# LIBERAL ORIGINALISM: A PAST FOR THE FUTURE

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*First comes the Declaration of Independence, the illuminated initial letter of our history . . . . Here is the national heart, the national soul, the national will, the national voice, which must inspire our interpretation of the Constitution, and enter into and diffuse itself through all the national legislation.*

—Charles Sumner [1]



* College of Public Interest Law Fellow, Pacific Legal Foundation. J.D. 2002, Chapman University School of Law; B.A. 1998, Hillsdale College. In the interest of full disclosure, I note that I am personally acquainted with several of the authors whose essays appear in *The Declaration of Independence: Origins and Impact* (Scott Douglas Gerber ed., 2002), particularly Prof. John C. Eastman, with whom I have worked as coauthor on numerous projects; I am also a Lincoln Fellow at the Claremont Institute. *See infra* note 35. However, the views expressed in this article are entirely my own. My thanks to CQ Press. I would like to dedicate this article to my friend and teacher Matt Kelly. He "probably fixed the destinies of my life." Thomas Jefferson, *Autobiography, reprinted in* THOMAS JEFFERSON: WRITINGS 3, 4 (Merrill D. Peterson ed., 1984).

1. CONG. GLOBE, 36th Cong., 1st Sess. 2602 (1860).

## I. INTRODUCTION

What role ought the Declaration of Independence play in interpreting the Constitution? Average Americans would probably be surprised that the subject has received relatively little scholarly attention. But in recent years, some writers, led particularly by Scott Douglas Gerber, have begun to devote serious consideration to the Declaration's constitutional role. These scholars are developing a theory of interpretation that Gerber calls "liberal originalism."[2] According to this view, the Declaration is part of the organic law of the United States, and ought to guide our understanding of the Constitution.[3] Liberal originalism contrasts with the "conservative originalism" of Robert Bork,[4] Chief Justice William Rehnquist,[5] and Justice Antonin Scalia,[6] who view the Declaration as a world apart from the Constitution.

Liberal originalism is relevant to a historical analysis of the Constitution because it illuminates the issue of slavery in America's founding. But it is also relevant today as a method of interpreting the Constitution. Like originalism in general, the liberal originalist view is incompatible with attempts to use government to accomplish "social justice" or other ends inconsistent with the principles of individual liberty and limited government reflected in the Declaration. This article addresses the merits of liberal originalism and the differences that this method would make if adopted by today's courts. I take the recent book *The Declaration of Independence: Origins and*

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2. SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 6 (1995); Jason F. Robinson, Book Note, *Gerber's* To Secure These Rights, 12 J.L. & POL. 123, 130-32 (1996).

3. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

4. *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (arguing generally that the expansive nature of modern constitutional interpretation has fundamentally shaken the foundations of American government).

5. *See generally* William H. Rehnquist, *The Notion of a Living Constitution,* 54 TEX. L. REV. 693 (1976) (arguing that the notion of a "living constitution" as a mandate for the courts to act against injustice where legislatures have failed is flawed, and should be rejected).

6. *See* Antonin Scalia, *Of Democracy, Morality and the Majority,* 26 ORIGINS 81 (1996), *reprinted in* THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY 164, 165 (Douglas W. Kmiec & Stephen B. Presser eds., 1998) ("[N]o federal court to my knowledge, in 220 years has ever decided a case on the basis of the Declaration of Independence. It is not part of our law.").

*Impact* ("*Origins and Impact*"),[7] edited by Gerber, as a point of departure. In it, Gerber brings together twelve essays on the Declaration, each written by a different historian or constitutional scholar. The essays range in scope from the history of the Declaration's writing and reception in 1776 to its impact on modern Presidents and the Supreme Court. To this, *Origins and Impact* adds a variety of primary sources, including the first drafts of the Declaration, passages from the constitutional ratification debates and the Federalist Papers, speeches by Abraham Lincoln, Franklin Roosevelt, Martin Luther King, Jr., and others, and even a list of all Supreme Court cases that have cited the Declaration. In the following, I offer some reflections on the liberal originalist project in general, in hopes that it will help us not only to know "*where* we are, and *whither* we are tending," but also to better judge "*what* to do and *how* to do it."[8]

## II. LIBERAL VS. CONSERVATIVE ORIGINALISM

Understanding the liberal originalist project requires a clear understanding of the ways in which it differs from conservative originalism. Although both conservative and liberal originalists emphasize the importance of understanding the Constitution as the framers meant it, they see the framers' intent in a different light and find different aspects of American tradition relevant. The conflict between these two groups is both heated and enlightening, and in the end it reveals a great deal about the intellectual motivations of the two groups.[9]

The use of the term "liberal originalism" can mislead novices because the term "liberal" has unusual connotations in America. Modern American liberalism differs greatly from the way liberalism was understood at the time of America's founding, largely as a result of the Progressive and New Deal eras, which caused the term "liberal" to take on a very different meaning.[10] The terms "classical liberal" or

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7. THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT (Scott Douglas Gerber ed., 2002) [hereinafter ORIGINS AND IMPACT].

8. Abraham Lincoln, A House Divided (June 16, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461, 461 (Roy P. Basler et al. eds., 1953).

9. *See, e.g.*, Harry V. Jaffa & Robert H. Bork, *Jaffa v. Bork: An Exchange*, NAT'L REV., March 21, 1994, at 56, 59, *available at* 1994 WL 13456356 (demonstrating the disagreement between Judge Bork and Professor Jaffa as to the constitutional moorings of Justice Taney's decision in *Dredd Scott*).

10. An example of the mutation of the word "liberal" in the mid-twentieth century: in a 1930 article about Justice Oliver Wendell Holmes, H.L. Mencken wrote that he was

"libertarian" are now often employed to avoid the confusion caused by referring to Thomas Jefferson—whose political philosophy is often expressed as "that government is best which governs least"[11]—as a "liberal," when that term today refers to a political philosophy emphasizing extensive government intervention in economic and personal lives of citizens.

John Dewey explained the evolution of American liberalism as occurring in two waves.[12] The first wave "emphasi[zed] . . . individuality and liberty," which was "directed against restrictions placed by . . . the political state, upon freedom of economic enterprise."[13] While this variety of liberalism also emphasized personal liberties such as freedom of religious conscience and freedom of expression, Dewey was correct that it also placed heavy emphasis on the importance of economic liberty. In short, classical liberalism sought to liberate people to reach their highest potential, in which endeavor their primary opponent was government. Hence this older liberalism believed, in Jefferson's words, that "the sum of good government" was one which "shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned."[14]

In Jefferson's day, there were those who opposed such liberation on the grounds that a prescribed social order was fundamental to social survival. The early Federalist Party emphasized the importance

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astonished that Holmes was often described as a "liberal," because

> [I]t is impossible to see how [Holmes's opinions] can conceivably promote liberty. . . . [I]f I do not misread his plain words, he was actually no more than an advocate of the rights of law-makers. There, indeed, is the clue to his whole jurisprudence. He believed that the law-making bodies should be free to experiment almost *ad libitum* . . . . If this is Liberalism, then all I can say is that Liberalism is not what it was when I was young.

H. L. MENCKEN, *Mr. Justice Holmes, in* A MENCKEN CHRESTOMATHY 258, 259 (1949).

11. Although this phrase does accurately capture his political philosophy, Thomas Jefferson never actually said this. It seems to have made its first notable appearance in Henry David Thoreau's essay *Civil Disobedience*. *See* HENRY DAVID THOREAU, *Civil Disobedience, in* COLLECTED ESSAYS AND POEMS 203, 203 (Elizabeth Hall Witherell ed., 2001). *Cf.* ALF MAPP JR., THOMAS JEFFERSON: A STRANGE CASE OF MISTAKEN IDENTITY 402-13 (1987) (describing Jefferson as a libertarian).

12. *See* John Dewey, *The Future of Liberalism*, 22 J. PHIL. 225 (1935), *reprinted in* NEW DEAL THOUGHT 28 (Howard Zinn ed., 1966).

13. *Id.* at 28-29.

14. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* Thomas JEFFERSON: WRITINGS 492, 494 (Merrill D. Peterson ed., 1984).

of class structure and attacked what they viewed as the dangerous secularism and social dynamism of liberals like Jefferson and Madison. Jefferson subtly replied to these opponents in his Second Inaugural Address, where, ostensibly discussing American relations with Indian tribes, he denounced

> crafty individuals . . . who feel themselves something in the present order of things, and fear to become nothing in any other. These persons inculcate a sanctimonious reverence for the customs of their ancestors; that whatsoever they did, must be done through all time; that reason is a false guide and to advance under its counsel, in their physical, moral, or political condition, is perilous innovation; that their duty is to remain as their Creator made them, ignorance being safety, and knowledge full of danger . . . anti-philosophers, who find an interest in keeping things in their present state, who dread reformation, and exert all their faculties to maintain the ascendancy of habit over the duty of improving our reason, and obeying its mandates.[15]

The dichotomy between Jefferson and these anti-philosophers is echoed in the distinction between liberal originalism and conservative originalism. While liberal originalists endorse Jefferson's classical liberalism, with its emphasis on individual liberty and limited government, conservative originalists, like Jefferson's opponents, emphasize traditionalism, the need for moral command,[16] and the pragmatic nature of the Revolution, while frequently downplaying Jefferson's historical importance.

The second wave of liberalism, as described by Dewey, began at the end of the nineteenth century, when liberal intellectuals decided that *laissez-faire* could not accomplish the liberal goals of individual autonomy. Modern liberalism, Dewey argued, had discovered that the

> individual is nothing fixed, given ready-made. It is something

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15. Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 14, at 518, 520-21.

