" illumines the difference between originalist and non-originalist theories of the authority of the Declaration in constitutional interpretation. Part V suggests that if the Declaration exercises authority in constitutional interpretation, that authority is of a "dialogical" sort.

The Declaration is a "living" document, the authority of which is best captured by the late-modern concept of a classic. On these assumptions, I make a soft claim for the place of the Declaration in constitutional interpretation. The Declaration is an authority not so much for a *particular* understanding of constitutional rights as for construing the equal dignity of each person as a fundamental constitutional value, the meaning of which derives in part from the shared national ethos of "We the

Christopher Darden, Rebuttal Argument in *People v. Simpson*, No. BA097211, 1995 WL 704342, at *5 (Cal. Super. Ct. Tr. Sept. 29, 1995).

The closest constitutional phrase appears in the Due Process Clause of the Fifth Amendment. U.S. CONST. amend. V ("nor [shall any person] be deprived of life, liberty, or property, without due process of law").

6. See Ronald R. Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 35, 132 (1985) (Garet reports that his undergraduates think the Declaration is part of the Constitution).

7. See *infra* Parts II & III.

People," who continue to debate the nature and limits of the rights we regard as basic.

II. A SAMPLING OF APPEALS TO THE DECLARATION IN SUPREME COURT OPINIONS

Over the course of American judicial history, the United States Supreme Court has articulated constitutional rights of liberty⁸ and the pursuit of happiness⁹ as grounded in the Declaration of Independence. The Court has also referred to the Declaration in working out, among other matters, the limits of executive power¹⁰ and military power,¹¹ the origins of national citizenship,¹² the scope of the right of trial by jury,¹³ and the meaning of equality before the law.¹⁴ An examination of a few such uses illustrates the variety of ways in which the Declaration has figured in Supreme Court opinions over the last two hundred years.

A. *The Declaration as the Legal Act of American Independence*

An early example of appeal to the Declaration in judicial adjudication is *Shanks v. Dupont*,¹⁵ where Chief Justice Joseph Story used the Declaration as a legal marker for determining that a woman born in South Carolina (before the ratification of Declaration of Independence), married to an English officer, and returning to England with him after the Revolutionary War to reside there until her death, was a British subject and not an American citizen.¹⁶ The Court would have regarded her as an American citizen had she married a citizen of one of the states

8. See *infra* Part III.C.2.

9. See *infra* Part II.B.

10. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (the Declaration shows that the founders intended to form an executive of limited powers). The Court cited this portion of Jackson's opinion in *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981).

11. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 37 (1866) (citing Declaration for the principle of the subordination of the military to the civil power).

12. See *infra* Part II.A.

13. See *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968).

14. See *infra* Parts V.A-B.

15. 28 U.S. (3 Pet.) 242 (1830).

16. See *id.* at 244-47.

and remained in America, as her sister did.¹⁷ This hypothetical appears to assume the existence of *national* citizenship between the Declaration and the ratification of the Constitution.

In his *Commentaries on the Constitution of the United States*, Story wrote that

[f]rom the moment of the declaration of independence, if not for most purposes at an antecedent period, the united colonies must be considered as belonging to a nation *de facto*, having a general government over it created, and acting by the general consent of the people of all the colonies.¹⁸

Thus, the act of independence created national citizenship, which had no basis in any antecedent form of nationhood. Moreover, Story argued, state sovereignty was limited by the event of independence, from which time Congress had exclusive authority to act in a range of domestic and international spheres.¹⁹

There is another aspect of Story's opinion in *Shanks* that bears on the Declaration's relation to constitutional law. It is not clear that Story had in view the declaration as a document. He may have had in mind only the declaration as an act of separation, distinct from the document that explained and justified the act.²⁰ Even more significant is the fact that the underpinnings of Story's ruling logically require only the legal act of separation on July 2, 1776, and not anything asserted by the document of July 4.²¹ In fact, the document, adopted by the

17. *See id.* at 244.

18. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 110 (abridged ed. 1987).

19. *See id.* (Congress had exclusive authority to "declare war and make peace; authorize captures; to institute appellate prize courts; to direct and control all national, military, and naval operations; to form alliances, and make treaties; to contract debts, and issue bills of credit upon national account.").

20. It happens that the term "declaration of independence" does not appear in Story's opinion with initial capitals. That could mean that he did not intend the document, which goes by the proper name, "The Declaration of Independence," but wished to refer merely to the act of independence. But this evidence is not decisive since we have other examples of judicial reference to the "declaration of independence" (in lower case letters), where the document is clearly in view. *See, e.g., Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 105 (1872).

21. Legal separation was declared by Congress on July 2, two days before it adopted the Declaration of Independence. *See* GARRY WILLS, INVESTING AMERICA:

Continental Congress two days after its declaratory act, could not effect an independence already legally declared; it could only explain it. Hence, one can argue that the document was never a legal instrument but only a piece of political propaganda, which is how Garry Wills interprets its original meaning.²² Nevertheless, as Wills observes, there was an early tendency to collapse the prior act of separation into the July 4 Declaration. "[A]s the Declaration acquired its popularity, it became the custom to misread it as both the first enactment (contained in it) *and* the later explanation—but principally the former!"²³ The language of the Declaration encouraged this. Although speaking technically after the fact, it used the traditional legal formulary for acts of declaration that effect what they announce.²⁴

It may be that Story, too, made no distinction between the July 2 act of separation and the explanatory document adopted on July 4. After *Shanks*, many courts simply assumed that the Declaration of Independence (the document) effected the legal independence of the states. Thus, the Declaration acquired legal significance in the courts for cases requiring, for example, consideration of state rights over the territories,²⁵ the rights of the United States over Indian lands formerly claimed by England,²⁶ and federal versus state power.²⁷

The July 2 declaration was ambiguous from the start since one could construe it as an act making each of the states sover-

JEFFERSON'S DECLARATION OF INDEPENDENCE 336-37 (1978).

22. *See id.* at 333.

23. *Id.* at 337 (emphasis in original).

24. "We, therefore, the Representatives of the United States of America, in General Congress Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by the authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be free and Independent States . . ." THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

25. *See* *Howard v. Ingersoll*, 54 U.S. (13 How.) 381, 398 (1851) (the Declaration of Independence and Revolutionary War created common lands among the states rather than a division of those territories among several states).

26. *See* *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 584 (1823) (the Declaration of Independence transferred title, to newly discovered lands in North America, from Great Britain to the United States).

27. *See* *Smith v. Turner*, 48 U.S. (7 How.) 283, 439-40 (1849) (federal power over naturalization and taxation of immigrants superior to that of states).

eigns or as an act of the united colonies asserting their independence from England and, in so doing, establishing themselves as a nation. As we have seen, Story adopted the latter view. Moreover, with the conceptual merger of the document and the act, the theory that the Declaration created the nation could take on even greater significance, since one might then treat the political doctrine of the Declaration as part of the Constitution that created the nation. That could mean conceiving the Constitution in the English sense of an unwritten constitution to which certain foundational documents attest,²⁸ or conceiving the Declaration as the privileged statement of the political doctrine to which the Constitution is to give effect.²⁹

In the 1850s, the Republican Party used the theory of the nation's birth through the Declaration of Independence to argue that slavery was inconsistent with America's fundamental identity.³⁰ Abraham Lincoln crystallized this sentiment in the Gettysburg Address when he dated the national founding to 1776 ("Four score and seven years ago"³¹) and claimed that this founding committed the nation to "the proposition that all men are created equal."³² Lincoln was not suggesting that slavery was unconstitutional, only that it contradicted America's national identity.³³ Nevertheless, some thought that a political doctrine, although not in the form of a legal provision, could

28. See e.g., Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 932-33, 944 (1995); see also Sanford Levinson, *Pledging Faith in the Civil Religion; or, Would You Sign the Constitution?* 29 WM. & MARY L. REV. 113, 125-26 (1987) (contrasting a "Protestant" view of the Constitution as the actual text of the document with a "Catholic" view of the Constitution as a tradition consisting of that text along with other fundamental American documents, including the Declaration of Independence and the Gettysburg Address); John Stick, *He Doth Protest Too Much: Moderating Meese's Theory of Constitutional Interpretation*, 61 TUL. L. REV. 1079, 1079-80 (1987) ("One can define the constitution as only the words ratified in 1788 along with all amendments, or one can include our broader political traditions: Supreme Court decisions, the Declaration of Independence, and the Gettysburg Address, as well as longstanding institutional accommodations between the executive branch and Congress.").

29. See, e.g., *infra* Parts III.B.1 & 4.

30. See Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMPLE L. REV. 361, 378-83 (1993).

31. ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-1865, at 536 (The Library of America 1989) [hereinafter LINCOLN: SPEECHES AND WRITINGS, 1859-1865].

32. *Id.*

33. See *infra* Part IV.A.

have the force of law if found in or presupposed by a legal instrument.³⁴

B. *Language of the Declaration in Judicial Doctrines*

The language of the Declaration has also figured in the development of specific constitutional doctrines. As Robert Post observes, “doctrinal interpretation” of the Constitution assumes that the Constitution has authority as *law*, meaning a rule that is stable and reliable.³⁵ Accordingly, doctrinal interpretation adheres to the principle of *stare decisis*, elaborating the Constitution by attending to the precedential chain of cases that define the state of the law.³⁶ Hence, doctrinal interpretation implies that “the actual text of the Constitution is remitted to one end of a growing line of precedents.”³⁷ What binds is not the text *per se* but the current tests which have evolved through that line of precedents.³⁸ It follows that the only authority that the language or political theory of the Declaration of Independence might possess for doctrinal interpretation of the Constitution is an authority it enjoys within the chain of precedent.

One way in which the Declaration of Independence has figured in doctrinal interpretation of the Constitution is through the development of doctrines formed around certain key phrases of the Declaration. A notable example is the expression, “the pursuit of Happiness.”³⁹

34. This was the position of the antislavery constitutionalists. See, e.g., SPOONER, *supra* note 1, at 43–44 (arguing that self-evident truths have legal force, even when not expressly stated in the Constitution). Spooner also treated declarations of natural rights found in constitutions as having legal force. See *id.* at 46–48.

35. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 30–31 (1995).

36. See *id.*

37. *Id.* at 31.

38. Referring to the Establishment Clause, Post observes that

[e]ven if the very first judicial decision to interpret the establishment clause had concentrated its attention on the specific words of the clause or the intentions of its Framers, the practice of doctrinal interpretation would require the second decision to focus chiefly on the meaning of the first decision, the third decision chiefly on the meaning of the second, and so forth.

Id. at 31–32.

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

There is a practical illustration of this theory in the *Slaughter-House Cases*.⁴⁰ In 1869, the Louisiana legislature passed an act granting a twenty-five year monopoly to the Crescent City Livestock Landing and Slaughterhouse Company ("Crescent City") for the sheltering and slaughtering of animals.⁴¹ The ostensible purpose of the statute was to protect the health of the public by confining the slaughtering of animals to a single corporation and the limited locales assigned to it.⁴² But an effect of the act was that other butchers in the New Orleans area had no other choice but to pay for slaughtering at the Crescent City abattoir.⁴³ It appears that, as a result, the livelihoods of a "thousand butchers" were jeopardized.⁴⁴ The butchers challenged the legislation on the grounds that it violated the Thirteenth Amendment and the Privileges and Immunities, Due Process, and Equal Protection clauses of the Constitution.⁴⁵

The United States Supreme Court upheld the statute, but the decision was split 5-4.⁴⁶ In what would become the first of a series of influential dissents, Justice Field defended the butchers' right to practice their trade, arguing that the Fourteenth Amendment "was intended to give practical effect to the declaration of 1776," in which "the pursuit of happiness" appears as one of those rights that "the law does not confer, but only recognizes."⁴⁷ The pursuit of happiness, Field urged, entailed the right to follow any of the ordinary occupations of life.⁴⁸ Hence, the state statute granting a monopoly to a favored few butchers violated the constitutional right of other butchers to pursue their chosen occupation.⁴⁹

40. 83 U.S. (16 Wall.) 36 (1872) (Field, J., Bradley, J., and Swayne, J., dissenting).

41. *See id.* at 59-60.

42. *See id.* at 59.

43. *See id.* at 59-60.

44. *See id.* at 88-89.

45. *See id.* at 66.

46. *See id.* at 111.

47. *Id.* at 105.

48. *See id.* at 105-06.

49. *See id.* In 1879, the Louisiana legislature repealed the act, and Crescent City, maintaining that this repeal was a breach of the original legislative contract, sought an injunction against slaughterhouses that had resumed business. *Butchers' Union Slaughter-House*, 111 U.S. 746 (1884), was decided against Crescent City, with Justices Field and Bradley writing separate concurring opinions in which they invoked the Fourteenth Amendment as protecting the rights enumerated by the Declaration of

Field's laissez-faire theory of the law gained constitutional currency toward the end of the nineteenth century when "the rejected dissents of Mr. Justice Field gradually established themselves as the views of the Court."⁵⁰ In this way, the doctrine of substantive due process was born with a particular construal of the Declaration's natural rights philosophy serving as its content. This meant reading the Due Process clause as an enactment of the rights theory of the Declaration of Independence. However, no part of the text of the Declaration was incorporated into the Constitution as law except in the attenuated sense that the phrase "pursuit of happiness" came to stand for a constitutional doctrine.