16. In an 1823 letter, Jefferson reflected that

> [some believe] that men in numerous associations cannot be restrained within the limits of order and justice, but by forces physical and moral, wielded over them by authorities independent of their will. . . . to constrain the brute force of the people . . . to fascinate the eyes of the people, and excite in them an humble adoration and submission, as to an order of superior beings.

Letter from Thomas Jefferson to William Johnson (June 12, 1823), *in* 3 THE REPUBLIC OF LETTERS 1862, 1862 (James Morton Smith ed., 1995). Jefferson shared this letter with Madison, who replied, "Johnson is much indebted to you for your remarks on the definition of parties. The radical distinction between them has always been a confidence of one, and distrust of the other, as to the capacity of Mankind for self Government." Letter from James Madison to Thomas Jefferson (June 27, 1823), *in* 3 THE REPUBLIC OF LETTERS, *supra*, at 1867, 1868.

> achieved, and achieved not in isolation, but the aid and support of conditions, cultural and physical, including in 'cultural' economic, legal, and political institutions . . . . [Modern liberalism seeks to develop] policies for dealing with these conditions in the interest of development of increased individuality and liberty.[17]

Thus governmental mechanisms for "adjusting the benefits and burdens of economic life" were created out of a belief that they were necessary to accomplish traditionally liberal goals of individual fulfillment.[18]

Despite the potential confusion between classic and modern liberalism, Gerber's distinction is useful when considering the "conservative originalists." This group of "anti-philosophers" tends to downplay the historical importance of principles such as equality or individual liberty, which conservatives see as the fountainhead of the immorality and social breakdown that they think reached its ascendancy in the 1960s. Robert Bork, for example, sees the Enlightenment as responsible for the decadence which, in his view, is symptomatic of modern society.[19] In this, he represents the mainstream of conservative thought regarding the Declaration of Independence. Some make a historical case, arguing that previous generations of historians have overemphasized the role that equality and liberty played in the Revolution. Russell Kirk, for instance, wrote that the American revolutionaries "meant to keep their old order and defend it against external interference," rather than fighting for any "theoretic dogma."[20] In his view, the Declaration, "[h]astily drawn up by Jefferson and a committee of four others," was meant as "an apology to the world—France in particular—for the Patriots' armed rising, in hope of assistance from abroad."[21] The principles which others have called "revolutionary" were, in Kirk's view, not new, but were "premises taken for granted, and every political order must be founded upon some such unquestioned premises."[22] Certainly, in Kirk's view, the Declaration did not refer to "a secularized version of natural rights theory."[23] In any case, as a matter of political

17. Dewey, *supra* note 12, at 31, 33.

18. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

19. *See* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 63 (1996).

20. RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 395-96 (3d ed. 1991) (adopting Edmund Burke's idea that the French Revolution was one of radical change).

21. *Id.* at 400-01.

22. *Id.* at 405.

23. *Id.* at 409.

philosophy, it was of little importance:

> [T]he Declaration really is not conspicuously American in its ideas or its phrases, and not even characteristically Jeffersonian. . . . [I]t was meant to persuade the court of France, and the *philosophes* of Paris, that the Americans were sufficiently un-English to deserve military assistance. . . . [I]t is not a work of political philosophy or an instrument of government . . . ."[24]

Other conservatives echo these themes. M. E. Bradford argued that the term equality only referred to the political equality of the British and American nations, not to equality on any individual level.[25] Jack Rakove writes that "[t]hough Americans invoked broader claims of natural rights . . . their dispute was always about their *English* rights."[26] Forrest McDonald writes that the framers "were . . . not much given to reading theoretical philosophy," but "[r]ather, as an empirical, practical, essentially nonideological people, they belittled speculative theorizing."[27] These interpretations contrast starkly with those of the founders themselves. In 1783, George Washington wrote that

> [t]he foundation of [America] was not laid in the gloomy age of Ignorance and Superstition, but at an Epocha when the rights of mankind were better understood and more clearly defined, than at any former period, the researches of the human mind, after social happiness, have been carried to a great extent, the Treasures of knowledge, acquired by the labours of Philosophers, Sages and Legislatures, through a long succession of years, are laid open for our use, and their collected wisdom may be happily applied in the Establishment of our forms of Government . . . .[28]

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24. Russell Kirk, *Introduction* to ALBERT JAY NOCK, MR. JEFFERSON, at xiii, xvi (Hallberg, 1983).

25. *See* M. E. Bradford, *The Heresy of Equality: Bradford Replies to Jaffa*, 20 MODERN AGE 62, 67-68 (1976).

26. JACK N. RAKOVE, ORIGINAL MEANINGS 293 (1996).

27. Forrest McDonald, *A Founding Father's Library*, 1 LITERATURE OF LIBERTY, Jan.-Mar. 1978, at 4, 5. *Cf.* John Willson, Was There a Founding?, Address at The Philadelphia Society, Williamsburg Meeting (Nov. 22, 1996), *at* http://www.townhall.com/phillysoc/willson.htm ("In [taking] ideas seriously, as they are held by people, and contained in the public record and in the great documents of the Founding, and in its law and literature, we are engaged in a powerful act of recovery.").

28. George Washington, Circular to State Governments (June 8, 1783), *reprinted in* GEORGE WASHINGTON: WRITINGS 516, 517 (John Rhodehamel ed., 1997). Thomas Jefferson saw the American revolution as a unique opportunity to build a country not on tradition and nationality, but on principles of human nature; he hoped that the spread of those principles would teach the rest of the world to embrace those principles. *See* Letter from Thomas Jefferson to Joseph Priestley (Mar. 21, 1801), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 14, at 1085, 1086 ("We can no longer say there is nothing new under the sun. For this whole chapter in the history of man is new."). His principal

Another group of conservatives accept that the leaders of the Revolution did mean what they wrote about equality and liberty and attack the Revolution and its actors more directly. Irving Kristol, for instance, claims that the American founders never "wrote anything worth reading on religion, especially Jefferson, who wrote nothing worth reading on religion or almost anything else,"[29] and that "it is wise to ignore some of the more grandiloquent declamations of [the American Revolution]."[30] In this view, the Declaration represents a corrosively anti-authoritarian philosophy of rationalism, which threatens social stratification and tradition and therefore inevitably leads to the sexual revolution, abortion, recreational drug use, secularism, the welfare state, and other modern ills. As an essentially secular document, the Declaration undermined the moral primacy of the church; as a revolutionary document, it undermined the social primacy of the state; as a document issued in the name of the people, it undermined the political foundation of class.

Liberal originalists respond in two ways. First, they argue that the negative social effects of which conservatives complain are not inevitable results of the Declaration properly understood, but stem from various other trends which are inconsistent with the Declaration, or have rejected the Declaration outright—in particular, the Progressive era, which eschewed natural rights.[31] Second, liberal originalists distance themselves from such things as social stratification and traditionalism and emphasize the values of individual freedom and self-determination.[32] Although these arguments mark an important break with conservative philosophy, they are at one with America's constitutional tradition. In *The Federalist,* James Madison described the founders' view of history's

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antagonist, Alexander Hamilton, agreed, writing that "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power." Alexander Hamilton, *The Farmer Refuted* (Feb. 23, 1775), *in* SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 19, 21 (Morton J. Frisch ed., 1985).

29. HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION 395 (1994) (quoting Irving Kristol).

30. *Id.* at 30 (quoting Irving Kristol).

31. *See* CHARLES E. MERRIAM, A HISTORY OF AMERICAN POLITICAL THEORIES 307-33 (photo. reprint 1969) (1903) (describing the Progressive era's rejection of natural rights theory); Thomas G. West, *The Constitutionalism of the Founders Versus Modern Liberalism,* 6 NEXUS J. OP. 75, 89-91 (2001).

32. *See* Thomas West, Vindicating John Locke: How A Seventeenth-Century "Liberal" Was Really A Social Conservative, Address at the Family Research Council (June 19, 2001), *at* http://www.frc.org/get/wt01f1.cfm?CFID=3802&CFTOKEN=85267762.

proper role:

> Is it not the glory of the people of America that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? To this manly spirit, posterity will be indebted for the possession, and the world for the example, of the numerous innovations displayed on the American theater in favor of private rights and public happiness.[33]

For liberal originalists, tradition is enlightening, but not the key to understanding either the Constitution or political society in general. Understanding the Constitution requires reference to more permanent principles than mere long-standing social convention. This unnerves conservatives, who perceive universal principles as "ideology,"— the stuff of revolution and upheaval—and conservatism has long defined itself as a sort of "anti-ideology."[34] But as the liberal originalists rightly point out, constitutional interpretation simply must have some reference beyond the plain text in order to make any sense of the document. The Constitution of 1787, after all, contains one very glaring ambiguity: it refers to black Americans in some places as "property," and in other places as "persons." As Harry V. Jaffa—one of the most important liberal originalists[35]—has pointed out, the issue of slavery cries out for an interpretation by the standards of philosophical principles, rather than social tradition. After all, slavery is a very old tradition, indeed.

## III. SLAVERY AND THE PROBLEMS OF RACE

Liberal originalism lay at the heart of the early Republican Party.

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33. THE FEDERALIST NO. 14, at 104 (James Madison) (Clinton Rossiter ed., 1961).

34. *See, e.g.*, Russell Kirk, *The Conservative Movement: Then and Now*, *at* http://www.townhall.com/hall_of_fame/kirk/kirk1.html (last visited Mar. 31, 2004) ("I do not mean that [conservatism] must, or should, possess an ideology. As H. Stuart Hughes wrote once, 'conservatism is the negation of ideology.'").

35. The organizational center for liberal originalism is the Claremont Institute, a think tank in Claremont, California. Three of the contributors to *The Declaration of Independence: Origins and Impact*, including Jaffa, are members of the Institute. Ken Masugi, Vice President of the Claremont Institute, and a former employee of Justice Thomas at the Equal Employment Opportunity Commission, *see* Ken Masugi, *Race, the Rule of Law, and* The Merchant of Venice*: From Slavery to Citizenship*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 197, n.* (1997), has referred to the Institute's members as "Declaration of Independence conservative[s]," and more jovially, "Jaffanese-Americans" in honor of the profound influence of Jaffa's ideas on the Institute's members. *See* Ken Masugi, *No Relativism on this Warren Court*, *at* http://www.claremont.org/writings/030124masugi.html.

Those who would come to found and take a prominent place in that party sought to develop a constitutional theory to oppose the claims of southerners that the Constitution enshrined slavery. This group of thinkers included the lawyer Lysander Spooner,[36] the former slave Frederick Douglass,[37] and the famous Massachusetts Senator Charles Sumner.[38] While these men were all abolitionists, they distinguished themselves from such radical abolitionists as William Lloyd Garrison by their belief that the Constitution was essentially an anti-slavery document. Some, like Spooner and Douglass, believed that the Constitution, correctly interpreted, required immediate abolition. Others, including Abraham Lincoln, argued that although the Constitution included temporary protections for slavery, it was written so as to require its eventual abolition. But whatever its internal differences, this group grounded their interpretation of the Constitution on the timeless principles of the Declaration of Independence.

Pauline Maier and others have argued that Lincoln was radically reinterpreting the language that "all men are created equal," in order to use the Declaration as a partisan document against slavery.[39] But the abolitionists certainly did not see themselves as doing that; to them, it was the slave power which was changing its tune to suit the time. They believed that, at the founding, the South had acknowledged that slavery was evil but had gradually come to change what were intended to be temporary compromises with slavery into a pro-slavery theory of the Constitution.[40] John C. Calhoun and others

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36. *See generally* LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (3d ed. 1860), *at* www.lysanderspooner.org (arguing that slavery was unconstitutional before the passage of the Thirteenth Amendment); Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation,* 28 PAC. L.J. 977 (1997) (analyzing Lysander Spooner's argument). Spooner later became an anarchist.

37. *See* BENJAMIN QUARLES, FREDERICK DOUGLASS 71-72 (Da Capo Press 1997) (1948).

38. *See* DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 208, 423 (1970).

39. *See, e.g.*, PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 208 (1997).

40. *See, e.g.*, Abraham Lincoln, Sixth Debate with Stephen A. Douglas, at Quincy, Ill. (October 13, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 8, at 245, 276. Lincoln, in his rejoinder to Douglas, stated:

> Mr. Brooks, of South Carolina, once said, and truly said, that when this government was established, no one expected the institution of slavery to last until this day; and that the men who formed this government were wiser and better men than the men of these days; but the men of these days had experience which the fathers had not, and that experience had taught them the invention of

had even come to argue that slavery was actually a positive good. Abolitionists could point to a number of comments by the founders to support their belief that the Constitution was written on anti-slavery principles set forth in the Declaration. They did not see themselves as commandeering the Declaration to serve their purposes, but rather as vindicating it. But even if Maier is right, the alleged process of redefinition began very early: As David Thelen writes, "[b]efore the ink was dry on the Declaration many Americans struggled with how to apply the Declaration's words to the practice of chattel slavery."[41] In 1842, John Quincy Adams invoked the Declaration to defend himself from congressional censure for introducing a petition against slavery in the House of Representatives.[42]

Moreover, antebellum defenders of slavery were under no illusions as to the threat that the Declaration posed to their "peculiar institution." "From John C. Calhoun of South Carolina to John Pettit of Indiana to Stephen Douglas of Illinois," writes Thelen, "they dismissed the idea that 'all men are created equal' as a 'self-evident lie.'"[43]

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> the cotton gin, and this had made the perpetuation of the institution of slavery a necessity in this country. Judge Douglas could not let it stand upon the basis upon which our fathers placed it, but removed it and *put it upon the cotton gin basis*.

*Id.*

41. David Thelen, *Reception of the Declaration of Independence*, *in* ORIGINS AND IMPACT, *supra* note 7, at 191, 206. *Cf.* Jackson v. Bulloch, 12 Conn. 38, 42-43 (1837) (discussing the extent to which slavery was permitted in Connecticut, in light of Connecticut Bill of Rights section which declares that "all men, when they form a social compact, are equal in rights"); Commonwealth v. Aves, 35 Mass. (18 Pick.) 193, 210 (1836) (striking down slavery because it was inconsistent with the Massachusetts Bill of Rights, which echoed language found in the Declaration).

42. *See* CONG. GLOBE, 27th Cong., 2d Sess. 170 (1842). As William Lee Miller explains, Adams and other abolitionists were

> developing [a] constitutional doctrine that delegitimated slavery. There had to be a doctrine that would change the formal American understanding of the nation-making instrument from one that sanctioned slavery to one that only reluctantly acquiesced in it as a fact, on the way to its being a document that explicitly forbade it.

WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY 445, 448-49 (1996).

43. Thelen, *supra* note 41, at 207. The phrase "self-evident lie" was pronounced by Senator Pettit. *See* CONG. GLOBE, 33d Cong., 1st Sess. app. at 214 (1854). John C. Calhoun said that there was "not a word of truth" in the Declaration's statement that all men are created equal. CONG. GLOBE, 30th Cong., 1st Sess. app. at 872 (1848). Confederate Vice President Alexander Stephens would later explain that while the authors of the Declaration had "rested upon the assumption of the equality of races," and thus had regarded slavery as a "violation of the laws of nature . . . wrong in principle, socially, morally, and politically," the new Confederate government was "founded upon exactly the opposite idea . . . upon the great truth that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition." Alexander H. Stephens, "Cornerstone" Speech (Mar. 21, 1861),

Whether Maier is right that the Declaration took on a new meaning in the 1830s, or whether the Declaration itself was always seen as essentially a command for the eventual abolition of slavery is a fascinating question.[44] On the whole, liberal originalists have the stronger argument, that the Declaration was indeed incompatible with slavery, that it was seen as such by the American founders, that the Constitution's protections for slavery in states where it already existed were indeed temporary, and that the Constitution placed slavery in the "course of ultimate extinction."[45]

Accordingly, the relationship of the Declaration to slavery and to racial equality in general is a subject that deserves thorough consideration. It is astonishing to discover that while civil rights leaders from Frederick Douglass[46] to Martin Luther King, Jr.[47] emphatically based their arguments on the Declaration of Independence, the civil rights establishment today has come to denounce the Declaration as a fundamentally racist document.[48] How

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http://www.founding.com/
library/lbody.cfm?id=492&parent=65. Stephen Douglas's attitude toward the Declaration was somewhat more complex; he argued that the Declaration was true, but that the authors had only intended it to apply to white men. *See* Harry V. Jaffa, *Abraham Lincoln and the Universal Meaning of the Declaration of Independence*, *in* ORIGINS AND IMPACT, *supra* note 7, at 29, 32-33.

44. *See generally* Barnett, *supra* note 36. On this issue, George Anastaplo wrote:

> Various of the [Constitution's] amendments make explicit, or confirm, what had been taken for granted or at least had been aimed at from the outset. Even the Civil War amendments . . . are consistent with, if not called for by, the American constitutional spirit. One must wonder how many of our twenty-six amendments were implicit either in the 'created equal' language of the Declaration of Independence or in the related 'Republican Form of Government' language of the Constitution of 1787, to say nothing of the language of the Bible, of Shakespeare, and of Magna Carta.

GEORGE ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY 11 (1989).

45. Lincoln, *supra* note 8, at 461.

46. *See, e.g.*, Frederick Douglass, The Meaning of July Fourth for the Negro (July 5, 1852), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 188, 188-206 (Philip S. Foner ed., Lawrence Hill Books 1999) (1950).

47. *See, e.g.*, Martin Luther King, Jr., Letter from Birmingham City Jail (Apr. 16, 1963), *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 289, 302 (James Melvin Washington ed., 1986) ("[We are] carrying our whole nation back to those great wells of democracy which were dug deep by the Founding Fathers in the formulation of the Constitution and the Declaration of Independence.").

48. The New Jersey legislature has repeatedly defeated attempts to require school children to recite portions of the Declaration in public school classrooms. These bills were defeated on the grounds that the Declaration is a racist document. *See* Ovetta Wiggins, *Declaration Recitation Shelved Again: Black Lawmakers Outraged by School Bill*, THE RECORD (Northern New Jersey), Feb. 29, 2000, at A1, *available at* 2000 WL 15802268. According to one opponent, State Representative Nia H. Gill, "[a]t the time these words were written, only white men, and only white men with property, were perceived to be the

did this shift come about? Keith Miller has documented the frequent citation of the Declaration by early leaders and the important break from this tradition during the 1960s, most visibly embodied by Malcolm X.[49] Where Douglass and King argued that the "nation's creed"[50] had always included black Americans within the "all men" who are created equal, Malcolm argued that "racial equality [was] a foreign concept for whites,"[51] and that the Declaration offered hope to minorities only insofar as it justified violent revolution.[52] Yet the principles of the Declaration were incoherent to Malcolm, precisely because he rejected the principle of equality.[53] If whites were, as Malcolm believed for much of his life,[54] inherently racist, then there

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beneficiaries of these words." Thomas Ginsberg, *Reciting the Declaration*, NEWSDAY, Apr. 5, 2000, at A27, *available at* 2000 WL 10030285. Speaking for the Court in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), Chief Justice Roger Taney stated:

> [A]t the time of the Declaration . . . [blacks were] regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . . This opinion was at that time fixed and universal in the civilized portion of the white race.