The rhetorical device by which bits of the Declaration have come to stand for constitutional doctrines is synecdoche, a part standing for a whole (e.g., "daily bread," where bread stands for the meal as a whole).⁵¹ But in this case, the part (the right to the pursuit of happiness) stands not for the original whole to which it belonged (the political tenets of the Declaration of Independence) but for a new whole, to which it has been relocated. That new whole is the constitutional doctrine of laissez-faire that we associate with the *Lochner* era.⁵² Moreover, Field's opinion would inspire litigants in the first half of the twentieth century to mine the "pursuit of happiness" doctrine for other specific rights, including "opium smoking, carrying a pistol, the sale of liquor by municipalities, the use of trading stamps, the sale of contraceptives, the spraying of citrus fruit, the sterilization of imbeciles, and the licensing of plumbers."⁵³

In *Loving v. Virginia*,⁵⁴ the United States Supreme Court struck down an anti-miscegenation law in part on the ground that "freedom to marry has long been recognized as one of the

Independence, including a right under "the pursuit of happiness" to engage in the common occupations. See *id.* at 754-66 (Field, J. and Brady, J. concurring).

50. Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121, 141 (1927).

51. See, e.g., J.A. CUDDEN, A DICTIONARY OF LITERARY TERMS 676-77 (rev. ed. 1976).

52. See, e.g., PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* (1990).

53. HOWARD MUMFORD JONES, THE PURSUIT OF HAPPINESS 47 (1953) (citations omitted).

54. 388 U.S. 1 (1967).

vital personal rights essential to the orderly pursuit of happiness by free men.⁵⁵ This formulation recalled the Court's language in *Meyer v. Nebraska*,⁵⁶ where the Court also found a Due Process right to freedom of marriage.⁵⁷ *Meyer* cited the *Slaughter-House Cases* and *Butchers' Union*.⁵⁸ Liberty, said the Court,

denotes not merely freedom from bodily restraint but also 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.⁵⁹

Meyer did not identify where in the older common law one might find a general right to pursue happiness. Certainly the concept was not original to the Declaration of Independence. The phrase "the pursuit of happiness" and similar formulations were widely used before Jefferson,⁶⁰ who himself claimed he was setting down common sense opinions.⁶¹ But since the *Meyer* Court did not adduce a history of the formulation in common law, it probably meant that the common law, by protecting various personal liberty interests, had, in effect, recognized a general right to the pursuit of happiness. By the time of *Meyer*, that right was most closely associated in American law with the Declaration of Independence. Moreover, the prestige of the Declaration necessarily attaches to that right both in *Meyer* and in the some 160 other federal cases in which the expression "orderly pursuit of happiness" appeared.⁶² In these cases, the courts have developed an evolving concept of the right to pursue happiness. The Declaration supplies not the

55. *Id.* at 12.

56. 262 U.S. 390 (1923).

57. *See id.* at 399.

58. *See id.* (citations omitted).

59. *Id.*

60. *See* WILLS, *supra* note 21, at 240-47.

61. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in THOMAS JEFFERSON: WRITINGS 1501, (MERILL D. PETERSON ED., 1984).

62. According to a natural language search for the phrase "orderly pursuit of happiness" on WESTLAW for ALLFEDS and ALLFEDS-OLD.

conception but the mere phrase concept backed by the Declaration's authority as a national symbol.

III. THEORIES OF THE RELATION OF THE DECLARATION TO THE CONSTITUTION

A number of nineteenth and twentieth century constitutional interpreters have theorized about the place of the Declaration in constitutional law. We can also tease out implicit theories from certain appeals to the Declaration in constitutional interpretation. These theories range from claims that the Declaration is itself a kind of fundamental or constitutional law to claims that the Declaration sets forth principles that should guide constitutional interpretation. We will begin by examining the idea of the Declaration as law.

A. *The Declaration as Law*

We noted that the courts initially treated the Declaration as law in one specific sense, that is, as the legal act severing the states from the British crown. A strand of constitutional interpretation eventually developed that accorded the Declaration a much more expansive status as law. Some antislavery advocates argued that the political doctrines expressed in the Declaration had the status of law.

During the antebellum period, the antislavery movement divided into three camps over differing interpretation of the Constitution. Followers of William Lloyd Garrison and the American Antislavery Society denounced the Constitution as "a covenant with death" and "an agreement with hell."⁶³ Other abolitionists took a more moderate view, contending that the constitutional provisions sheltering slavery were necessary compromises that conflicted with the Constitution's principal commitments to liberty and equality, and that the Constitution (and the Supreme Court's interpretations of it) could be used in modest ways to combat or at least limit slavery and its attendant laws and practices.⁶⁴ Finally, the radical antislavery

63. See WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848*, at 228 (1977).

64. See generally *id.* at 202-27; Paul Finkelman, *Prigg v. Pennsylvania and*

constitutionalists contended that the Constitution, properly construed, was antislavery, that it permitted slavery only as a temporary expedient, and that it gave Congress the power, at least after 1808,⁶⁵ to abolish slavery in all the states.⁶⁶

1. *Commonwealth v. Aves*

A famous 1863 case reflects the efforts of a moderate anti-slavery constitutionalist judge to limit the claims of slave owners in the non-slaveholding state of Massachusetts. *Commonwealth v. Aves*⁶⁷ involved a slave girl voluntarily brought into the State of Massachusetts by her master's wife. The case is intriguing, although also murky, in its conception of the Declaration as law in relation to the states as sovereigns and as constitutionally-bound subjects of an American nation.

In *Aves*, Chief Justice Lemuel Shaw, writing for the Supreme Judicial Court of Massachusetts, ruled on whether a citizen of a slaveholding state, who brings a slave into Massachusetts with the intention of returning with the slave to the slaveholding state, can restrain the slave for that purpose.⁶⁸ Shaw held that the slave owner had no such authority.⁶⁹ In reaching this decision, Shaw considered the status of slavery under Massachusetts law and in other jurisdictions,⁷⁰ the obligations of comity between the states,⁷¹ and whether the Fugitive Slave Clause of the United States Constitution⁷² required Massachusetts to honor the slave owner's claim on a slave who had not escaped but was brought freely into Massachusetts by the slave owner.⁷³ Shaw found that slavery was abolished in Massachusetts before the adoption of the Constitution.⁷⁴ Shaw speculated that

Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision, 25 CIVIL WAR HISTORY 5 (1979).

65. The Constitution provides that Congress shall not prohibit the importation of slaves into the United States prior to 1808. U.S. CONST. art. I, § 9.

66. See WIECEK, *supra* note 63, at 255, 270-71.

67. 35 Mass. (18 Pick.) 193 (1836).

68. See *id.* at 207.

69. See *id.* at 224.

70. See *id.* at 207-17.

71. See *id.* at 217-18.

72. See U.S. CONST. art. IV, § 2, amended by U.S. CONST. amend. XIII, § 1.

73. See *Aves*, 35 Mass. (18 Pick.) at 218-24.

74. See *id.* at 208.

slavery may have been abolished, by the State's adoption of the English common law ruling in *Somerset's case*,⁷⁵ by the Declaration of Independence,⁷⁶ or by the declaration of rights contained in the Massachusetts constitution of 1780.⁷⁷

Shaw's speculation that the Declaration of Independence may have abolished slavery in Massachusetts is remarkable since the Declaration was an act of the confederated colonies, some of which were and remained slaveholding. Nevertheless, Shaw did not mean that the Declaration may have abolished slavery in *all* the states, since he recognized slavery as legal in the slave states.⁷⁸ It is, therefore, unclear exactly how Shaw conceived the Declaration as having a different effect on slavery in Massachusetts than in Louisiana or Virginia. Shaw may have assumed that each of the states, as sovereigns,⁷⁹ had the right to appropriate the Declaration of Independence for itself, according to its own interpretation of the import of that document, for its own law. One state could not impose an interpretation of the Declaration on another state; the judiciary of each state would have the right to determine the legal significance of the Declaration for its state and its state alone.

In deciding *Aves*, however, Shaw found no need to rule on whether the Declaration abolished slavery in Massachusetts because he was able to construe the Massachusetts constitution as having abolished slavery in Massachusetts.⁸⁰ Interestingly, Shaw arrived at this conclusion by construing a portion of the constitution's *political* language, cast in indicative statements,⁸¹ because there were no express formulations abolishing slavery in the Massachusetts constitution. As quoted by Shaw, the relevant political language read as follows: "All men are born free and equal, and have certain natural, essential, and unalienable rights, which are, the right of enjoying and defending their lives and liberties, that of acquiring, possessing, and

75. See *id.* at 209. Shaw was referring to *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772) (holding that a slave became free when he was brought by his master into England, where slavery had not been established by positive law).

76. See *Aves*, 35 Mass. (18. Pick.) at 209.

77. See *id.*

78. See *id.* at 217.

79. See *id.* at 220.

80. See *id.* at 209-10.

81. See *id.* at 210.

protecting property."⁸² The similarity between this political exordium and that of the Declaration of Independence, together with Shaw's willingness to treat such a prefatory statement of political doctrine in a legal instrument as legally binding, probably explains Shaw's speculation that the Declaration of Independence itself may have abolished slavery in Massachusetts in 1776.⁸³

2. The Declaration in the Antislavery Constitutionalism of Alexander Spooner

Radical antislavery constitutionalists argued that a proper reading of the Constitution indicated that slavery was unconstitutional⁸⁴ and claimed that the Declaration had an independent standing as law that the Constitution did not supersede, but rather incorporated.⁸⁵

An example of such antislavery constitutionalism can be found in the jurisprudence of Lysander Spooner who contended that the Declaration of Independence was a legal constitution.⁸⁶ Moreover, Spooner argued that if the Declaration was law, its principles were also law.⁸⁷ Therefore, if the Declaration was lawful "even for a day," it freed every slave in America.⁸⁸

82. *Id.* at 210. An earlier Massachusetts case had already appealed to this same language to make the same argument. See WIECEK *supra* note 63, at 46-47 (citing *Commonwealth v. Jennison* (1783, unreported)). The relevant portion of the opinion in this case is reproduced in PAUL FINKLEMAN, *THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK* 36-37 (1986).

83. Evidently, Chief Justice Shaw did not subscribe to the view that the Declaration of Independence and the preamble to the Constitution cannot be law because they do not command. Others have taken the position that political preambles to constitutions and statutes have no force as law. See, e.g., Patrick M. O'Neil, *The Declaration as Ur-Constitution: The Bizarre Jurisprudential Philosophy of Professor Harry V. Jaffa*, 28 AKRON L. REV. 237, 239 (1995) (reviewing HARRY V. JAFFA, *ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION* (1994)) ("Laws often have prefatory statements prefixed to them, but no necessary logical relationship exists between the facts and values asserted in any preamble and the contents of the law it introduces.") (emphasis omitted)).

84. See generally WIECEK, *supra* note 63, 249-75.

85. See *id.* at 264-65.

86. See SPOONER, *supra* note 2, at 42.

87. See *id.*

88. *Id.* at 37.

Spooner assumed that law is fundamentally natural law.⁸⁹ He also appears to have thought that once natural law was converted into positive law (enacted law), the intentions of the natural law itself should control, not the intentions of the drafters or ratifiers. Spooner nowhere argues this explicitly, but it seems to be the implication of the force he gives to the principles of natural law and the explicitly textualist (nonintentionalist) hermeneutic that he adopts from Chief Justice John Marshall's opinion in *Ogden v. Saunders*.⁹⁰

In *Ogden*, Marshall wrote that in construing the Constitution, "the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in the sense that they are *generally used* by those for whom the instrument was intended."⁹¹ Spooner theorized that if the language of natural law is made part of a legal instrument, the conventional understanding of that language should control and not any contrary intentions that the drafters may have had. Seen in this light, the Declaration was the occasion for the egalitarian principles of natural law to gain a foothold in the enacted law of the nation created by the Declaration, regardless of whether its drafters or signers intended it to have any effect on slavery. This logic would explain Spooner's contention that, regardless of the intentions of the founders, the Declaration freed every slave in America and the Constitution never revoked this legal emancipation, despite the fact that this law of the Declaration went unenforced.

Spooner further defended the widespread view that slavery, as against natural law, cannot lawfully exist except by express positive law.⁹² He argued accordingly that those who defend

89. According to Spooner, natural law is the paramount law, and there can be no law, properly speaking, that is not natural law. See *id.* at 8; see also 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 2 at 63 (William Carey Jones ed., 1916) (The natural law is "superior in obligation to any other. [N]o human laws are of any validity, if contrary to this."). Walter Murphy observes that other statements by Blackstone are not entirely consistent with his position that natural law supersedes any enacted law contradicting it. See Walter F. Murphy, *The Art of Constitutional Interpretation: A Preliminary Showing*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 130, 139 (M. Judd Harmon ed., 1978).

90. 25 U.S. (12 Wheat) 213 (1827).

91. See SPOONER, *supra* note 2, at 82 (citing *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (emphasis in original)).

92. See *id.* at 70. Spooner specifically stated:

the constitutionality of slavery must show that, after the adoption of the Declaration (which freed the slaves), the Constitution expressly established slavery.⁹³ Without such an express establishment, slavery, as against natural law, is unconstitutional.