*Id.* at 407. There is something deeply unnerving about alleged defenders of racial minorities parroting the language of *Dred Scott*! Even more disturbing is the fact that Justice Thurgood Marshall agreed with Chief Justice Taney's assessment:

> The original intent of the phrase, "We the People," was far too clear for any ameliorating construction. . . .
>
> And so, nearly seven decades after the Constitutional Convention, the Supreme Court [in *Dred Scott*] reaffirmed the prevailing opinion of the framers regarding the rights of Negroes in America. . . .
>
> . . . "We the People" no longer enslave, but the credit does not belong to the framers.

Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 4-5 (1987).

49. *See* Keith D. Miller, *Frederick Douglass, Martin Luther King Jr., and Malcolm X Interpret the Declaration of Independence*, *in* ORIGINS AND IMPACT, *supra* note 7, at 161.

50. Martin Luther King Jr., 'I Have a Dream' (Aug. 28, 1963), *reprinted in* ORIGINS AND IMPACT, *supra* note 7, at 317, 319.

51. Miller, *supra* note 49, at 167.

52. *See id.* at 168.

53. *See* TAYLOR BRANCH, PILLAR OF FIRE 131 (1998).

54. Malcolm later came to accept the doctrine of racial equality. However, through most of his career, he practiced the doctrines of Prophet Elijah Muhammad, teaching that whites were descended from "blond, pale-skinned, cold-blue-eyed devils," who "turned what had been a peaceful heaven on earth into a hell," and who "would rule the world for six thousand years." MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 181-82 (Ballantine Books 1992) (1965). Malcolm claimed that whites "are referred to in the Bible as devils. . . . The whites will never accept the so-called Negroes and will always be hypocrites." BRANCH, *supra* note 53, at 131. In the autobiography, Malcolm described one incident that had a lasting impact on his outlook. A young white woman flew to New York to meet him, and asked him "Don't you believe there are any *good* white people?" "People's *deeds* I believe in, Miss, not their words," answered Malcolm. "What I can *do*?" she asked. He replied, "Nothing." MALCOLM X, *supra*, at 312.

In the early 1960s, however, Malcolm moderated his view. Although he did not endorse

would be truly nothing that they could do to end racial oppression.[55] This view is the exact opposite of that found in the Declaration. It is not addressed to a particular racial caste, but to "the opinions of mankind" and to "a candid world"—*i.e.*, to the sense of all rational people. As Robert W. Hoffert writes, "The holding of self-evident truths by a people also implies an inherent equality. If truths are self-evident, they are knowable . . . not as the discoveries of esoteric reasonings but as knowledge—equally available to all."[56] All men are created equal because they possess the faculty that makes them human beings: in Aristotle's terms, they possess the ability to reason about good and evil.[57] John Quincy Adams dramatized this principle when defending the right of slaves to send petitions to Congress:

> A gentleman had said on yesterday that he would as soon receive a petition from a horse or a dog as from slaves. Sir, . . . if a horse or a dog had the power of speech and of writing, and he should send [me] a petition, [I] would present it to the House; ay, if it were from a famished horse or dog, [I] would present it.[58]

Malcolm's assumption that whites were inherently incapable of embracing the principles of racial equality presumes that the reasoning faculty depends on one's racial background. As Miller writes, "[o]ne can view all or parts of the Declaration as statements of timeless truths. But Malcolm interpreted the Declaration in its situatedness."[59]

Miller could have shined more light on these issues by contrasting

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what he considered the appeasing and superficial nature of Martin Luther King's non-violent crusade, he withdrew his previous blanket condemnation of whites. "I don't speak against the sincere, well-meaning, good white people. I have learned that there *are* some. I have learned that not all white people are racists." *Id.* at 401. He often reflected on the episode with the white woman in New York. "I told her that there was 'nothing' she could do. I regret that I told her that," he wrote. *Id.* at 411. "I've lived to regret that incident . . . . Something like this kills a lot of argument. I did many things as a Muslim that I'm sorry for now." *Id.* at 468.

55. *Cf.* MALCOLM X, *supra* note 54, at 292.

> [I]n the arena of dealing with human beings, the white man's working intelligence is hobbled. His intelligence will fail him altogether if the humans happen to be non-white. The white man's emotions superseded his intelligence. He will commit against non-whites the most incredible spontaneous emotional acts, so psyche-deep is his 'white superiority' complex.

*Id.*

56. Robert W. Hoffert, *The Declaration of Independence and the Articles of Confederation: A Completed Constitutional Covenant*, *in* ORIGINS AND IMPACT, *supra* note 7, at 56, 58.

57. *See* ARISTOTLE, *Politics*, *reprinted in* THE BASIC WORKS OF ARISTOTLE 1127, 1129 (Richard McKeon ed., 1941).

58. CONG. GLOBE, 24th Cong., 2d Sess. 165 (1837).

59. Miller, *supra* note 49, at 168.

Malcolm with Frederick Douglass. Malcolm roundly criticized Martin Luther King, Jr.'s nonviolent tactics, arguing that black Americans had just as much right to fight in self-defense as did whites.[60] On this, he was in agreement with Douglass, who insisted that blacks had a constitutional right to keep and bear arms.[61] "[T]he liberties of the American people," said Douglass, "[are] dependent upon the ballot-box, the jury-box, and the cartridge-box . . . ."[62] But for much of his career, Malcolm rejected the possibility that white America might really reform, and he believed that black Americans must separate themselves from whites. This conclusion Douglass would not share; he had known too many whites who fought alongside him to free the slaves.[63] Douglass believed it was senseless to advocate racial separation. He insisted that black Americans were, nevertheless, Americans.[64] Separating the races was both unrealistic and unwise. It would prevent black advancement:

> When we thus isolate ourselves and say to those around us, "We have nothing in common with you," and, very naturally, the reply of our neighbors is in the same tone and to the same effect . . . . we lose, in large measure, the common benefit of association with those whose advantages have been superior to ours.[65]

Douglass further argued that "the whole assumption of race pride is ridiculous. Let us have done with complexional superiorities or

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60. Indeed, this view is consistent with the Declaration, which notes that "when a long Train of Abuses and Usurpations . . . evinces a Design to reduce [people] under absolute Despotism, it is their Right, it is their Duty, to throw off such Government . . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

61. *See* Frederick Douglass, Address for the Promotion of Colored Enlistments (July 6, 1863), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS, *supra* note 46, at 534, 537; Frederick Douglass, The Need for Continuing Anti-Slavery Work (May 10, 1865), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS, *supra* note 46, at 577, 579; Frederick Douglass, The Nation's Problem (Apr. 16, 1889), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS, *supra* note 46, at 725, 736-37 [hereinafter Douglass, The Nation's Problem].

62. FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS (1893), *reprinted in* FREDERICK DOUGLASS: AUTOBIOGRAPHIES 453, 816-17 (Henry Louis Gates, Jr. ed., 1994).

63. *See id.* at 901.

64. *See* Frederick Douglass, The Claims of Our Common Cause (July 6-8, 1853), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS, *supra* note 46, at 260, 261 ("We are Americans, and as Americans, we would speak to Americans. We address you not as aliens nor as exiles, humbly asking to be permitted to dwell among you in peace; but we address you as American citizens asserting their rights on their own native soil."); *see also* Frederick Douglass, The Future of the Negro People of the Slave States (Feb. 5,1862), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS, *supra* note 46, at 474, 476 ("I am an American citizen. In birth, in sentiment, in ideas, in hopes, in aspirations, and responsibilities, I am an American citizen.").

65. Douglass, The Nation's Problem, *supra* note 61, at 732.

inferiorities, complexional pride or shame. . . . God has made of one blood all nations of men to dwell on all the face of the earth."[66]

Unfortunately, Miller fails to discuss Douglass in any depth, but simply characterizes his views as naive faith in a "lovely utopia."[67] This allows Miller to dismiss Douglass with a single sentence: "Douglass was wrong."[68] But as Douglass himself would surely have pointed out, Malcolm was far *more* utopian to insist on racial separation or violent revolution and to condemn real (if piecemeal) reform. To Douglass, Malcolm's revolutionary rhetoric would have appeared every bit as irresponsible—*even though motivated by legitimate grievances*—as that of William Lloyd Garrison, who publicly burned the Constitution, denouncing it as a "compromise[] with tyranny"[69] and demanding that the north secede from the south.[70] Douglass replied to Garrison in words that would also have applied to Malcolm:

> If I were on board of a pirate ship, with a company of men and women whose lives and liberties I had put in jeopardy, I would not clear my soul of their blood by jumping in the long boat, and singing out no union with pirates. My business would be to remain on board . . . exhaust[ing] every means given me by my position, to save the lives and liberties of those against whom I had committed piracy. In like manner, I hold it is our duty to remain inside this Union, and use all the power to restore to enslaved millions their precious and God-given rights.[71]

Malcolm's defense of race consciousness does not entirely conflict with the principles of the Declaration, however. As Miller rightly notes, one of Malcolm's most valuable contributions was that he "prodded ordinary people to nurture self-respect by refusing to imitate whites"[72] and "to achieve a decidedly greater measure of self-definition."[73] Malcolm recognized that the doctrine of white

66. *Id.* at 731.

67. Miller, *supra* note 49, at 162.

68. *Id.*

69. HENRY MAYER, ALL ON FIRE 444-45 (1998).

70. *See id.* at 413-16, 452-53.

71. Frederick Douglass, The Dred Scott Decision (May 14, 1857), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS, *supra* note 46, at 344, 352; *see also* Frederick Douglass, The Anti-Slavery Movement (Mar. 19, 1855), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS, *supra* note 46, at 311, 324 (criticizing Garrisonians because they "started to free the slave [but] . . . end[ ] by leaving the slave to free himself").

72. Miller, *supra* note 49, at 171.

73. *Id.* at 172.

supremacy was backed up by a white cultural bias against things identified with black culture, and that this was psychologically crippling to blacks, especially black youths.[74] Instead, he hoped that by embracing the distinct aspects of their culture, blacks could build the self-respect necessary to demand and protect their equal rights. But while Malcolm emphasized the racist elements of American history, Douglass continued to recall America's attention to its founding principles. "There is no Negro problem. The problem is whether the American people have loyalty enough, honor enough, patriotism enough, to live up to their own Constitution."[75]

A portrait of Frederick Douglass hangs in the office of Justice Clarence Thomas.[76] Thomas is "without question the nation's leading proponent of the view that the American regime was founded on the principles articulated in the Declaration of Independence and that public policy should be made, and assessed, in light of those principles."[77] In his essay, *Clarence Thomas, Civil Rights, and the Declaration of Independence*, Scott Douglas Gerber cites Thomas's several articles and speeches on the role of the Declaration in constitutional interpretation,[78] noting that "[t]he classical liberal orientation of Thomas's interpretation of America's founding document is clear beyond cavil."[79] Just as Douglass interpreted the Constitution through the lens of the Declaration, Thomas has consistently invoked the principles of the Declaration in cases involving civil rights enforcement.[80] In his separate opinion in *Missouri v. Jenkins*,[81] for instance, Thomas criticized the decision in *Brown v. Board of Education*,[82] because it did not go far enough. In

74. *See* MALCOLM X, *supra* note 54, at 61-62.

75. WILLIAM S. MCFEELY, FREDERICK DOUGLASS 371 (1991) (quoting Frederick Douglass).

76. Thomas is also one of only two Supreme Court Justices to quote Douglass in an opinion. *See* Grutter v. Bollinger, 539 U.S. 306, 346 (2003) (Thomas, J., dissenting); Zelman v. Simmons-Harris, 536 U.S. 639, 676, 684 (2002) (Thomas, J., concurring). The other was Justice William Douglas in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 446 (1968) (Douglas, J., concurring).

77. Scott Douglas Gerber, *Clarence Thomas, Civil Rights, and the Declaration of Independence*, *in* ORIGINS AND IMPACT, *supra* note 7, at 45, 45.

78. *See, e.g.*, Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989) [hereinafter Thomas, *Higher Law Background*]; Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 691 (1987).

79. Gerber, *supra* note 77, at 51.

80. *Id.* at 52-53.

81. 515 U.S. 70 (1995).

82. 347 U.S. 483 (1954).

Thomas's view, *Brown* failed to actually reverse *Plessy v. Ferguson*,[83] it "rel[ied] upon disputable social science" rather than "invoking the 'constitutional principle' that 'the Government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups.'"[84] Even more distinctly, Justice Thomas invoked the Declaration in *Adarand Constructors, Inc. v. Pena*:[85]

> That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. . . . There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See 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, and the pursuit of Happiness").[86]

This contrast reveals the tragic irony of Malcolm's view that the Declaration was bound by eighteenth century racial and class attitudes: such a premise dooms racial equality to being a permanent fantasy. If all enunciations of principle are inextricable from their temporal and class background, then it is impossible to make any statement which aspires to universality; so no matter how fervent a crusade for racial justice a person might make, it can never gain a foothold beyond the context which produced it. The crudity of the postmodernist belief that all asserted truths are built out of political ideologies[87]—and ineluctably so—is that it cannot avoid self-destruction, since it would of necessity apply to itself. If "equality" as enunciated in the Declaration is just a sham concocted by racial elites in order to preserve their status quo,[88] then how can one *possibly*

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83. 163 U.S. 537 (1896).

84. Gerber, *supra* note 77, at 52 (quoting *Jenkins*, 515 U.S. at 120-21 (Thomas, J., concurring)). This criticism is more fully developed in Edward J. Erler, *Sowing the Wind: Judicial Oligarchy and The Legacy of* Brown v. Board of Education, 8 HARV. J.L. & PUB. POL'Y 399 (1985).

85. 515 U.S. 200 (1995).

86. *Id.* at 240 (Thomas, J., concurring in judgment).

87. This virulent notion has had a profound impact not only on the humanities, but the sciences as well. *See* THE FLIGHT FROM SCIENCE AND REASON (Paul R. Gross et al. eds., 1997) (criticizing postmodernism); Daniel C. Dennett, Postmodernism and Truth (Aug. 13, 1998) (unpublished paper, delivered at the World Congress of Philosophy) (criticizing postmodernism), http://www.butterfliesandwheels.com/articleprint.php?num=13.

88. This is the view of Howard Zinn, among others. *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 73 (1980). Indeed, it is, as Charles Kromkowski notes, "the prevailing yet narrow reading of the Declaration of Independence." Charles A. Kromkowski, *The Declaration of Independence, Congress, and Presidents of the United*

formulate a theory of justice, or even of "social justice," which can lay claim to any real profundity?[89] Unless defenders of "social justice" are prepared to admit that even their claims are mere manifestations of their own political and cultural background, and therefore nothing but another missile fired in the great power-struggle that they call "dialogue," then there simply must be some truths that run deeper than the racial and class background of those who enunciate them. By interpreting the Constitution through the Declaration, John Quincy Adams, Frederick Douglass, and others were able to see the Constitution as a form of government with universal potential.[90] As Gerard W. Gawalt notes in his essay, Jefferson was mortified at the suggestion that the Declaration had been written solely for the purposes of the Revolution, and "should now be buried in utter oblivion."[91] He hoped that the Declaration would "be to the world, what I believe it will be . . . the signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings and security of self-government."[92] Martin Luther King, Jr.'s movement—regardless of the efficacy of non-violent tactics—always aspired to this, and to realize a principle which is true always and everywhere.

## IV. LIBERAL ORIGINALISM AND CONSERVATISM IN GENERAL

Lincoln described the Declaration as announcing a timeless principle "applicable to all men and all times."[93] He believed that the

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*States*, *in* ORIGINS AND IMPACT, *supra* note 7, at 118, 118.

89. *See, e.g.*, Sally Ackerman, *The White Supremacist Status Quo: How the American Legal System Perpetuates Racism as Seen Through the Lens of Property Law*, 21 HAMLINE J. PUB. L. & POL'Y 137, 142 (1999) ("'[L]iberty' and 'civilization,' tacitly understood as 'property accumulation' and 'protection,' can actually be viewed as steps toward slavery.").

90. John Quincy Adams stated, "[T]he Declaration of Independence [is] the Word of God, and is the bow in the Heavens, that promises its principles shall be eternal, and their dissemination universal over the Earth." Kromkowski, *supra* note 88, at 127. Similarly, Secretary of State Daniel Webster explained in a famous letter to a foreign diplomat that America was "wholly founded" on universal republican principles, and that Americans would "cherish, always, a lively interest in the fortunes of Nations, struggling for institutions like their own." Letter from Daniel Webster to Johann Georg Hulsemann (Dec. 21, 1850), http://www.davekopel.org/Misc/Hulsemann.htm (last visited Mar. 10, 2004).

91. Gerald W. Gawalt, *Drafting the Declaration*, *in* ORIGINS AND IMPACT, *supra* note 7, at 1, 15 (quoting Letter from Thomas Jefferson to James Madison (Aug. 30, 1823)).

92. Letter from Thomas Jefferson to Roger C. Weightman (June 24, 1826), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 14, at 1516, 1517.

93. Letter from Abraham Lincoln to Henry L. Pierce and Others (Apr. 6. 1859), *in* 3

Declaration and the Constitution together were more than a simple government charter, but a political system with worldwide ramifications. In this sense, then, liberal originalism resembles what has come to be called the "notion of a living constitution."[94] Since the Declaration is a timeless principle, framed in the Constitution, it is applicable to changing circumstances, depending not on an organic national history, but instead on assent to principle.[95]

The Declaration is adaptable to new circumstances. This resembles "living constitutionalism," which is one reason that conservative originalists reject this interpretation. In their view, such adaptation threatens the moral stability of society. Unlike Jefferson's "anti-philosophers," conservative originalists do not necessarily denounce innovation on the ground that it is too democratic; quite the opposite. Chief Justice Rehnquist, espousing the conservative originalist view, argued against living constitution theory in a 1976 article:

> [The] notion of the living Constitution . . . seems to ignore totally the nature of political value judgments in a democratic society. If such a society adopts a constitution and incorporates in that constitution safeguards for individual liberty, these safeguards indeed do take on a generalized moral rightness or goodness. They assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone's idea of natural justice but instead simply because they have been incorporated in a constitution by the people.[96]

But liberal originalists see this as going too far. While, like Rehnquist, they reject constitutional interpretations which are not guided by the framers' design, they see equal danger in Rehnquist's appeal to collectivism and subjectivism. Indeed, their view differs from the leftist notion of living constitutionalism precisely in its

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THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 8, at 374, 376.