3. The Declaration in the Antislavery Constitutionalism of George Anastaplo

Today, few find any merit in the antislavery constitutionalists' interpretation of the Constitution.⁹⁴ But George Anastaplo⁹⁵ has recently defended the view that the Constitution of 1787 was indeed inherently antislavery in its aspirations, if not directly antislavery in its provisions. According to Anastaplo, the Declaration of Independence and other founding documents and traditions embody a constitutional tradition that gives the Constitution its intended meaning.⁹⁶ Thus, from the 1774 adoption of the Articles of Association until the adoption of the Constitution, Americans conducted themselves according to a "constitutional system implicit in the Declaration of Independence."⁹⁷ Furthermore, the Constitution incorporated the basic principles of the Declaration, including the theory that government derives its authority from the consent of the governed and has as its end the protection of inalienable human

The rule of law is materially different as to the terms necessary to legalize and sanction any thing contrary to natural right, and those necessary to legalize things that are consistent with natural right. The latter may be sanctioned by implication and inference; the former only by inevitable implication, or by language that is full, definite, express, explicit, unequivocal, and whose *unavoidable* import is to sanction the *specific wrong* intended.

Id. (emphasis in original).

93. *See id.* at 43.

94. For a recent argument that the Constitution of 1787 was unambiguously a proslavery compact, see PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 1-33 (1996). Wiecek takes a more moderate view, arguing that while the Constitution included provisions for the protection of slavery, its overall approach to slavery was ambiguous and susceptible to antislavery interpretations. *See* WIECEK, *supra* note 63, at 17, 18, 247-48.

95. *See* GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* (1989).

96. *See id.* at 11 (Along with the Declaration, this larger constitutional tradition includes the Articles of Confederation, statutes enacted under the Articles (such as the Northwest Ordinance), the British Constitution, and the common law.).

97. *Id.* at 3.

rights.⁹⁸ Hence, “[t]he Constitution of 1787 can plausibly be taken . . . as an incarnation of the principles revealed in the Declaration of Independence.”⁹⁹

Anastaplo recognized that the Constitution of 1787 was “deeply flawed” in its compromise with slavery; yet it contained principles that were antislavery and granted powers that could be marshaled to the ultimate extinction of slavery.¹⁰⁰ The Constitution was inherently antislavery in its commitment to the Declaration’s vision of human equality and republican government.¹⁰¹ Moreover, the Commerce Clause granted Congress the power (after 1808¹⁰²) to curtail slavery to the point of extinction.¹⁰³ The original powers of the Commerce Clause were sufficient to regulate the incoming slave trade, the slave trade between the states, and the general influence of slavery on the commercial life of the nation.¹⁰⁴ From this interpretation of the principles of the Constitution and the powers it confers on Congress, one can infer that the non-use of these powers to break up the institution of slavery owed more to the bad faith of the American people than to any inherent constitutional restraints. If I understood Anastaplo correctly, he thinks that slavery might have been abolished without any constitutional amendments.

We can better assess Anastaplo’s interpretation of the original Constitution by conducting the following experiment in thought. Suppose that a majority of the slave states had, by the

98. *See id.* at 14, 22.

99. *Id.* at 22.

100. *Id.*

101. *See id.* at 177. In this regard, Anastaplo wrote:

It was no accident then that the decided majority of the people shaped by the Constitution of 1787 should have become, if they were not from the outset, so “dedicated to the proposition that all men are created equal” that they were eventually willing and able to make great sacrifices in behalf of strangers among them held in bondage by fellow citizens whose material interests had blinded them to their ancient republican faith.

Id.

102. *See ANASTAPLO, supra* note 95, at 64.

103. *See id.* at 64–65.

104. *See id.* at 64. Among Anastaplo’s arguments is the contention that the twenty-year international slave trade guarantee implies a broad commerce power. The clause should be read as a curtailment of a power that was merely to lie dormant until 1808. *See id.* at 64–65.

1850s, abolished slavery of their own accord. Suppose further that the presidency during the antebellum years had been dominated not by proslavery or slavery-indifferent executives and congressional leaders, but by antislavery presidents and legislators, and that the Supreme Court during those same years had likewise been dominated by antislavery justices.¹⁰⁵ Suppose as well, that the phrase "We the People" had embraced the theory that the Declaration be treated as the privileged guide to the theory of government enshrined in our Constitution. Suppose finally, that only one or two intransigent states remained slaveholding by 1855.

Under these historical conditions, had Congress enacted legislation effectively abolishing slavery in all the states, the Supreme Court could have mustered the requisite constitutional arguments to uphold that legislation against attack by the holdout states. What appeared at the time like farfetched constitutional arguments by the radical antislavery would have been far more plausible and compelling had they been made under the radically different historical conditions we have just fantasized. Anastaplo's original Constitution is the unrealized potential of the Constitution in just such a world that might have been, but was not.

B. The Declaration in Originalist Interpretation of the Constitution

Current debate about the use of the Declaration in constitutional interpretation has been provoked largely by theorists advocating an originalist hermeneutic.¹⁰⁶ Originalism assumes that the binding sense of the Constitution is the original mean-

105. On the domination of pro-slavery interests in the Executive Office, Congress, and the Supreme Court during the antebellum period, see WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS* 13 (1996).

106. See WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* (1987); SCOTT D. GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (1995); JAFFA, *supra* note 83. An originalist approach apparently also informs Dennis J. Mahoney's argument that the Declaration is foundational to the Constitution. See Mahoney, *The Declaration of Independence as a Constitutional Document*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 54-68 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

ing of its text or the intentions of those who framed and adopted it.¹⁰⁷ Robert Post suggests that this assumption in turn presupposes "the equation of constitutional authority with consent."¹⁰⁸ The authority of the Constitution is the compact between the people when they adopted the Constitution.¹⁰⁹ Thus, originalists regard this original agreement as constitutionally binding in the way a promise is binding. For some, the original terms of the constitutional compact reside in the text itself, for others in the original public understanding of its language, and for still others in the intentions of its framers.¹¹⁰

In 1987, then Attorney General Edwin Meese rallied conservatives to originalism in a highly publicized speech to the American Bar Association.¹¹¹ Some of those who today advocate interpreting the Constitution in the light of the Declaration share Meese's views about method in constitutional interpretation, even if they do not reach the same conservative results that he does. One such person is Harry Jaffa.

1. The Originalism of Harry Jaffa¹¹²

Jaffa agrees with Meese that the Constitution lies in its original intent, but he disputes Meese's conception and construction of that intent.¹¹³ According to Jaffa, the original intent of the founders are the moral and political principles that guided them (their general intent), not "their personal judgment about contingent matters."¹¹⁴ The Declaration of Independence states these principles.¹¹⁵ Moreover, unlike other statements of the founders' philosophy, the Declaration is a privileged authority for establishing constitutional principles because it is "the

107. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

108. POST, *supra* note 35, at 32.

109. See *id.*

110. See *id.* at 33.

111. See Edwin Meese III, *Interpreting the Constitution*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 13 (Jack N. Rakove ed., 1990).

112. Jaffa's most important essays on constitutional jurisprudence are gathered in JAFFA, *supra* note 83.

113. See *id.* at 55-73.

114. *Id.* at 42.

115. See *id.* at 23, 43.

fundamental legal instrument attesting to the existence of the United States."¹¹⁶ As such, the Declaration identifies and authorizes the constitutional subject; "We the people of the United States."¹¹⁷ Hence, the Declaration is "the most fundamental dimension of the law of the Constitution."¹¹⁸ According to Jaffa, the core philosophy of the Declaration is a republicanism based on belief in universal equality and natural rights, indicating that the original Constitution was fundamentally committed to equality and opposed to slavery.¹¹⁹ The Constitution's provisions for slavery gave that institution only "a temporary security."¹²⁰ Hence, one must distinguish the principles of the Constitution from its prudential compromises.¹²¹ Jaffa wants judges to interpret the Constitution in the light of the human rights philosophy of the founders and, thus, to act as checks on legislatures when legislative acts violate fundamental rights.¹²² Jaffa, however, opposes modern liberal judicial activists, such as William Brennan, because they do not show fidelity to the natural law views of the founders.¹²³

2. Jaffa and *Dred Scott v. Sandford*

Jaffa contends that the fathers of conservative originalism are Southern statesman John C. Calhoun and Chief Justice Roger B. Taney.¹²⁴ In examining Taney's infamous opinion in *Dred Scott v. Sandford*,¹²⁵ Jaffa treats Taney as an originalist who sought the meaning of the Constitution's attitude toward slaves through his mistaken interpretation of the Declaration of

116. *Id.* at 23.

117. *Id.*

118. *Id.* Similar claims are made by Lewis Lehrman in a foreword to a collection of Jaffa's essays. See Lewis Lehrman, *On Jaffa, Lincoln, Marshall, and Original Intent*, in JAFFA, *supra* note 83, at 4. Lehrman argues that the appearance of the Declaration at the head of the statutes-at-large of the U.S. Code attests its status as the primary document of the organic law of the United States. See *id.* at 4-5.

119. See JAFFA, *supra* note 83, at 39-43, 67-71.

120. *Id.* at 43.

121. See *id.* at 28-29, 293-94.

122. See *id.* at 62.

123. See *id.* at 41, 49, 62.

124. See *id.* at 13-14, 16, 22, 26-28. For a lucid summary of Jaffa's views on this point, see Bruce D. Ledewitz, *Judicial Conscience and Natural Rights: A Reply to Professor Jaffa*, in JAFFA, *supra* note 83, at 110-111.

125. 60 U.S. (19 How.) 393 (1856).

Independence.¹²⁶ A close look at Taney's opinion, however, suggests that he was not an originalist and did not regard the Declaration as decisive for constitutional interpretation.

In *Dred Scott*, the Taney Court addressed two questions. First, the court addressed whether a slave had standing to sue for his freedom, where the slave was carried by his Missouri master into a free state, was then taken by his master two years later from that free state into one of the territories where slavery was forbidden by the Missouri Compromise, and who subsequently was brought by his master back to Missouri.¹²⁷ Second, the Court addressed whether that slave could claim his freedom on the ground that he became free when he entered the free territory.¹²⁸

Before we consider the place of the Declaration in Taney's argument, we must examine Taney's interpretation of the Declaration. Taney maintained that by using the phrase "all men are created equal," the framers of the Declaration had in view only those individuals belonging to civilized governments, thereby excluding Africans as uncivilized peoples.¹²⁹ Taney further contended that the framers "perfectly understood the meaning of the language they used, and how it would be understood by others."¹³⁰ He conceded, however, that the words themselves "would seem to embrace the whole human family" and "if they were used in a similar instrument at this day would be so understood."¹³¹ This concession admitted too much. Long before Taney and Jefferson, the English language used the generic term "man" to denote the human being as such, not some narrow class of so-called civilized persons. If Taney was correct about the intentions of the framers, then perhaps they spoke too extravagantly; thinking of persons like themselves—and not of blacks—they intoned the equality of "all men." If the framers did not say what they meant, then the Declaration itself carried a meaning beyond the framers' intent.¹³²

126. See JAFFA, *supra* note 83, at 27.

127. See *Dred Scott*, 60 U.S. (19 How.) at 400, 403, 430-32.

128. See *id.*

129. See *id.* at 410.

130. *Id.*

131. *Id.*

132. One could say that the founders' language carries a "public meaning." Under-

Taney also elided an important logical distinction between the premises of the Declaration's assertion of independence and that assertion itself. "[I]t is too clear for dispute," he wrote, "that the enslaved African race were not intended to be included and formed no part of the people who framed and adopted this declaration. . . ."¹³³ Nevertheless, whoever "the people" were who were referred to in the Declaration, they asserted universal human equality as the premise of their right to independence.

We turn now to consider how Taney conceived the relevance of the Declaration to the case of *Dred Scott*. Taney appealed to the Declaration in the first part of his opinion, where he addressed the question of Dred Scott's standing to sue in federal court. In order to bring suit, Scott had to be a citizen of the United States within the meaning of the Constitution.¹³⁴ To show that Scott was not a citizen of the United States, Taney argued that slaves did not become citizens of the United States at the adoption of the Constitution and that there had been no change in the status of slaves since the Constitution's adoption.¹³⁵ Taney's proof led him to examine the assumptions of the framers, and of (white) Americans generally, about the identity of the people who declared themselves independent from the British crown in 1776 and united under the constitution of 1787.¹³⁶ His comments about the Declaration served this inquiry. Taney's discussion of the founders, however, was only the first step in an argument he carried forward in time to show that no different understanding of blacks or of citizenship had evolved in the history of constitutional interpretation to offset the original understanding.¹³⁷ An originalist would not find it necessary to make that sort of argument. Moreover, unlike Jaffa, Taney did not treat the Declaration as having any *legal* force in constitutional interpretation. Taney appealed to

stood according to conventional linguistic conventions, it asserts a universal equality that is not racialized, although it may be gender focused.

133. *Dred Scott*, 60 U.S. (19 How.) at 410.

134. *See id.* at 406.

135. *See id.* at 406-27.

136. *See id.*

137. *See id.*

the Declaration as no more than a piece of relevant historical evidence about the founders' intentions in framing the Constitution.

3. The Originalism of Walter Berns

Walter Berns also adopts an originalist approach in arguing that the Declaration should enjoy a determinative place in constitutional interpretation. Berns highlights the promissory or contractual vision of the Constitution. Taking a cue from James Madison, Berns distinguishes two American compacts: one an original and unwritten compact and another, the Constitution, following as a second written instrument of the original compact.¹³⁸ In Berns's scheme, the Declaration is not itself a compact but has a privileged status as the explanation of the unwritten original compact.¹³⁹ This relation between the Declaration and the original contract warrants interpreting the Constitution "by reference to the Declaration."¹⁴⁰

Berns quotes with approval some remarks by Abraham Lincoln on the relation between the Declaration and the Constitution:

The *expression* of that principle [liberty to all], in our Declaration of Independence, was most happy, and fortunate. . . . The assertion of that *principle*, at *that time*, was *the word*, "*fitly spoken*" which has proven an "apple of gold" to us. The *Union*, and the *Constitution*, are the *picture of silver*, subsequently framed around it. The picture was made, not to *conceal*, or *destroy* the apple; but to *adorn*, and *preserve* it. The *picture* was made *for* the apple—*not* the apple for the picture.¹⁴¹

According to Berns, explaining the Constitution by reference to the Declaration requires interpreting the original intent of the

138. See BERNs, *supra* note 106, at 24–26.

139. See *id.* at 23–25 (writing that the Declaration, as organic law, defines the political constitution of the people who formed the first unwritten compact).

140. *Id.* at 11.

141. *Id.* at 18–19 (quoting Abraham Lincoln, *Fragment on the Constitution and the Union*, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 169 (Roy P. Basler ed., 1953) (all emphases in original)). Lincoln's extended metaphor plays on the trope of *Proverbs* 25:11.

Constitution from the original intent of the Declaration as a statement of classical liberal philosophy of a Lockean and Hobbesian variety.¹⁴² The resultant constitutional intent entails recognition of fundamental natural rights, among which are the rights of self-government,¹⁴³ freedom of conscience,¹⁴⁴ and property.¹⁴⁵ Using this approach, Berns also defends a conservative agenda for a limited judiciary. Specifically, he supports curtailment of what he sees as a liberal judicial activism that converts certain liberal values and interests into constitutional rights, thus subverting the democratic process.¹⁴⁶

4. The Originalism of Scott Gerber

According to Scott Gerber, the correct politics of constitutional interpretation is the natural law philosophy of the founding era.¹⁴⁷ More specifically, the Constitution should be construed in the tradition of the natural law philosophy "expressed with unparalleled eloquence . . . in the Declaration of Independence."¹⁴⁸ The Constitution is the instrument designed to achieve the ends announced by the Declaration,¹⁴⁹ namely, "to secure natural rights."¹⁵⁰

Gerber quotes with approval Felix Frankfurter's remark that constitutional interpretation "is not at all a science, but applied politics."¹⁵¹ Gerber, therefore, calls for a liberal originalist¹⁵² approach to the Constitution guided by what Gerber takes to be the classical (Lockean) liberalism of the founders.¹⁵³ The importance of that liberal philosophy in constitutional adjudication owes to the generality of the language of the Constitution. For

142. See BERNs, *supra* note 106, at 161, 241, 246.

143. See *id.* at 152.

144. See *id.* at 160-61.

145. See *id.* at 225-26.

146. See *id.* at 204-08, 229-30.

147. See GERBER, *supra* note 106, at 2-3.

148. *Id.* at 7.

149. See *id.* at 59.

150. *Id.* at 6.

151. *Id.* at 2 (quoting Felix Frankfurter, *The Zeitgeist and the Judiciary*, in LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913-1938, at 3, 6 (Archibald Mac Leish and E.F. Prichard, Jr. eds., 1939)).

152. See *id.* at 6-8.

153. See *id.* at 23-56.

example, the First Amendment provision that "Congress shall make no law respecting an establishment of religion," the Eighth Amendment's prohibition against "cruel and unusual punishments," the Fourteenth Amendment's guarantee of "equal protection of the laws," and many other constitutional phrases are ambiguous.¹⁵⁴ "They can be given meaning and life," Gerber explains, "only when they are construed in light of the moral and political principles upon which they are based."¹⁵⁵

Gerber justifies his brand of originalism in basically three steps. First, the original natural rights philosophy is an appropriate context to give specific content to the generalities of the Constitution.¹⁵⁶ Second, any other interpretative context or framework (*e.g.*, a modern liberal theory) is inappropriate because the choice of any different context must necessarily be subjective.¹⁵⁷ Third, given that subjectivity, it does not seem fair, and is contrary to the founders' original intent, that "unelected and life-tenured judges" should read their own modern political and moral philosophy into the Constitution.¹⁵⁸ In short, the problem with modernization is that it "is uncontrolled by the text of the Constitution and the political philosophy upon which the text and this nation are based."¹⁵⁹

5. A Critique of the Originalism of Jaffa, Berns, and Gerber

The approaches of Jaffa, Berns, and Gerber suffer from three weaknesses. First, they fail to adequately defend an originalist method of constitutional interpretation. Second, each has a tendency toward historical oversimplification. Third, they all make naive assumptions about the nature of interpretation.

Jaffa makes no defense of an originalist methodology, perhaps because his purpose is to persuade originalists to a different conception of originalism.¹⁶⁰ According to Gerber, the basic

154. *Id.* at 7.

155. *Id.*

156. *See id.* at 6-7.

157. *See id.* at 8.

158. *Id.*

159. *Id.* at 9.

160. The title of Jaffa's book, ORIGINAL INTENT, and the title of the main essay of that book, *What Were the Original Intentions of the Framers of the Constitution of the*

appeal of originalism is that it alone "can give us law that is something other than, and superior to, the judge's will."¹⁶¹ In this way, originalism is supposed to honor the democratic process. Gerber never explains how originalism respects democracy if the current generation must be bound to the political philosophy of a long extinct generation of founders.¹⁶² Nor does Gerber show that the founders' philosophy is in fact "the political philosophy upon which the text and the nation are based."¹⁶³

Berns comes closer to articulating the assumptions of the originalist approach by speaking of the Constitution as a contract. But he also fails to explain why this contract, whose authorial subject is a "We the People" existing across many generations, must be construed strictly in terms of the original intents of the founding generation. Even when dealing with a contract made between living parties, intent does not always control. Where there is a conflict of interpretations, a court may resort to other considerations, such as standards of reasonableness, conventional linguistic usage, fair play, public interest, and so forth.¹⁶⁴

The originalism of Jaffa, Berns, and Gerber also tends toward oversimplification in historical reconstruction. Their common claim that the Declaration is a Lockean document obscures the complexity of influences on not only Jefferson as drafter but on the Congress that adopted the Declaration.¹⁶⁵ They also oversimplify the history leading to the framing of the Constitution.¹⁶⁶

United States?, reflect this orientation. See JAFFA, *supra* note 83.

161. GERBER, *supra* note 106, at 4 (quoting Robert H. Bork, *Original Intent and the Constitution*, 7 HUMANITIES 22, 26 (1986)).

162. Post makes this same point about what he terms the "historical" (originalist) approach in constitutional interpretation. See POST, *supra* note 35, at 34-35, 338 n.53 (citing Brest, *supra* note 107, at 225-26).

163. GERBER, *supra* note 106, at 9.

164. See E. ALLAN FARNSWORTH, CONTRACTS § 244-61 (1990).

165. See Wendy Ann Semel, Note, *Defender of the Natural Rights Faith*, 105 YALE L.J. 1427, 1430 (1996) (reviewing GERBER, *supra* note 106, and discussing the historical oversimplifications in GERBER, *supra* note 106).

166. See *id.* at 1430-31. For a historian's judicious discussion of the "perils of originalism," see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 3-22 (1996).

Judging whose intent counts and what those intents are when it comes to establishing the original intent of the Constitution presents an additional difficulty. One can limit the scope of intent to that of the framers (*i.e.*, the delegates to what became a constitutional convention). Nevertheless, the People's understanding during the ratification process would appear to be just as relevant.¹⁶⁷ Moreover, Congress itself sealed the records of its debates until 1818, an act that at least one delegate urged to forestall "a bad use" of the debates.¹⁶⁸ The quintessential framer, James Madison, whose notes are the standard guide to the debates, insisted that "[a]s a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the [Philadelphia] Convention can have no authoritative character."¹⁶⁹ Evidence of original intent of this kind forces the originalists into the contradictory position of making original intent authoritative when at least some (if not most) of the framers themselves *intended* to block investigations of their intent, preferring to let the document speak for itself.

Furthermore, whichever set of intentions we might choose, we immediately confront insurmountable problems of data gathering. It has been estimated, for example, that Madison's notes represent only ten percent of the proceedings of the constitutional convention.¹⁷⁰ Recently, Philip Kurland and Ralph Lerner compiled a five volume collection of sources pertinent to the founders' understanding of the Constitution.¹⁷¹ Boris Bittker remarks that a perusal of this mine of information "reveals that the founders' intent does not have the constituen-

167. Madison thought that the Constitution did not arrive at its true meaning until the ratification process, when it was imbued with the living voice of the people. See 5 ANNALS OF CONG. 776 (1796), quoted in Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235, 264 (1989).

168. See Bittker, *supra* note 167, at 260 (quoting delegate King).

169. *Id.* at 264 (quoting letter from James Madison to Thomas Ritchie (Sept. 15, 1821), reprinted in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 228 (1865)).

170. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 34 (1986), cited in Bittker, *supra* note 167, at 263.

171. See THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987).

cy of homogenized milk" but "is more like a well-stocked pantry waiting for an imaginative chef."¹⁷²

Consideration of the state ratification conventions raises other obstacles. Bittker details a number of them to serve as illustrations. The vote of a state convention delegate in favor of the Constitution did not necessarily mean that that delegate agreed with the reasons espoused by his colleagues for adoption.¹⁷³ And many of the delegates were bound by their constituencies before the ratification debates.¹⁷⁴ Hence, the ratification debates at the convention are largely irrelevant and misleading as guides to the "intent" of the delegates who cast their votes for the Constitution. Moreover, it would appear that in such cases one needs to establish not the intent of the delegates but the intent of those who elected them.¹⁷⁵ Gerber seeks to overcome these difficulties by contending for the framer's general intent instead of their specific intent. Gerber assumes that everyone shared basically the same Lockean natural-rights political philosophy,¹⁷⁶ a dubious assumption.

There is the further problem of showing from history that the Constitution, produced after the Revolutionary War, was meant to embody the principles of the Declaration. We must, therefore, attend to not one, but two sets of original intents. Each set (that of the Constitution and that of the Declaration) must be historically reconstructed. Both intents must be correlated with each other to achieve a convincing demonstration that a common view prevailed from 1776 to 1787. There is, however, very scant evidence from the time of the framing and ratification that anyone was thinking of the Constitution as an extension of a political theory announced in the Declaration.¹⁷⁷ In fact, the

172. Bittker, *supra* note 167, at 251.

173. *See id.* at 266-67.

174. *See id.* at 269.

175. *See id.*

176. *See GERBER, supra* note 106, at 12-15. On Gerber's assumption that the reigning natural-rights philosophy was Lockean, *see id.* at 40.

For a brief survey of competing theories about what political philosophy(ies) reigned in late eighteenth-century America, see BARRY ALAN SHAIN, *THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT* xiii-ixx (corrected printing, 1996). In the body of his study, Shain argues persuasively that Protestant communalism was dominant among non-elites of the founding era.

177. *See Philip F. Detweiler, The Changing Reputation of the Declaration of Independence: The First Fifty Years*, 19 WM. & MARY Q. 557, 568-64 (1962).

Declaration suffered an obscure and uninfluential history during the first decades after its promulgation.¹⁷⁸ Plausible arguments can also be made that, by the time of the Constitution, many of the founders had undergone significant changes of mind since the heady and idealistic days of 1776.¹⁷⁹ One can also argue that some of the founders merely *adapted* their revolutionary rhetoric to popular egalitarian sentiments in an effort to rally the colonists to revolt.¹⁸⁰ This makes the view even more plausible that these same founders adhered to their own less egalitarian sentiments when the power was in their hands to frame the postwar government.

Finally, as the preceding also suggests, originalism requires an implausible view of the interpretive process. Berns states that "there is nothing obscure about that text [the Constitution], or nothing so obscure as to defy a search for its true meaning."¹⁸¹ Gerber maintains that "it is quite feasible to understand what [the framers] intended at the basic level of philosophical principle—that embodied in the Declaration of Independence."¹⁸² Yet, the later controversies among the framers over the meaning of the Constitution show that there were profound differences of opinion about what the Constitution meant. A famous example is the early disagreement between Madison and Jefferson over whether the United States Supreme Court had the power under the Constitution to find an act of Congress unconstitutional.¹⁸³

The same problem of interpretive disagreement attaches to original understandings of the Declaration. Jaffa assumes that the founders affirmed racial equality.¹⁸⁴ Even if that is so, such a theory does not tell us what kind of racial equality the

178. *See id.*

179. *See, e.g.,* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 519–24 (1969). Gerber is aware of the longstanding debates about whether the founders' philosophy(ies) of government underwent significant transformation between 1776 and the constitutional convention, but he relegates comment on these debates to a dismissive footnote. *See* GERBER, *supra* note 106, at 224 n.13.

180. *See* CELESTE MICHELLE CONDIT & JOHN LOUIS LUCATTES, *CRAFTING EQUALITY: AMERICA'S ANGLO-AFRICAN WORD 27–29* (1993).

181. BERNES, *supra* note 106, at 240.

182. GERBER, *supra* note 106, at 12.

183. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing the doctrine of judicial review).

184. *See* JAFFA, *supra* note 83, at 46–48.

founder subscribed to whether it was the minimalist understanding of equality that Jefferson approved,¹⁸⁵ or what is arguably a more expansive view espoused by the later Republican party,¹⁸⁶ or the unqualified equality that Black abolitionists heard in the Declaration.¹⁸⁷ More specifically, it is difficult to judge what a Lockean understanding of the phrase "all men are created equal" might mean. Garry Wills explains that some Lockeanes interpreted human equality (equality "at birth") to mean that all human beings start out life as blank slates with the same inherent potential.¹⁸⁸ It is difficult to determine how far Lockeanes were willing to extend this idea. Adam Smith, for instance, claimed that

[t]he difference of natural talents in different men is, in reality, *much less* than we are aware of; and the very different genius [aptitude or ability] which appears to distinguish men of different professions, when grown up to maturity, is not upon many occasions so much the cause, as the effect of the division of labour.¹⁸⁹

185. In one of his rare discussions of blacks, Jefferson stated that in "[endowments] of the heart" nature "will be found to have done them [negroes] justice." JEFFERSON, *supra* note 61, at 269. It appears that in Jefferson's view, black *moral* equality with whites entitled them to freedom, but not to a share in the American social compact, since he saw the two races as inherently too different and as sharing too bitter a history to compose one people. Hence, blacks and whites would be best off if blacks lived as a self-governing people in a colony separate from America. *See id.* at 264.