94. The term "living Constitution" was first used in *The Living Constitution*, by Howard Lee McBain. *See* HOWARD LEE MCBAIN, THE LIVING CONSTITUTION (1927); *see also* Gerber, *supra* note 77, at 50 (quoting Clarence Thomas' confirmation hearings: "[W]e also agree that the provisions that [the Constitution's framers] chose were broad provisions, that adjudicating through our history and tradition, using our history and tradition evolve.").

95. As Charles Sumner put it:

[A]n old and barbarous case is a poor answer to a principle, which is brought into activity by the demands of an advancing Civilization, and which once recognized can never be denied . . . . [J]urisprudence is not a dark lantern, shining in a narrow circle, and never changing, but a gladsome light, which, slowly emerging from original darkness, grows and spreads with human improvement, until at last it becomes as broad and general as the Light of Day.

CONG. GLOBE, 36th Cong., 1st Sess. 2602 (1860).

96. Rehnquist, *supra* note 5, at 704.

appeal to *unchanging* principles underlying the Constitution: where the leftist theory of living constitutionalism sees the *principles* of good government—if not the very nature of human beings themselves[97]—as malleable and subject to progressive change, liberal originalism sees the principles of equality and the entitlement to liberty as unchanging, even though their applicability to particular circumstances might evolve. Thomas G. West explains,

> American constitutionalism is grounded in the principles of the Declaration of Independence. These principles do not dictate any specific constitutional design. They provide a broad outline of the structure and purposes of government. The ends of government are absolute and unchanging. The means are not. The specifics must be worked out by prudent statesmen.[98]

So liberal originalism fits between tradition-bound conservatism on one hand, and the progressivism of leftist "living constitutionalism" on the other. The former seeks to avoid change, seeing the soul of a society in its organic connections to cultural tradition,[99] while the latter can find no consistent intellectual anchor except the notoriously unstable "will of the people" (which is hardly an *anchor* at all). The liberal originalist sees these as both embodying a fundamental error—both rely on nothing more permanent than subjectivism on a large scale. Like the leftist, the conservative originalist is unable to build a political morality on any more fundamental ground than majority will. The fact that modern liberals and conservative originalists share this basic assumption accounts for the fact that the views of the conservative originalist Robert Bork are routinely invoked by the modern liberal Justice David Souter,[100] and that Justice Antonin Scalia conscientiously avoids moral condemnations of political

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97. *See* HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 9 (1994) ("[T]he paradox we find in our own time may be put in this way: In the understanding of the most advanced feminism, there are 'human rights' to be vindicated in all places, but in the strictest sense there are no humans . . . .").

98. Thomas G. West, *The Declaration of Independence, the U.S. Constitution, and the Bill of Rights*, *in* ORIGINS AND IMPACT, *supra* note 7, at 72, 72.

99. Traditionalist conservatism is reminiscent of Karl Popper's description of Plato's Republic as "[t]he state which is free from the evil of change and corruption . . . . the *arrested state*." 1 KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 21 (5th ed. 1966).

100. *Compare, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 788-89 (1997) (Souter, J., concurring in judgment) (deferring to legislative will, but recognizing that rights can be derived from due process), *with* BORK, *supra* note 4, at 18-49 (locating evil of *Dred Scott* and *Lochner* in the Court's use of substantive due process because it fails to respect the will of legislative majorities).

decisions made by majorities:

> It just seems to me incompatible with democratic theory that it's good and right for the state to do something that the majority of the people do not want done. Once you adopt democratic theory, it seems to me, you accept that proposition. If the people, for example, want abortion, the state should permit abortion in a democracy. If the people do not want it, the state should be able to prohibit it as well. . . .
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> . . . .
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> . . . I have written in my opinions . . . that the government has no business in adopting moral positions such as laws against pornography, but only as a consequence of the desire of the people to have such laws. . . .
>
> But the government, it seems to me, in and of itself is totally neutral on those points.[101]

By abandoning natural rights, both the right and the left can finally agree only that there are no standards of right and wrong other than the choice of "the people." As Jaffa has shown, this is exactly the position defended by Stephen Douglas in his famous debates with Abraham Lincoln. Like Lincoln, liberal originalists decry majoritarianism as the principle "that 'if one man would enslave another, no third man should object.'"[102]

## V. ARGUMENTS AGAINST LIBERAL ORIGINALISM

We have seen that conservative originalists view the Declaration as inevitably tending toward antisocial behavior, while leftists reject it because, in their view, it is embodies a racist and exploitative worldview. These do not exhaust the arguments against the liberal originalist interpretation; indeed, they are extremes which border on caricature. More nuanced arguments have been presented against interpreting the Constitution in light of the Declaration. We will take a moment to consider some of the more important arguments. The leading objection—that the whole issue is irrelevant to the modern world—will occupy a separate section.

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101. Scalia, *supra* note 6, at 164.

102. Abraham Lincoln, Address at Cooper Institute (Feb. 27, 1860), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 8, at 522, 538.

### *A. Liberal Originalism Overemphasizes Locke*

Jason Robinson criticizes liberal originalism on the grounds that it assumes that the politics of John Locke predominated among the framers, and thus that Gerber gives short shrift to other philosophers who were equally influential.[103] But while it is true that the framers drew from many political thinkers when framing America's political institutions, it would be a mistake to assume that these thinkers were in fundamental disagreement on essential points.[104] Jefferson, for example, wrote that Locke, Algernon Sidney, Cicero, and Aristotle were the "elementary books of public right."[105] Locke and Sidney,[106] as well as the many other philosophers upon whom the framers relied (including Hume, Montesquieu, Burlamaqui, Trenchard & Gordon,[107] Milton, and Coke) were largely in agreement over those elements which are found in the Declaration. As Ralph Lerner has put it, "Most of the divisions of mind and policy that beset the founding generation were over different interpretations of what was held in common."[108]

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103. Robinson, *supra* note 2, at 133-34.

104. *Cf.* CLINTON ROSSITER, THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION 67 (1953) ("It is not easy to separate the English libertarians into major and minor prophets of the American cause . . . .").

105. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 14, at 1500, 1501.

106. Algernon Sidney is, unfortunately, little remembered today. His *Discourses Concerning Government* was, like Locke's *First Treatise*, written as a rebuttal of Robert Filmer's *Patriarcha*, which defended the theory of absolute monarchy. *See* ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT (Thomas G. West ed., Liberty Classics 1990) (1698). Sidney had participated in the rebellion against Charles II and was involved in the intrigues against James II which would eventually culminate in the Glorious Revolution of 1688. But Sidney would not live to see that Revolution, since James II had him executed for treason in 1683. *See* Thomas G. West, *Foreword* to ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT, *supra*, at xv, xxxiv-xxxv. The *Discourses* are less well organized than Locke's books, are often redundant, and are missing some passages. Nevertheless, they have their moments of wit and power, which endeared Sidney to the American patriots.

107. John Trenchard and Thomas Gordon were the authors of a series of seventeenth century papers which they signed "Cato." *Cato's Letters* "ranked with the treatises of Locke as the most authoritative statement of the nature of political liberty" among the American founders. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 36 (2d ed. 1992).

108. RALPH LERNER, THE THINKING REVOLUTIONARY, at x-xi (1987). William Blackstone did have an important disagreement with Locke over a central issue: whether or not the legislative branch was vested with full, unbounded sovereignty. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *159-61. This subject would become absolutely vital in later American history, and the popularity of Blackstone in early America might at first suggest that Locke's influence was not so profound as has often been assumed, but on this issue, the framers were clearly on Locke's side, since they held that our rights are "unalienable," and that "when [people] enter into a state of society, they cannot, by any compact, deprive or divest their posterity" of these rights; that is clearly a Lockean, not a Blackstonian, answer. VA. DECLARATION OF RIGHTS § 1 (1776), *in* ORIGINS AND IMPACT,

Even Edmund Burke, a hero among conservative originalists, was really more of a classical liberal than modern historians have acknowledged.[109]

The attempts of modern historians to minimize the importance of Locke, which Robinson describes,[110] are unconvincing. Gerber makes this clear by including a comparison of the Declaration and passages from Locke's *Second Treatise*.[111] In 1825, Jefferson wrote that in drafting the Declaration, he had not turned to "any particular and previous writing," but had instead attempted to give "expression of the American mind," which, "with respect to our rights . . . was [of] but one opinion."[112] Locke and Sidney, he wrote, were

> those [writers] generally approved by our fellow citizens of this, and the United States, and that on the distinctive principles of the government of our State, and of that of the United States, the best guides are to be found in, 1. The Declaration of Independence, as the fundamental act of union of these States. 2. . . . 'The Federalist,' . . . . 3. [The Virginia Resolutions]. 4. [Washington's farewell address].[113]

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*supra* note 7, at 294-95. In fact, late in life, Jefferson commented on the increasing popularity of Blackstone:

> [B]efore the revolution, Coke['s *Institutes*] was the universal elementary book of law students, and a sounder whig never wrote . . . . [O]ur lawyers were then all whigs. But when his black-letter text, and uncouth but cunning learning got out of fashion, and the honied Mansfieldism of Blackstone became the student's hornbook, from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue.

Letter from Thomas Jefferson to James Madison (Feb. 17, 1826), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 14, at 1512, 1513-14.

109. *See, e.g.*, EDMUND BURKE, A VINDICATION OF NATURAL SOCIETY (Frank N. Pagano ed., Liberty Fund 1982) (1756). *But see* Frank N. Pagano, *Introduction* to EDMUND BURKE, A VINDICATION OF NATURAL SOCIETY, *supra*, at xi, xiv-xxi (suggesting that Burke intended to satirize classical liberalism).