186. *See generally* Reinstein, *supra* note 30, at 392-410.

187. Black abolitionists frequently quoted the egalitarian assertion of the Declaration of Independence to argue the nation's commitment to full racial equality. *See* CONDIT & LUCAITES, *supra* note 180, at 85, 288 n.95. For example, in 1831, a group of blacks gathered in New York City to protest the organization of the American Colonization Society. A portion of their joint address went as follows:

A difference of color is not a difference of species. Our structure and organization are the same, and not distinct from other men; and in what respects are we inferior? . . . We are content to abide where we are. We do not believe that things will always continue the same. The time must come when the Declaration of Independence will be felt in the heart, as well as uttered from the mouth. . . .

1 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 109 (Herbert Aptheker ed., 1979).

188. *See* WILLS, *supra* note 21, at 208-10.

189. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 15 (Random House 1937) (emphasis added).

This remark probably suggests a levelling tendency of a Lockean sort, but it is not clear how "equal" Smith thought human beings were in raw natural capacities, or whether he even pretended to know.

C. *The Living Declaration and the Living Constitution*

A third approach to the place of the Declaration in constitutional interpretation treats the Declaration as a privileged guide to constitutional principles and values, but regards both the Declaration and the Constitution as living documents whose meanings evolve over time.

We begin with the notion of the living, or adaptable, Constitution. According to Supreme Court Justice William Brennan, the "genius of the Constitution rests . . . in the adaptability of its great principles to cope with current problems and current needs."¹⁹⁰ Robert Post calls Brennan's brand of "responsive interpretation," which Post characterizes as the view that constitutional adjudication "must ultimately be accountable to contemporary concepts of value."¹⁹¹

According to Post, the authority of responsive interpretation is an ethos emanating from American national identity as a whole. Post refers to Oliver Wendell Holmes' dictum that the judge must consider a case "in the light of our whole experience and not merely of what was said a hundred years ago."¹⁹² By the same token, the authoritative ethos of the Constitution is not, for Post, simply a current set of values.¹⁹³ The ethos of the Constitution warrants responsive interpretation according to "general ends that have been closely linked over the long run to

190. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in INTERPRETING THE CONSTITUTION *supra* note 111, at 27.

191. POST, *supra* note 35, at 35. Others have termed the modernizing approach "noninterpretivism" because, in adapting the Constitution to current needs, it reaches outside the four corners of the text. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

192. *Missouri v. Holland*, 252 U.S. 416, 433 (1920), quoted in POST, *supra* note 35, at 35.

193. See, POST, *supra* note 35, at 36.

a historical instantiation of national identity.¹⁹⁴ That identity has authority over us because it is *our* identity.¹⁹⁵

The concept of a constitutional authority of national ethos suggests that the Declaration of Independence, as a defining symbol of that ethos, has bearing on constitutional interpretation. As our understanding of the Declaration evolves, it rightly shapes the way in which we read our living Constitution. Among contemporary constitutional interpreters who appear to hold some version of this view are Charles Black,¹⁹⁶ Justice William Brennan,¹⁹⁷ and Justice Ruth Bader Ginsburg.¹⁹⁸

1. Charles Black and the Constitutional Right to Livelihood

Charles Black's¹⁹⁹ conception of the place of the Declaration in constitutional interpretation seems to make most sense if Black regards the Declaration as a living guide to a living Constitution.

Like Jaffa, Black sees the Declaration as law, "our one legal instrument on which all else rests."²⁰⁰ But he is willing to accept the "minimal lesser included case" that the Declaration asserts rights that are "irrevocable without national humiliation" and that constitute at least "a binding gloss on the 'rights retained by the people,'" found in the Ninth Amendment²⁰¹ and the "privileges and immunities" clause of the Fourteenth Amendment.²⁰²

Black's method for identifying unenumerated constitutional rights utilizes the Declaration and the preamble of the Consti-

194. *Id.*

195. *See id.*

196. *See* discussion *infra* Part III.C.1.

197. *See* discussion *infra* Part III.C.2.

198. *See id.*

199. *See* Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986) [hereinafter, Black, *Justice of Livelihood*]; Charles L. Black, Jr., "One Nation Indivisible": *Unnamed Human Rights in the States*, 65 ST. JOHN'S L. REV. 17 (1991) [hereinafter Black, *Unnamed Rights*].

200. Black, *Unnamed Rights*, *supra* note 199, at 27.

201. *Id.* at 38; *see generally* Stephen D. Hampton, *Sleeping Giant: The Ninth Amendment and Criminal Law*, 20 SW. U. L. REV. 349 (1991).

202. *See* Black, *Unnamed Rights*, *supra* note 199, at 38.

tution as touchstones.²⁰³ By this route, Black makes out a case for “a constitutional justice of livelihood,”²⁰⁴ which he also describes as “a constitutional right to a decent material basis for life”²⁰⁵ and “the right to be rescued from poverty.”²⁰⁶ According to Black, this right is implied as a necessary precondition of “the right to the pursuit of happiness.”²⁰⁷ Black analogizes to Benjamin Cardozo’s argument in *Palko v. Connecticut*²⁰⁸ that freedom of speech is an essential right, “the matrix, the indispensable condition, of nearly every other form of freedom.”²⁰⁹ Black reasons that if this is so, then we should consider that “the rights to freedom from gnawing hunger and from preventable sickness” may also be constitutional rights because they, too, belong to the indispensable matrix of freedom.²¹⁰

According to Black, the warrant for turning to the Declaration and the preamble of the Constitution is that they are the best places to start a search for fundamental rights.²¹¹ Moreover, even if one does not approve of using the Ninth Amendment as a constitutional justification for identifying unenumerated constitutional rights, the Declaration and the preamble to the Constitution are the obvious places to start a search for those “fundamental values” that should inform our understanding of due process and guide our determination of “suspect classifications” under the Equal Protection clause.²¹² We ought to regard the Constitution the way we look at a will or a contract and seek its fundamental values just as we look for the basic purposes of any other legal instrument.²¹³ That will lead us back to the Declaration as “the organic act that

203. See Black, *Justice of Livelihood*, *supra* note 199, at 1104–05.

204. *Id.* at 1104.

205. *Id.* at 1105.

206. *Id.* at 1108.

207. *Id.* at 1106.

208. 302 U.S. 319 (1937).

209. Black, *Justice of Livelihood*, *supra* note 199, at 1110 (quoting *Palko*, 302 U.S. at 327). Cardozo’s argument is considered a paradigm of substantive due process reasoning. See Brennan, *supra* note 190, at 30.

210. Black, *Justice of Livelihood*, *supra* note 199, at 1110.

211. See *id.* at 1105.

212. See *id.*

213. See *id.* at 1107.

made us a separate nation."²¹⁴ The Declaration is "a statement of our nation's goals and reason for being."²¹⁵

These arguments give Black the appearance of an originalist. Yet, it is apparent that Black is ready to deduce, from the fundamental values of the founders, rights not thought of by the founders and perhaps inconceivable to them, for example, the right to livelihood. Further, Black does not argue from original intent to a constitutional right to livelihood. He makes no inquiry into the general or specific intentions of the founders; he does not seek to establish any plausible original meanings of the founding documents. Instead, he focusses rather ahistorically on the texts of the Declaration and the Constitution, elaborating his interpretations by analogizing to other doctrinal constructions of unnamed constitutional rights. This suggests that Black takes the Declaration as binding authority for constitutional interpretation without claiming that the original meaning of the Declaration is what controls.

Three aspects of Black's conception of constitutional adjudication reinforce the impression that he takes a nonoriginalist approach to interpreting the Declaration of Independence. First, according to Black, constitutional law has, at its disposal, various methods for going beyond the text: the method of analogy, the method of inference from textual structure, and the method of following precedent.²¹⁶ Since these methods may, even when used in good faith and with technical competence, produce different results,²¹⁷ one should judge between interpretive options by exercising "disciplined and insightful choice amongst the competing values and expediences, marshaled and structured as best they may be."²¹⁸ As Black explains in a very nonoriginalist comment, "we now know (whether or not people knew in 1787) that the judge who decides the cases under law *cannot avoid* making—and acting upon—judgments of justice, morality, expediency, fitness."²¹⁹

214. *Id.* at 1108.

215. Black, *Unnamed Rights*, *supra* note 199, at 37.

216. See CHARLES L. BLACK, JR., *DECISION ACCORDING TO LAW: THE 1979 HOLMES LECTURES* 23 (1981).

217. *See id.*

218. *Id.* at 24.

219. *Id.* at 26 (emphasis in original).

Second, justification for the enormous power that the judiciary enjoys in our system cannot be the original ratification of the Constitution (in 1788)²²⁰ or even a "fictitious or mystical 'popular consent,' not expressed in a positive way by the people's elected representatives."²²¹ The power of the judiciary can be justified only if "Congress, representing the democracy from year to year, right now in 1981 could seriously diminish this allocation of policy power to tenured judges, and has instead chosen, and still chooses, not to do so."²²² Black thinks that Congress does have this power over the courts,²²³ which implies that by not exercising its power to retract or limit the judiciary's authority to enlarge the sense of the Constitution through doctrinal interpretation, "We the People," through our elected representatives, have in effect been tacitly affirming and reaffirming year by year the idea of a living constitution created by the Supreme Court. If that is the case, William Brennan's notion of "contemporary ratification"²²⁴ may have a basis in the constitutional relationship of the Congress to the courts.

Third, Black emphasizes that original intent is not the standard for identifying unnamed rights in the Ninth Amendment.²²⁵ The Ninth Amendment is couched in language that suggests it refers to rights not thought of or not fully agreed upon, making the intent of the drafters as to specific rights beside the point for identifying and judging the constitutionality of unspecified rights.²²⁶ Moreover, the Ninth Amendment seeks to protect any rights of the people, not just those the framers may have had in mind.²²⁷

220. *See id.*

221. *Id.*

222. *Id.*

223. According to Black, because Congress has the power to determine to a large extent the matters over which the courts have jurisdiction, Congress could exercise this power to limit the Court's interpretive power. *See BLACK supra* note 216, at 37-39.

224. Brennan, *supra* note 190, at 23 (in the title of Brennan's address).

225. *See* Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, in BLACK, *THE HUMANE IMAGINATION* 186, 190-91 (1986).

226. *See id.* at 191.

227. *See id.*

It follows from these three points, especially from the third, that Black, in regarding the Declaration as a source for identifying the unnamed rights of the Ninth Amendment, could not mean that the Declaration is to be read on originalist terms. No doubt Black approaches the Declaration as he does the Ninth Amendment. In that case, the Declaration, too, ought to be elaborated by the method of analogy, inference from structure, and perhaps even inference from "precedent" in the sense of inference from the meanings the judiciary, or Americans in general, have come to invest in the Declaration.

2. The Living Declaration as Interpreter of the Living Constitution in the Jurisprudence of William Brennan and Ruth Bader Ginsburg

The phrase "living Constitution" is usually associated with Justice William Brennan, who used it to suggest that the meaning of the Constitution evolves as Americans seek better to define, from generation to generation, human dignity as the central value of the Constitution. According to Brennan, "[t]he Declaration of Independence, the Constitution and the Bill of Rights, solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority."²²⁸ Moreover, one ought to interpret the Constitution on the premise that its fundamental meaning is the aspiration inherent in this commitment to do justice to the dignity of the person.²²⁹ This method of interpretation requires that one construe what Brennan calls "the majestic generalities"²³⁰ of the Constitution from the perspective of a larger constitutional tradition, symbolized by the Declaration of Independence (but also stretching back to the Magna Carta²³¹), which must also be inherently adaptable. Hence, it is a living Declaration that informs a living Constitution in the adaptation of the Constitution to the questions of the day.

228. Brennan, *supra* note 190, at 23.

229. *See id.* at 28, 31-34.

230. *Id.* at 23. Brennan borrowed this language from Justice Robert Jackson. *See id.* at 27 (quoting *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).

231. *See* Brennan, *supra* note 190, at 23.

A similar conception is found in the jurisprudence of Justice Ruth Bader Ginsburg. During the Senate confirmation hearings on her appointment to the Supreme Court, Ginsburg seemed to suggest that the ideals of the Declaration of Independence are evolving concepts, such that the general idea of equality found in the Declaration of Independence and the Equal Protection Clause of the Fourteenth Amendment now warrant equal rights for women.²³² This view assumes that the Fourteenth Amendment incorporates the second paragraph of the Declaration of Independence. Further evidence that Justice Ginsburg makes this assumption is found in her dissent in *Sandin v. Connor*,²³³ where she argued that the liberty interest of prisoners in state penitentiaries ought to be based uniformly on the Due Process Clause, and not defined ultimately by prison codes, because “[l]iberty that may vary from Ossining, New York, to San Quentin, California, does not resemble the ‘Liberty’ enshrined among ‘unalienable Rights’ with which all persons are ‘endowed by their Creator.’”²³⁴

IV. THE DECLARATION OF INDEPENDENCE AS A NATIONAL CLASSIC

When originalist Clarence Thomas²³⁵ or non-originalist Ruth Bader Ginsburg²³⁶ invokes the authority of the Declaration in construing the nature and scope of a constitutional right, each is doing what one of their predecessors on the Supreme Court declared was always a wise approach: “It is always safe,” said Justice Brewer, “to read the letter of the Constitution in the spirit of the Declaration of Independence.”²³⁷ If that sentiment should strike most Americans—if not most constitutional theo-

232. See *Excerpts from Senate Hearings on the Ginsburg Nomination*, N.Y. TIMES, July 21, 1993, at A12.

233. 515 U.S. 472 (1995) (Ginsburg, J., dissenting).