110. Robinson, *supra* note 2, at 133-34. Oddly, although Robinson claims to rely on Bernard Bailyn for the idea that Locke was not of such central importance to the American founding, *id.* at 133 n.46, Bailyn himself describes Locke's influence as "clearly dominant," "wholly determinative," and "the most authoritative" on the nature of political liberty. BAILYN, *supra* note 107, at 30, 36.

111. ORIGINS AND IMPACT, *supra* note 7, at 229-31.

112. Letter from Thomas Jefferson to Henry Lee, *supra* note 105, at 1501.

113. Thomas Jefferson, From the Minutes of the Board of Visitors, University of Virginia, 1822-1825, *in* THOMAS JEFFERSON: WRITINGS, *supra* note 14, at 477, 479. Jefferson wrote to Madison that although "none of us are so much at the heights of science in the several branches, as to undertake [compiling a book of required readings,] there is one branch in which I think we are the best judges . . . . It is that of govmt." Letter from Thomas Jefferson to James Madison (Feb. 1, 1825), *in* 3 THE REPUBLIC OF LETTERS, *supra* note 16, at 1923, 1923. Madison agreed in general, but suggested that the Virginia Resolutions be removed from Jefferson's list. Letter from James Madison to Thomas Jefferson (Feb 8, 1825), *in* 3 THE REPUBLIC OF LETTERS, *supra* note 16, at 1924, 1925.

John Quincy Adams said,

> The Declaration of Independence and the Constitution of the United States, are parts of one consistent whole, founded upon one and the same theory of government, then new, not as a theory, for it had been working itself into the mind of man for many ages, and been especially expounded in the writings of Locke, but had never before been adopted by a great nation in practice.[114]

Of course it is true that the Declaration did not, and was not meant to, state new ideas; John Quincy's father said that there was "not an idea in it but what ha[d] been hackney'd in Congress for two years before."[115] But Locke's theories were not original to him, either, when he wrote them down in the seventeenth century. He simply put them into terms more accessible than those of Milton or Sidney. Locke is used more as a symbol of the political principles, *i.e.*, equality, limited government, individual liberty, which prevailed, without significant difference, among the founders.[116]

### *B. The Founders Did Not Really Mean It*

Another pervasive critique of liberal originalism is the argument that the framers of the Declaration did not really mean that all people are entitled to equal rights.[117] This argument is really a criticism of the Declaration itself, and a very old one. Lincoln focused his debates against Douglas on attacking this theory: "When Judge Douglas undertakes to say that as a matter of choice the fathers of the government made this nation part slave and part free, *he assumes what is historically a falsehood.*"[118] The historical record is strongly on Lincoln's side as we have seen in discussing slavery.[119] Jefferson's original draft of the Declaration included a condemnation of slavery,[120] and Jefferson's life was replete with instances of his opposition to slavery—even while he continued to live off of it.[121] Slavery continued in spite of the Declaration, not in accordance with it. We have seen that defenders of slavery denounced the Declaration:

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114. JOHN QUINCY ADAMS, THE JUBILEE OF THE CONSTITUTION 40-41 (1839).

115. Gawalt, *supra* note 91, at 14 (quoting John Adams).

116. *Cf.* ROSSITER, *supra* note 104, at 70 ("The natural-law philosophy had long held sway in the Western world, and a colonist in search of first principles could have turned to any one of a score of political theorists and have been completely satisfied.").

117. *See* Thelen, *supra* note 41, at 206-07.

118. Lincoln, *supra* note 40, at 276.

119. *See* THOMAS G. WEST, VINDICATING THE FOUNDERS 1-36 (1997).

120. Gawalt, *supra* note 91, at 2.

121. *See* MAPP, *supra* note 11, at 406.

David Thelen notes that six slave states even wrote constitutions "that resolved the contradiction by adding a four-letter modifier to Jefferson's key word: 'All *free*men . . . are equal.'"[122] These admissions against interest, so to speak, suggest that the Declaration really does mean just what it says. But if that is so, why has the argument to the contrary prevailed? In large part, the answer lies in the political theory of modern liberalism, which sees political action as a historical unfolding of changing principles. In this view, progress is denoted by gradual acceptance of previously excluded groups, as a result of social change, not by the application of timeless principles in changing circumstances. Social change, in this theory, "creates rights *ex nihilo* . . . as a matter of 'American law.'"[123] As a consequence, modern liberalism views all rights as forms of "welfare,"[124] whereby collective decisions open new fields of "freedom" for these excluded groups by accepting them within the penumbra of "equality." It serves the interests of the modern regulatory welfare state's defenders to portray the framers of the Declaration as benighted or ignorant, blinded by their own social class; this allows them both to portray the Declaration's vision of inherent equality and limited government as suspect, and to portray twentieth century government intervention as consistent with American founding ideals, and the "attainment of equality."

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122. Thelen, *supra* note 41, at 206. The Virginia Declaration of Rights was likewise qualified to protect slavery: "[A]ll men are by nature equally free and independent, and have certain inherent rights, of which, *when they enter into a state of society*, they cannot, by any compact, deprive or divest their posterity . . . ." VA. DECLARATION OF RIGHTS § 1 (1776), *reprinted in* ORIGINS AND IMPACT, *supra* note 7, at 294-95 (emphasis added). Another remarkable instance of this editing occurred in the California Constitutional Convention of 1878. The convention was largely dominated by nativists who despised the Chinese who had come during the Gold Rush and the building of the transcontinental railroad. The federal government made the Chinese ineligible for American citizenship, but this was not quite enough for the 1878 convention. When framing a state bill of rights, the convention first wrote that "All men are by nature free and independent . . . ." Convention members sought to qualify the language:

> MR. O'DONNELL: I move to amend by inserting after the word "men" in the first line, the words, "who are capable of becoming citizens of the United States."
>
> MR. MCFARLAND: I second the amendment. [Laughter.]
>
> THE CHAIRMAN: The Secretary will read it as amended.
>
> THE SECRETARY read: 'All men who are capable of becoming citizens of the United States, are by nature free and independent.' [Laughter.]

1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 233 (E.B. Willis & P.K. Stockton eds., 1880).

123. Tom G. Palmer, *Saving Rights Theory from Its Friends*, *in* INDIVIDUAL RIGHTS RECONSIDERED: ARE THE TRUTHS OF THE U.S. DECLARATION OF INDEPENDENCE LASTING? 35, 39 (Tibor R. Machan ed., 2001).

124. *Id.* at 37.

### *C. The Founders Did Not Understand Evolution*

One of the strongest arguments against the liberal originalists' use of the Declaration to guide constitutional inquiries today is that it was the product of assumptions about human beings and the world they inhabit which have now been refuted. In this connection, the word "Newtonian" is often used. Woodrow Wilson, for example, wrote that "[t]he government of the United States was constructed upon the Whig theory of political dynamics, which was a sort of unconscious copy of the Newtonian theory of the universe. In our own day . . . we consciously or unconsciously follow Mr. Darwin; but before Mr. Darwin, they followed Newton."[125] According to this argument, the "Newtonian" conception of the universe posited laws of the universe, moral as well as physical, but the advent of evolution demolished the assumption that there are moral truths because now we realize that there is no essential human nature on which to build them.[126] With Darwin's arrival, writes Daniel Boorstin, "[m]an's culture seemed his one and only place in the universe. Nature no longer was a fixed point of reference. Everything seemed flux while the philosopher sought to make his definitions by reference to the varying needs of animate life."[127] There are only conventions, none more true than any other, and their triumph within a culture establishes them as the reigning theory. Indeed, it was on these grounds that Carl Becker concluded that "ask[ing] whether the natural rights philosophy in the Declaration of Independence is true or false is essentially a meaningless question."[128]

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125. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 54-55 (Transaction Publishers 2002) (1908); *see also* CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 40-51 (Vintage Books 1958) (1942) (discussing how the "work of Newton . . . powerfully affected the social and political thought of the eighteenth century").

126. *See* RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION 7-10 (Vintage Books 1973) (1948); *see also* Benjamin N. Cardozo, Book Review, 37 HARV. L. REV. 279, 280 (1924) (reviewing ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY (1923)) ("The seventeenth and eighteenth centuries put their faith . . . in Nature, and their dominant philosophy was that of natural law. . . . The nineteenth century put its faith in unconscious and undirected growth; and Nature, dethroned as an exemplar, was made to yield the place to History.").

127. DANIEL J. BOORSTIN, THE LOST WORLD OF THOMAS JEFFERSON 247-48 (Beacon Press 1960) (1948). Boorstin's book is among the best analyses of Jeffersonian thought I have encountered.

128. BECKER, *supra* note 125, at 277. In Becker's view, nineteenth century science demonstrated that the allegedly "universal and eternal laws" (Becker's scare quotes), were really "a multiplicity of incomplete and temporary hypotheses." *Id.* at 279. Becker was at least correct in one sense: the nineteenth century did abandon natural rights, and excused that abandonment with appeals to scientific advancement. *See, e.g.*, MERRIAM, *supra* note

This view has been useful particularly to modern liberal advocates of "living constitutionalism," who view American legal history as the gradual growth of "equality" through social change.[129] But there are three grounds on which this argument fails. First, it misunderstands evolution. While it is true that evolution applies to moral ideas as well as biology,[130] this does not require the abandonment of the idea of objective truths. An example by Daniel C. Dennett illustrates this point:

> A parody will expose the fallacy: "The people at Boeing are under the ludicrous misapprehension that they have *figured out* the design of their planes on sound scientific and engineering principles . . . when *in fact* memetics shows us that all these design elements are simply the memes that have survived and spread among the social groups to which those airplane manufacturers belong."[131]

Of course, the aerospace design survives *because* it works on sound engineering principles. Likewise, the fact that social institutions resulted from cultural evolution does not support the claim that there are no lasting principles of human nature.