234. *Id.* at 489. Ginsburg also appeals to a dissenting opinion by Justice Stevens. See *id.* at 489-90 (citing *Meachum v. Fano*, 427 U.S. 215, 230 (1976)) (“I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom that the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws and regulations.”).

235. See *infra* Part V.B.

236. See *supra* Part III.C.2.

237. *Gulf, Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 160 (1897).

rists—as a sound principle of interpretation, it is largely thanks to the quasi-constitutional status that Lincoln’s presidency bestowed on the Declaration. Whatever the practical and theoretical problems with using the Declaration as a guide to interpreting the Constitution, the plausibility of doing so owes largely to Lincoln’s legacy, which elevated the Declaration to the status of founding charter and national classic.

A. *Abraham Lincoln on the Declaration and the Constitution*

Lincoln regarded the egalitarian doctrine of the Declaration of Independence as “the great fundamental principle upon which our free institutions rest.”²³⁸ In the First Inaugural, he argued that the Union was considerably older than the Constitution, having been founded by the Articles of Association in 1774 and “matured and continued by the Declaration of Independence.”²³⁹ The aim of the Constitution was not to create the Union but to perfect it.²⁴⁰ By the Gettysburg Address, Lincoln was ready to fix the birth of the nation at the Declaration and thus to contend that from its inception, the Union had been dedicated to the Declaration’s universal egalitarianism.²⁴¹ As we have seen, Lincoln also argued that the purpose of the Constitution was to secure the right to liberty which the Union recognized in the Declaration as a universal right.²⁴² In these respects, Lincoln was in agreement with the radical antislavery constitutionalists.²⁴³ Unlike them, however, Lincoln held

that by our frame of government, that principle [of equal freedom] has not been made one of legal obligation; that by our frame of government, the States which have slavery are to retain it, or surrender it at their own pleasure; and that

238. ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1832–1858, at 822 (Library of America, 1989) [hereinafter LINCOLN: SPEECHES AND WRITINGS, 1832-1858].

239. LINCOLN: SPEECHES AND WRITINGS, 1859–1865, *supra* note 31, at 217–18.

240. *See id.* at 218 (quoting the preamble to the Constitution).

241. *See* LINCOLN, *Address at Gettysburg*, in LINCOLN: SPEECHES AND WRITINGS, 1859-1865, *supra* note 31, at 536.

242. The principle of liberty to all in the Declaration of Independence and the Union dedicated to that principle is the “apple of gold” preserved by the Constitution as in a “silver picture frame.” 4 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 141, at 169.

243. *See supra* Part III.A.2.

all others—individuals, free-states and national government—are constitutionally bound to leave them alone about it.²⁴⁴

According to Garry Wills, the words of Lincoln's Gettysburg Address "remade America."²⁴⁵ Henceforth, we Americans would read the Constitution as an effort to fulfill the ideals of the Declaration of Independence and would understand our constitutional system as committed to universal human equality.²⁴⁶ With qualification, Wills' thesis is compelling. The Civil War did remake America, and the Gettysburg Address canonized Lincoln's executive interpretation of the relation between the Declaration and the Constitution because we Americans came to regard the Gettysburg Address as one of our national classics and as the noblest interpretation of the meaning of the Civil War. Yet, this constitutional remaking involved more than reinterpretation; it also entailed three amendments to the Constitution that radically changed both the nature of the Constitution²⁴⁷ and the identity of "We the People."²⁴⁸ The Republicans, who controlled the Presidency and Congress in the post-war era, achieved in significant measure their goal of incorporating the ideals of the Declaration into the Constitution, most notably in the Fourteenth Amendment.²⁴⁹

It was, therefore, not the words at Gettysburg by themselves that refashioned us. Something far greater was necessary; the war and a refashioned Constitution remade America. *That* Constitution, together with the People who amended it and who were in turn reconstituted by it, was dedicated to equality in a way the first Constitution of 1787 never was.

244. LINCOLN: SPEECHES AND WRITINGS, 1832-1858, *supra* note 238, at 822-23.

245. See GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992).

246. See *id.* at 37-40, 146-47.

247. See U.S. CONST. amends. XIII-XV.

248. "We the People" would, henceforth, include the slave population, made irrevocably free by the Thirteenth Amendment outlawing chattel slavery, and made citizens "of the United States and of the States in which they reside" by the Fourteenth Amendment.

249. See generally Reinstein, *supra* note 30.

Yet, we still hold to the myth²⁵⁰ propounded at Gettysburg that the Declaration gave birth to our nation and is a foundation of our constitutional law. The only way to defend that myth as true is to show that we can *now* plausibly read the original Constitution the way the radical antislavery constitutionalists read it. Their reading was dubious because the nation had not yet embraced the Declaration as constitutionally defining; nor had the nation yet adopted the meaning of the Union as taught by Lincoln and established by the Civil War. Today, we stand on different national assumptions and those different assumptions change the way we can plausibly read the original Constitution. Paradoxically, we can *now* construe that original Constitution, the living text, not simply a representation of the framers' intents,²⁵¹ as enshrining the ideals of the Declaration of Independence and we can *now* find that the original Constitution grants to Congress the power to make laws commensurate with those ideals.

"We the People" might have agreed, without going to war, that the Declaration of Independence is the privileged guide to constitutional interpretation, and much antislavery argument was designed to coax the nation into accepting that view.²⁵² Had antebellum America been receptive, constitutional conditions might have evolved to make radical antislavery constitutionalism genuinely reasonable. But by the time the Civil War had changed our world forever, it was more prudent to amend the Constitution than to reinterpret it by completing the reinterpretation Lincoln began at Gettysburg. Nevertheless, after the war, further antislavery reinterpretation was a genuine hermeneutical option. Congress could have passed legislation providing for the immediate or gradual extinction of slavery throughout the states,²⁵³ and the United States Supreme

250. Wills calls Lincoln's reinterpretation a "giant (if benign) swindle." WILLS, *supra* note 245, at 38. Lincoln

altered the document [the Constitution] from within, by appeal from its letter to the spirit [H]e performed one of the most daring acts of open-air sleight-of-hand ever witnessed by the unsuspecting The crowd [at Gettysburg] departed with a new thing in its ideological luggage, that new constitution Lincoln had substituted for the one they brought there with them.

Id.

251. *See supra* Part III.C.

252. *See supra* Part III.A.2.

253. Congress might have enacted a law modeled on state law provisions for the

Court might have upheld challenges to such legislation, crafting an antislavery constitutionalism under the leadership of Chief Justice Salmon P. Chase, who Lincoln appointed to replace Taney.²⁵⁴ Assuming that political conditions had been conducive and Chase had been amenable, the Chase Court might have ruled that slavery was no longer constitutional, deeming the provisions for slavery in the Constitution a set of protections for what was, after the war, a constitutionally obsolete status. It might have buttressed this view with some of the arguments of the more radical antislavery constitutionalists. Such antislavery constitutional interpretation would have been just as plausible as many other subsequent Supreme Court doctrines, such as the expansion of the powers of the federal government under the Commerce Clause or the discovery of a right of privacy in the Constitution. If antislavery constitutionalism seems implausible to us, it is only because the Court never developed an antislavery doctrine by availing itself of the arguments at hand favoring it. In any event, the adoption of the Fourteenth Amendment obviated that line of doctrinal development.

B. *The Declaration as Classic in Constitutional Interpretation*

Lincoln's use of the Declaration of Independence bestowed an executive imprimatur on the notion that the Declaration is our national charter and not merely a symbol of national independence. As national charter, the Declaration is also a national classic, if we define classics as "those texts, events, images, persons, rituals and symbols which are assumed to disclose permanent possibilities of meaning and truth."²⁵⁵ The Declara-

gradual extinction of slavery, such as the gradual emancipation statutes of Pennsylvania and New Jersey. The Pennsylvania statutes are reprinted in FINKELMAN, *supra* note 82, at 42-47. The operative language of the New Jersey act is quoted in *State v. Post*, 20 N.J.L. 368, 371 (1845).

254. See JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 373-75 (1995). Chase espoused moderate antislavery constitutionalism, holding that: (i) Congress had the power to exclude slavery from the territories and should do so (slavery being against the laws of nature), (ii) that slavery did not exist legally where it had not been established by positive law, (iii) that the Fugitive Slave Clause of the Constitution provided for a state and not a federal power, and (iv) that the Fifth Amendment guarantee of due process applied not only to federal, but also to state action, and therefore to state actions involving slaves. See *id.* at 62-63, 68-69, 89, 147 (1995).

255. DAVID TRACY, THE ANALOGICAL IMAGINATION: CHRISTIAN THEOLOGY AND THE

tion as classic is thus a "model or criterion"²⁵⁶ for our national identity and commitments. As Frank Kermode points out in his celebrated study of the literary classic, the classic as a model assumes the authority of some revered past and further assumes that this treasured past "can be more or less immediately relevant and available, in a sense contemporaneous with the modern."²⁵⁷

Kermode's study is in part a meditation on T.S. Eliot's famous essay, *What Is a Classic?*,²⁵⁸ in which Eliot defined the classic as the expression of the maturity of a civilization.²⁵⁹ Kermode dubs Eliot's conception the "imperial" view.²⁶⁰ The classic in this sense is possible because it draws on a rich tradition of language and culture that has reached a stage of full development. The classic displays an amplitude of vision and understanding that breaks the bounds of its own original time and place.²⁶¹ In this way, the classic "express[es] the maximum possible of the whole range of feeling which represents the character of the people who speak [its] language"²⁶² and may even speak universally to people of other cultural-linguistic traditions (the universal classic).²⁶³

Where Eliot is concerned to discover the moment when a tradition reaches maturity in a work of literature, Kermode is intrigued with the way in which such a work "retains its identity" at the hands of future generations of readers, "without refusing to subject itself to change."²⁶⁴ For Eliot, the universal classic is unsurpassable, an *imperium sine fine* ("empire without end").²⁶⁵ But in the modern view of the classic, Kermode suggests, this unsurpassability owes paradoxically to the classic's

CULTURE OF PLURALISM 68 (1981).

256. FRANK KERMODE, *THE CLASSIC: LITERARY IMAGES OF PERMANENCE AND CHANGE* 15 (1975).

257. *Id.* at 15-16.

258. *In* *SELECTED PROSE OF T.S. ELIOT* 115 (Frank Kermode ed., 1975).

259. *See id.* at 116.

260. *See* KERMODE, *supra* note 256, at 15, 25, 42, 45, 140.

261. *See* ELIOT, *supra* note 258, at 116, 121-22.

262. *Id.* at 127-28.

263. *See id.* at 116, 128 (referring to the universal classic).

264. KERMODE, *supra* note 256, at 45.

265. *Compare id.* at 25 (describing Eliot's characterization of the eternal classic in Virgil's language of the eternal empire) *with id.* at 45 (proposing to explain, without mythologizing, the classic's capacity to effect its own permanence by changing).

susceptibility to reinterpretations which allow the classic to change while retaining its identity.²⁶⁶

Kermode uses the term "modern" for what some might call a "postmodern" or "late-modern" view that texts are inherently unstable, deriving their sense not only from the structure of their own signs but also from the constructive activity of readers.²⁶⁷ Moreover, the imperial view that Kermode ascribes to Eliot might be classified as "early modern," since it owes much to the Renaissance recovery of ancient Greek and Roman literary traditions that moderns came to call "classics." The postmodern or late-modern view of the classic retains from the imperial view the idea that the classic is time-transcending, but only in the sense that the classic persists by the power of reinterpretation. One might say that the classic never becomes obsolete insofar as it continues to surpass its own prior meanings as new generations of readers explore the surplus of its signs.²⁶⁸

1. The Declaration as Classic: An Imperial View

The Declaration of Independence is certainly not a *literary* classic in Eliot's or Kermode's use of that term; nevertheless, it functions for many Americans as a *political* classic. In that case, both Eliot and Kermode's definitions of the classic may shed light on claims made about and in the name of the Declaration in constitutional interpretation. Consider the claim of originalist thinkers. Post may be correct that the historical approach often assumes an authority of the Constitution based on the notion of original consent.²⁶⁹ However, one might better account, however, for the historical approach of Gerber or Jaffa on the theory that they regard the Constitution as an effort to effect the vision of a political classic in Eliot's sense: the Declaration of Independence as the product of a mature Anglo-American political tradition, one that rests on a profound understand-

266. See *id.* at 45, 140-41.

267. On this conception of the reader's role in the construction of a text's meaning, see *infra* note 331.

268. On the notion of a semantic "surplus," see KERMODE, *supra* note 256, at 139-40.

269. See *supra* Part III.B.

ing of the nature of the human being and succeeds in expressing a political vision commensurate with the kind of persons we are. That would also explain how these originalists see the relation of the Declaration to natural law, namely, as expressing a vision of human society ordered rightly according to the nature of the human being. For them, the Enlightenment tradition represented by the Declaration was a mature tradition that understood human nature and its implications for government.

If this is how we ought to read Gerber or Jaffa, then they are not so much originalists as classicists, since it is not priority in time but maturity of understanding and expression that makes for authority in their conception of constitutional interpretation. In this imperial brand of classicism, one accords precedence to the original meaning of the Constitution not because the founding generation had the power to bind all future generations to its own contract with government, but because the founding was a classical moment. This would explain why Jaffa goes to such trouble to show that the original constitutional provisions for slavery are anomalous within the original Constitution itself.²⁷⁰ Jaffa wants to maintain that the original Constitution enshrined "truths 'applicable to all men and all times,'"²⁷¹ a thesis to which the Constitution's protections of slavery gave the lie unless one could argue, as Jaffa does, that the Constitution assumed the principles of the Declaration and protected slavery only out of temporary expediency with a view to its abolition.²⁷²

2. The Declaration as Classic: A Late-Modern View

Bruce Ledewitz remarks that Jaffa's "implied prescription for conservatives is to accept an antiquated natural rights outlook, and for liberals, to abandon the search for a modern one."²⁷³ This criticism assumes that the founding moment was not classical in Eliot or Jaffa's sense. The Declaration belonged to a "living tradition,"²⁷⁴ says Ledewitz, but Jaffa "treats the Decla-

270. See JAFFA *supra* note 83, at 43, 67-71.

271. *Id.* at 42 (citations omitted).

272. See *id.* at 43, 67-71.

273. Ledewitz, *supra* note 124, at 112.

274. *Id.* at 115.

ration as a document frozen in time.²⁷⁵ It appears that Ledewitz would be more receptive to a theory incorporating the Declaration into the Constitution if that meant treating the Declaration as a living document, the implications of which must be different today than they were for the founders.²⁷⁶ That is, Ledewitz would prefer the late-modern view to the imperial view of the Declaration as classic.

The notion of a living and adaptable Declaration suggests that the Declaration remains an enduring symbol of American ideals because it possesses the power of a classic in the late-modern sense. For example, when we say "all men are created equal" most of us now mean "all men and women," even though it is doubtful that the language expressed egalitarian gender inclusivity in 1776.²⁷⁷ We may defend gender equality or some other contemporary conception of equality as a fair implication

275. *Id.* at 114.

276. *See id.* at 114–15.

277. Advocates of women's equality who quoted or alluded to the Declaration tended to paraphrase it to make it more explicitly inclusive. *See, e.g.,* SARAH GRIMKÉ, LETTERS ON THE EQUALITY OF THE SEXES AND OTHER AND OTHER ESSAYS 38 (1838; Elizabeth Ann Bartlett ed., 1988) ("Men and women were *created equal*") (emphasis in original); *see id.* at 49 ("God created man and woman equal, and endowed them, without any reference to sex, with intelligence and responsibilities, as rational and accountable beings."). Another telling example is the "Declaration of Sentiments" adopted by the Seneca Falls Convention in 1848. The inspiration for the form of this statement came several days before the convention, when the organizers decided to use the Declaration of Independence as the model for their own statement. As several of the participants later recalled for the HISTORY OF WOMEN SUFFRAGE, "[a]fter much delay, one of the circle took up the Declaration of 1776, and read it aloud with much spirit and emphasis, and it was at once decided to adopt the historic document, with some slight changes such as substituting 'all men' for 'King George.'" THE CONCISE HISTORY OF WOMEN SUFFRAGE: SELECTIONS FROM THE CLASSIC WORK OF STANTON, ANTHONY, GAGE, AND HARPER 92 (Mari Jo & Paul Buhle eds., 1978).

Moreover, even if one takes "all men" in a gender inclusive sense, that does not mean that the Declaration's egalitarian assertion is a statement of sexual equality. If the generic definition of "man" is male and female in a hierarchical relationship, embodied ideally in a household hierarchy, then "all men are created equal" means that one man and his household is equal to any other. The married woman participates in such equality as an unequal subordinate. The single woman is even further removed from this kind of equality, even if she enjoys greater freedom. Anglo-American law formalized this conception of "man" for legal relations. "By marriage," Blackstone explained, "the husband and wife are one person in law; that is, the very being, or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover she performs everything." 1 BLACKSTONE, § 598 at 625–26. The wife, "covered" in this way (a *feme covert*), was included in "man" as a subordinate.

of the Declaration.²⁷⁸ Since the Declaration is open to competing interpretations, and has been from the beginning,²⁷⁹ we cannot properly speak of its strict logical implications as if these were to be simply deduced from some singular original meaning. We can speak only of reasonable inferences based on a given plausible interpretation. Moreover, the meaning of the Declaration as a national symbol changes as we Americans bestow meanings upon it. For example, the Declaration has come to stand for gender equality because we Americans have, in effect, bestowed this meaning on the text and thus modernized it. In this way, as Gary Wills aptly puts it, the Declaration is a symbol that "we have reshaped even as it was shaping us."²⁸⁰

V. DEFINING THE AUTHORITY OF THE DECLARATION IN CONSTITUTIONAL INTERPRETATION

If the Declaration possesses authority for constitutional interpretation, yet its meaning is not fixed, what is the nature of its authority? Those who recognize the authority of the Declaration for constitutional interpretation have not addressed this question. Nevertheless, we can illumine the issue by exploring appeals to the Declaration by Justices Stevens and Thomas in some recent Supreme Court cases involving affirmative action.

A. *Justice Stevens in Wygant v. Jackson Board of Education*²⁸¹

In recent controversies over "affirmative action," Americans are engaged in a great debate over what sort of public measures are required to serve the ends of equality symbolized by the Declaration of Independence.²⁸² An illustration comparing

278. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* xxix (1993).

279. For example, the expansive black abolitionist interpretation (see *supra* note 187) conflicts with the minimalist Jeffersonian interpretation (see *supra* note 185), although both were plausible interpretations.

280. WILLS, *supra* note 21, at ix.

281. 476 U.S. 267 (1986).

282. For a general discussion of our modern debates about equality and policies to advance equality (including affirmative action), see CONDIT & LUCAITES, *supra* note 180, at 188-216.

two opinions in recent United States Supreme Court cases reveals how the Declaration of Independence has figured in judicial deliberations in the midst of this national debate.

The first opinion is a dissent by Justice John Paul Stevens in *Wygant v. Jackson Board of Education*.²⁸³ In *Wygant*, a group of teachers brought suit against a school board, alleging violations of the Equal Protection clause of the Fourteenth Amendment; the board had laid off white teachers while retaining minority teachers with less seniority.²⁸⁴ The board acted pursuant to a collective bargaining agreement which provided that in cases of layoffs seniority would be respected, but not to the point where the percentage of minority teachers laid off would exceed the percentage of their representation on the faculty before the layoffs.²⁸⁵

Justice Powell, writing for a plurality of the Court, supported the petitioners' claim,²⁸⁶ arguing that general societal discrimination did not provide a compelling state interest to justify the race-conscious provision in the collective bargaining agreement.²⁸⁷ There must be a showing of past discriminatory hiring practices.²⁸⁸ According to Justice Powell, the rationale of the collective bargaining agreement—that an integrated faculty makes for a better educational experience for minority students and thus offsets the effects of general societal discrimination—might be reversible, allowing other school boards to argue that segregated classes or segregated faculties should be permissible where local experience shows that such segregation conduces to better academic achievement.²⁸⁹

In his dissent, Justice Stevens challenged this analysis, arguing that there is "a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in

283. *Wygant*, 476 U.S. at 313–20 (1986) (Stevens, J., dissenting).

284. *See id.* at 270–71.

285. *See id.* at 270.

286. *See id.* at 284.

287. *See id.* at 274–76.

288. *See id.*

289. *See id.* at 276 (stating that "carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*." (citation omitted)).

a school faculty for that reason."²⁹⁰ The exclusionary decision assumes that racial differences are relevant for determining the degree of one's rights; the inclusionary decision is based on the opposite assumption and tends to dispel such notions of racial inequality.²⁹¹ This observation led Stevens to the Declaration of Independence: "The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection clause of the Fourteenth Amendment; the other does not."²⁹² The parallel structure of this formulation suggests that, in Stevens' understanding, the Fourteenth Amendment incorporates the egalitarian doctrine of the Declaration of Independence, interpreting that doctrine as equality before the law. As Stevens has defined the inclusionary decision, however, it is not simply a mechanism for fostering equality before the law or in this case equality in the public education mandated by law; it is, instead, designed to undo perceptions of black inferiority in the minds of any in the school environment who entertain that irrational notion.²⁹³

Stevens' opinion thus contains two strands of argument based on different premises. One strand asserts that a changed perception by all in the school environment, including teachers, administrators, and students, would go a long way toward fostering equal education for minority students. According to Stevens, the local school board's inclusionary decision was a reasonable way to foster such changed perception in the interest of equal education. The second strand sees a valid public purpose in promoting an egalitarian theory of racial difference²⁹⁴ as one of the fundamental values that public education is to inculcate in the citizenry.²⁹⁵ With that claim, however, Stevens has introduced a more momentous argument. According to Stevens, among the "most important lessons" in the American public school curriculum is that racial, ethnic, and cultural

290. *Id.* at 316 (emphasis added).

291. *See id.*

292. *Id.*

293. *See id.*

294. *See id.* at 315-16, 315 n.8, 319.

295. In a note, Stevens described the Court's traditional emphasis on the importance of public education as a means of socializing citizens to values that are basic to a democratic political system. *See id.* at 315 n.8.

differences are not essential.²⁹⁶ The inclusionary decision is, therefore, also a reasonable instrument for advancing the valid public goal of using public education to foster a belief in racial equality.

One can link these two arguments in the following way: Since all human beings are equal, the law ought to treat them equally. Nevertheless, it is also possible to dispense with the premise that all human beings are equal and yet to recognize the constitutional requirement that the law must treat all its citizens equally. In that case, human equality is not a constitutional value. At most, one might say that human equality in the constitutional sense means no more than the equality that Equal Protection bestows as a right, not any other kind of factual equality about human nature.

These two ways of thinking about the relation of human equality to human rights are also found in interpretation of the famous second sentence of the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, & the pursuit of Happiness.²⁹⁷

The enumeration of "these truths" is marked off by commas, which give little guidance to the logical relations governing the three subordinate clauses that follow the first comma. One way to construe the series is to take the second subordinate clause as an inference from the first, which makes universal equality the premise of universal rights. Nevertheless, one can also interpret the second clause as a restatement in other terms of what "all men are created equal" means, which makes universal equality not the premise of universal rights but simply another way of expressing the idea of such rights.

We can infer that Justice Stevens reads the Declaration in the first manner, which explains his opinion that the egalitarian doctrine of the Declaration is in the Fourteenth Amendment. Stevens appears to assume that if the universal rights an-

296. *Id.* at 315.

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

nounced by the Declaration are expressly protected by the Constitution, the premise of these rights, as set forth in the Declaration, is a tacit constitutional assumption. Hence, in Stevens' analysis of the school board's action, the board was not simply protecting minority students' rights to equal treatment under the local ordinances providing for public education, it was also promoting belief in universal human equality as a constitutional value.

Moreover, Stevens argued, this public interest overrode the harms to the white teachers because the procedures used to effect the race-conscious action were fair and the resultant harms did not implicate the fundamental constitutional value of universal equality.²⁹⁸ By this, Stevens meant that the layoffs of the white teachers were not based on any lack of esteem for the white race.²⁹⁹ One might add (and Stevens may also have meant) that the layoffs also did not stigmatize the white teachers as members of an inferior race, encourage belief in white inferiority, or help to perpetuate conditions in which belief in white inferiority was already entrenched. The white teachers were harmed, first, because of the economic conditions that required the layoffs and, second, because of the collective bargaining agreement that furthered the weighty public purpose of promoting the constitutional value of equality.³⁰⁰

Justice Powell took a very different view, arguing that the Fourteenth Amendment may warrant in some cases the use of "race-conscious remedial action" to help "eliminate every vestige of racial segregation and discrimination in schools," but that public officials must also adhere to the "core purpose of the Fourteenth Amendment" which is "to do away with all governmentally imposed discriminations based on race."³⁰¹ These two "constitutional duties," said Justice Powell, "are not always harmonious."³⁰²

Powell laid down a two-fold test for working through such tensions: the race-conscious action must serve a "compelling

298. See *Wygant*, 476 U.S. at 317-19.

299. See *id.* at 318.

300. See *id.* at 318-19.

301. *Id.* at 277 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

302. *Id.*

governmental interest³⁰³ and it must be "narrowly tailored to the achievement of that goal."³⁰⁴ He then considered two proposed purposes for the race-conscious provision of the collective bargaining agreement. One purpose was to provide more minority role models to overcome the effects of societal discrimination.³⁰⁵ Powell argued that this was not a valid purpose because the Court had never held that general societal discrimination alone was enough to justify a racial classification³⁰⁶ and because societal discrimination alone is "too amorphous a basis for imposing a racially classified remedy."³⁰⁷

A comparison shows that Powell's plurality opinion and Stevens' dissent operated with different interpretations of the core meaning of the Fourteenth Amendment and, therefore, used different conceptions of what a valid purpose of a race-based remedy might be. For the plurality, the core purpose of the Fourteenth Amendment is to eliminate racial discrimination by government. For Stevens, however, the Fourteenth Amendment, incorporating the Declaration of Independence, states a constitutional commitment to universal human equality.³⁰⁸ The Fourteenth Amendment therefore protects government-based efforts to promote belief in equality³⁰⁹ and signals that such efforts do express a compelling state interest, even when they are intended to overcome general societal prejudice rather than a specific history of discrimination by the government unit involved.³¹⁰

303. *Id.* at 274 (quoting *Palmore*, 466 U.S. at 432).

304. *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980)).

305. *See id.* at 274.

306. *See id.*

307. *Id.* at 276. The Court went on to note the claim that the race-conscious provision was intended to overcome past discrimination against minorities by the Jackson County Board. The Court elected not to consider this contention because it found that the layoff provision designed to redress this alleged past discrimination was not a legally appropriate means for that purpose. *See id.* at 278.

308. *See generally id.* at 313 (Steven, J., dissenting).

309. On equality as a value to be promoted, see R.R. Palmer, *Equality*, in 2 *DICTIONARY OF THE HISTORY OF IDEAS: STUDIES OF SELECTED PIVOTAL IDEAS* 139 (Philip P. Wiener ed., 1973).

B. *Justice Thomas in Adarand Constructors v. Pena*³¹¹

Wygant is one of a series of cases that have eroded constitutional protections for affirmative action programs.³¹² Another such case is *Adarand Constructors v. Pena*.³¹³ *Adarand* involved a federal program designed to provide highway construction contracts to "socially and economically disadvantaged individuals."³¹⁴ The federal government gave a financial incentive to contractors who hired disadvantaged subcontractors.³¹⁵ One subcontractor, who did not belong to the class of the disadvantaged and who was not awarded a contract, filed suit on equal protection grounds.³¹⁶ The Court ruled that all racial classifications imposed by any government actor must stand a strict scrutiny test.³¹⁷

Justice Thomas filed a partially concurring opinion in *Adarand* to challenge a premise underlying the dissent in *Adarand* by Justice Stevens.³¹⁸ In his dissent, Stevens argued

310. According to Stevens, the board's race-conscious provision was designed to serve a compelling state interest in providing an education that inculcates belief in equality. See *Wygant*, 476 U.S. at 315 n.8.

311. 515 U.S. 200 (1995).

312. For a review of this history, see Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291 (1996); Don Munro, *The Continuing Evolution of Affirmative Action Under Title VII: New Directions After the Civil Rights Act of 1991*, 81 VA. L. REV. 565 (1995).

313. 515 U.S. 200 (1995).

314. *Id.* at 205 (citations omitted).

315. See *id.* at 207.

316. See *id.* at 210.

317. See *id.* at 224-29 (ruling that strict scrutiny test already applicable under the Fourteenth Amendment to state race-conscious actions also applies under the Fifth Amendment to federal actions). This holding overturned *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). In *Metro Broadcasting* the Court held that

benign race-conscious measures mandated by Congress—even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives.

Metro Broadcasting, 497 U.S. at 564-65.

318. See *Adarand*, 515 U.S. at 240 (Thomas, J., concurring).

that “[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system” and “[r]emedial race-based preferences” designed “to foster equality in society.”³¹⁹ Thomas countered that “there is a ‘moral [and] constitutional equivalence’ . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.”³²⁰ The federal program in question, Thomas argued, was paternalistic and therefore contradicted “the principle of inherent equality that underlies and infuses our Constitution,”³²¹ a principle that Thomas found enunciated in the Declaration of Independence.³²² Thomas went on to maintain that such “racial paternalism” can have “unintended consequences . . . as poisonous and pernicious as any other form of discrimination”³²³ because they “stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”³²⁴

Evidently both Thomas³²⁵ and Stevens³²⁶ think that the Constitution in some way incorporates the second sentence of the Declaration of Independence. Moreover, the logic of Thomas’ concurring opinion in *Adarand* appears to grant that the government ought to act in ways that are conducive to the value of equality. In two crucial respects, however, Thomas’ conception of what constitutional equality requires differs from that of Stevens. First, Thomas rejects the use of any “current notion of equality” to inform the interpretation of constitutional equality.

319. *Id.* at 243 (Stevens, J., dissenting)

320. *Id.* at 240 (emphasis added).

321. *Id.*

322. *See id.*

323. *Id.* at 241.

324. *Id.*

325. According to Thomas, the Declaration of Independence provides the principles for understanding the Constitution. *See* Clarence Thomas, *Toward a ‘Plain Reading’ of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 *How. L.J.* 983, 985–87, 994–95 (1987); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 *HARV. J.L. & PUB. POL’Y* 63, 65 (1989) [hereinafter *Higher Law*].

326. In addition to Stevens’ dissent in *Wygant* as evidence of his views of the place of the Declaration in constitutional interpretation, see *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 330–31, n.1, 345 (1990) (Stevens, J., dissenting).

ty,³²⁷ which is consistent with views he has expressed elsewhere endorsing an originalist natural law interpretation of the Constitution.³²⁸ Second, Thomas restricts the federal government's role in promoting constitutional equality to the negative task of ensuring equal protection before the law.³²⁹ This limited role is also consistent with an originalist interpretation, since the framers would not have endorsed the modern idea that the government should be engaged in producing "equality of result."³³⁰

C. Constitutional Ethos and the Dialogical Authority of the Declaration

Stevens' and Thomas' competing appeals to the Declaration of Independence assume the authority of the Declaration for constitutional interpretation, yet Stevens and Thomas are led by the Declaration in different directions when it comes to cases involving affirmative action. Their tacit agreement that the Declaration's notion of universal equality ought to be dispositive in cases involving the government's obligation to protect equality does not mean that they will arrive at the same conclusion about how to dispose of such cases. Among the differences that lead them to opposing conclusions is that they interpret the Declaration differently. From this, we may draw the following conclusion: if the Declaration has authority in constitutional interpretation, it appears that that authority resides more complexly and ambiguously in an agreement that the meaning and import of constitutional equality ought to be worked out through debate over what the Declaration means.

The act of reading constructs the meaning of a classic text

327. *Adarand*, 515 U.S. at 240.

328. See Thomas, *Higher Law*, *supra* note 325, at 68 ("The higher-law background of the American Constitution . . . provides the only firm basis for a just, wise, and constitutional decision." (emphasis in original)). During the confirmation hearings on his appointment to the Supreme Court, however, Thomas virtually denied that he was committed to a natural law approach to constitutional decision-making. See Scott D. Gerber, *The Jurisprudence of Clarence Thomas*, 8 J.L. & POL'Y 107, 112 (1991).

329. See *Adarand*, 515 U.S. at 240. (stating that "government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.").

330. GERBER, *supra* note 106, at 174-75 (contrasting eighteenth century views on government's role in promoting equality with those of the Great Society).

such that interpretation can legitimately uncover a text's meaning beyond original authorial intent.³³¹ Therefore, the authority of the classic is a shared authorization by the text and its community of readers through a dialogue in which the text shapes us as we shape the text. Such a dialogue "with" the classic is also necessarily a conversation with others who lay claim to that classic. Hence, in our common claim to a classic we operate by a tacit covenant to show to one another how we will share a common identity in the future, through the interpretation of that same classic text.³³² This covenant exists because the classic has no enduring authority unless we continue to fund its claim over us by collectively bestowing value upon it. The appeal of any one of us to the authority of a national symbol depends on some national consensus that this symbol expresses who we are. Hence, when we argue about the meaning of a symbol, our debates ought to entail a search for some new shared understanding of that symbol which is to stand for our common identity in the future.

Those debates are largely antecedent and external to whatever discussion of the second sentence of the Declaration might show up in one of the Supreme Court's published opinions. The Declaration is a symbol of our national debate over equality. When the Declaration is invoked in a particular judicial context, it is one of the competing views from that larger debate that speaks and not some plain sense of the Declaration itself. Yet, the Declaration itself does speak, shaping us and our constitutional law. The fact that the "living part"³³³ of one of our

331. On the idea that readers help to construct the meaning of texts and can do so in multiple ways, see, for example, UMBERTO ECO, *THE ROLE OF THE READER: EXPLORATIONS IN THE SEMIOTICS OF TEXTS* (1979). Eco discusses the *limits* of interpretation in two later works. See UMBERTO ECO ET AL., *INTERPRETATION AND OVERINTERPRETATION* 73-88 (Stefan Collini ed., 1992); UMBERTO ECO, *THE LIMITS OF INTERPRETATION* (1990).

332. This suggestion draws its inspiration from the following remark by Gerald Sheppard regarding the interpretation of the Bible. Speaking with special reference to the Book of Isaiah and its vision of the law of God, Sheppard likens the Bible to a "social contract between disparate groups of believers who share some degree of consensus and must seek through the interpretation of scripture to justify how they will share, in fact, the same Torah [the life-giving and life-ordering law of God] in the future." Gerald T. Sheppard, *The Book of Isaiah: Competing Structures according to a Late Modern Description of Its Shape and Scope*, in *SOCIETY OF BIBLICAL LITERATURE 1992 SEMINAR PAPERS* 549, 581 (Eugene H. Lovering, Jr. ed., 1992).

333. See Detweiler, *supra* note 177, at 574 (explaining that by the antebellum era,

most revered national symbols is an assertion of human equality has helped to keep Americans preoccupied with equality. Hence, the American public takes claims to equality very seriously even though Americans disagree about what equality means and what role the government ought to have in protecting or promoting it.

The influence of the Declaration in constitutional interpretation is, therefore, not accurately measured by counting and weighing explicit appeals to the Declaration in judicial opinions. One must also weigh the contribution of the Declaration to our two-hundred year national debate over equality. To do that thoroughly would require a history of the Declaration in America, a task which lies beyond the scope of this study. But several general observations can be made.

Lincoln's Gettysburg Address established the Declaration's proposition of universal equality as the central ideal of American nationhood. In so doing, Lincoln revolutionized our conception of the Constitution.³³⁴ We now interpret the Constitution as dedicated to equality. The warrant for that is found in part in the Fourteenth Amendment.³³⁵ It is also found in the Declaration of Independence, that commanding symbol which inspired and shaped the Fourteenth Amendment.³³⁶ Moreover, we interpret the Constitution as dedicated to equality because we regard the Declaration as an enduring statement of our constitutional commitments. Thus, what Lincoln asserted at Gettysburg is no longer controversial in the minds of most Americans. Thus, when a current U.S. president asserts in one breath that we are committed as a nation to the principles of

"all could agree that the living part of the Declaration lay in the now 'immortal' lines of the preamble.").

334. See WILLS, *supra* note 245, at 37-40, 146-47. Wiecek, noting that the Declaration has been largely ignored, as a source of constitutional principles, by the Supreme Court and legal scholars, comments that "[n]evertheless, the Declaration of Independence endures as the basic statement of the principles of American government . . . and it remains today the foundation of our constitutional order." William M. Wiecek, *Declaration of Independence*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 222, 223 (Kermit L. Hall et al. eds., 1992).

335. See U.S. CONST. amend. XIV, § 1 ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

336. After the Civil War, the Republican Party largely succeeded in incorporating its interpretation of the Declaration into the Fourteenth Amendment. See *generally* Reinstein, *supra* note 30.

the Declaration of Independence and the Constitution,³³⁷ he is stating what most Americans take to be a truism. The Declaration and the Constitution exist in such close association in our national consciousness that many Americans assume that the famous second sentence of the Declaration is in the Constitution.

The Declaration has become a cluster of concepts whose meaning we debate, but whose significance is nonetheless some rights-based notion of justice: "We hold these truths to self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights" The tension in American justice between rights-based and utilitarian notions of justice³³⁸ means that the Declaration represents only one of two competing sets of intuitions by which we make moral judgments. It is significant, however, that so preeminent a symbol of our national ethos proclaims the inviolability of individual human rights against encroachment by majority will or the utilitarian dictates of collective interest.

The Declaration is a *dialogical* symbol for taking rights seriously while debating what the concept of human right entails. In this way the Declaration guides constitutional interpretation by helping to keep alive our defining national preoccupation with human rights. The Declaration exemplifies the way a classic keeps an identity alive while submitting that identity to change. Thus, the Declaration is an authority not so much for a *particular* understanding of constitutional rights as for regarding the equal dignity of each person as a central value in constitutional interpretation, the meaning of which owes in large measure to a common, but fluid, national ethos of "We the People," who continue to debate the identity, nature, and limits of those rights we seek together to affirm.

337. See William J. Clinton, *Remarks to the Community in Salinas, California*, 32 WEEKLY COMP. PRES. DOC. 1425, 1427 (Aug. 12, 1996).

338. See generally, e.g., Richard W. Wright, *Right, Justice and Tort Law*, in *THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW* (David Owen ed., 1995).

VI. CONCLUSION

The Declaration is a classic in the late-modern sense, a text bearing a surplus of meaning. That semantic surplus arises and grows under the logic of the analogical imagination driven by the fresh questions and urgencies that each successive change in socio-cultural conditions brings to the fore. This evolving Declaration helps to galvanize our national preoccupation with human rights as an activity that defines who we are as a nation and shapes how we read our Constitution. One really cannot claim more for the role of the Declaration in constitutional adjudication. But one ought not to underestimate the importance of the Declaration's brooding presence over debates about our national identity and commitments. If the Declaration cannot call specific legal rights into constitutional existence, it does retain the power to remind us that one way or other we are a people most profoundly committed to protecting, under the constraints of social existence, the irreplaceable value of each individual and to defining the human equality and rights commensurate with that value. The Declaration is no talisman for deciding constitutional questions involving rights claims. Instead it has an antecedent power. It has already shaped us, We the People and our judiciary, as we have shaped it.