Second, this argument misunderstands the Declaration. Yes, evolution necessarily does away with philosophical theories based on "essences,"[132] but the Lockean theory underlying the Declaration saw man as *essentially* rational, and from that rationality, it devised the notion of inalienable rights.[133] To many, the end of essentialism required abandoning the presumption that man has unique moral significance.[134] But this criticism fails for the same reason that one of John C. Calhoun's attacks on the Declaration failed. Calhoun claimed that the phrase "all men are created equal" is not true because "[a]ll men are not created," but instead are *born.*[135] Such word-splitting was needed to deflect the reader from the Declaration's actual view which

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31, at 307-33.

129. *See, e.g.*, Elizabeth A. Cavendish, *The Legitimacy of Considering Judicial Philosophy in the Nominations Process*, 7 NEXUS 27, 34 (2002) ("[O]ur society properly views *Brown v. Board of Education* as a milestone on the path to racial equality, and . . . *Roe v. Wade* is a milestone in women's continuing march to full equality in America.").

130. *See generally* DANIEL C. DENNETT, DARWIN'S DANGEROUS IDEA (1995) (discussing philosophical implications of evolution).

131. DANIEL C. DENNETT, FREEDOM EVOLVES 187 (2003).

132. *See* DENNETT, *supra* note 130, at 36-39.

133. *See infra* text accompanying notes 156-87.

134. *See generally* Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645 (1985) (exploring the implications of "'evolutionary' jurisprudence").

135. CONG. GLOBE, 30th Cong., 1st Sess. 872 (1848).

dictates that the qualities that are morally relevant to the definition of "man," rationality in particular, are what entitle people to rights, and those people who do not have those qualities are not created equal in the relevant sense. "'All men are created equal' is meant in the sense that no one is so perfect that he may rightfully exercise absolute power over other men for their good or for his own."[136] This claim does not depend on essentialism.

In this connection, Bonnie L. Ford's essay in *Origins and Impact* is relevant. Ford explains that, "[a]lthough they would not markedly change the role of women in the years immediately following the American Revolution, certain trends were put in motion by Revolutionary ideology" in the form of the Declaration.[137] Indeed, one of the most famous of early feminist statements was the Seneca Falls Declaration, in which feminist leaders re-wrote the Declaration to demand equality of the sexes.[138] These feminists did not regard the Declaration as untrue, or even as essentially chauvinistic. Rather, it made a promise which was valid for women as well as men—but America had, as a practical matter, refused to live up to that promise. Being rational creatures like men, the Seneca Falls organizers held women were equally entitled to natural rights. As John Quincy Adams asked,

> Why does it follow . . . that women are fitted for nothing but the cares of domestic life? for bearing children, and cooking the food of a family? devoting all their time to the domestic circle—to promoting the immediate personal comfort of their husbands, brothers, and sons? . . . I admit that it is their duty to attend to these things. . . . But I say that the correct principle is, that women are not only justified, but exhibit the most exalted virtue when they do depart from the domestic circle, and enter on the concerns of their country, of humanity, and of their God. The mere departure of woman from the duties of the domestic circle, far from being a reproach to her, is a virtue of the highest order, when it is done from purity of motive, by appropriate means, and towards a virtuous purpose.[139]

In fact, those who have denied the equal rights of women have routinely done so, not by denying the *humanity* of women—

136. West, *supra* note 98, at 74.

137. Bonnie L. Ford, *Women, Equality, and the Declaration of Independence, in* ORIGINS AND IMPACT, *supra* note 7, at 174, 176.

138. DECLARATION OF SENTIMENTS (1848), *reprinted in* ORIGINS AND IMPACT, *supra* note 7, at 322.

139. MILLER, *supra* note 42, at 321-22 (citation omitted).

obviously—but by denying their *rationality.* Ford quotes an American feminist of the post-Revolutionary period: "'The *idea of the incapability* of women, is, we conceive, in this *enlightened age,* totally *inadmissible.*'"[140] This again reflects the Declaration's fundamental principle: rationality, not biology or culture, is what entitles human beings to inalienable rights.

Finally, as with all arguments from relativism, the argument that the Declaration is undermined by evolution is self-contradictory and useless. As Jaffa has pointed out, the problem with Becker's claim that previous generations erred by failing to understand that all of their statements were merely instances of historical evolution over which they had no control is that it must apply to Becker as well. "Becker [has] exempted the mind of the philosopher or scientist" from his own theory, and thus fallen "into the same fatal dualism that has characterized the descendants of that first of modern philosophers, the Cretan who said that all Cretans are liars!"[141] Ideas may compete within a society, in an evolutionary process, but what they compete for is acceptance by people—and that acceptance will frequently come because such ideas reflect some an underlying truth about the world.

### *D. The Framers Didn't Intend for It to Be Relevant*

One objection to using the Declaration in interpreting the Constitution is that the framers, although they did believe in natural rights, did not expect those rights to be protected by courts.[142] This view was expressed as early as *Calder v. Bull,*[143] when Justice Samuel Chase declared that certain legislative acts were prohibited by the very nature of the Constitution.[144] To this, Justice James Iredell responded:

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140. Ford, *supra* note 137, at 177 (quoting Judith Sargent Murray).

141. HARRY V. JAFFA, A NEW BIRTH OF FREEDOM 97 (2000).

142. *See* BORK, *supra* note 4, at 66.

143. 3 U.S. (3 Dall.) 386 (1798). Remarkably, Justice Chase would be impeached only a few years later largely in retaliation for political comments made in his charges to juries, in which he *denied* the theory of natural rights. *See* LERNER, *supra* note 108, at 108-15.

144. *Calder*, 3 U.S. (3 Dall.) at 388.

> A law that punished a citizen for an *innocent* action, or, in other words, for an act, which, when done, was in violation of no *existing* law; a law that destroys, or impairs, the *lawful private* contracts of citizens; a law that makes a man *a Judge in his own cause*; or a law that takes *property* from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.

*Id.*

> [S]ome speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess a power to declare it so. . . .
>
> . . . The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. [145]

This fascinating debate has not gone away, but rather has continued to the present, with Justice Iredell representing the views of conservative originalists, and Justice Chase those of liberal originalists. As Bork, who explicitly agrees with Iredell, puts it, "the debate has grown increasingly complex, [but] in almost two centuries the fundamental ideas have not been improved upon."[146] Like Iredell, Bork claims that "if the Founders intended judges to apply natural law, they certainly kept quiet about it. . . . No one at the time suggested any such power in the courts, and early courts made no claim that such a power had been delegated to them."[147] Justice Antonin Scalia has gone even further: "[T]o my mind fortunately, the Supreme Court of the United States, no federal court to my knowledge, in 220 years has ever decided a case on the basis of the Declaration of Independence. It is not part of our law."[148]

Gerber, however, has collected a long list of Supreme Court cases that have relied on the Declaration, at least in part, from 1793 to 2001.[149] As of 2000, writes Mark David Hall, "justices had explicitly invoked the Declaration in 184 opinions (106 majority, 54 dissenting, and 24 concurring or other type of opinion)."[150] These include opinions by Justice Scalia,[151] as well as other conservatives, along

145. *Id.* at 398-99.

146. BORK, *supra* note 4, at 20. *Compare id.* (defending Iredell's view), *with* JAFFA, *supra* note 29, at 294-95 (defending Chase's views). One interesting example of this parallel is *Billings v. Hall*, 7 Cal. 1 (1857), in which California Supreme Court Justice Murray takes the position of Chase, *see id.* at 13, while dissenting Justice Terry takes the position of Iredell, *see id.* at 23 (Terry, J., dissenting).

147. BORK, *supra* note 4, at 209.

148. Scalia, *supra* note 6, at 165; *see also* Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) ("The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts.").

149. *See* ORIGINS AND IMPACT, *supra* note 7, at 303-14.

150. Mark David Hall, *The Declaration of Independence in the Supreme Court*, *in* ORIGINS AND IMPACT, *supra* note 7, at 142, 142.

151. *See, e.g.*, Weiss v. United States, 510 U.S. 163, 198 (1994) (Scalia, J., concurring)

with liberal justices like Thurgood Marshall and William Brennan. And with regard to Justice Scalia's comment that the Declaration is "not part of our law," John C. Eastman points out that the Declaration appears as the very first document in the United States Code,[152] and what's more, every state, beginning with Nevada in 1864, has been required to incorporate certain principles of the Declaration in its state constitution, particularly the notion that all men are created equal.[153] *Origins and Impact* includes a list of state constitutions and admission acts which included language from the Declaration.[154] Finally, early courts did invoke natural law.[155] The Declaration of Independence is indeed a part of the American Constitution.

## VI. WHAT DIFFERENCE DOES IT MAKE?

### *A. Civil Rights*

As I have already observed, the most obvious instance in which the Declaration would be relevant to interpreting Constitutional provisions would be in the area of race relations. Justice Thomas cited the Declaration in his concurring opinion in *Adarand Constructors, Inc. v. Pena*.[156] Likewise, California Supreme Court Justice Janice Rogers Brown began the discussion section of her landmark decision in *Hi-Voltage Wire Works, Inc. v. City of San Jose*[157]—interpreting the California Civil Rights Initiative[158]—by quoting the Declaration.[159] The Declaration clearly endorses what has come to be called "color-blind constitutionalism:" that the government has no business taking cognizance of a person's race, even where doing so is allegedly benevolent, because doing so necessarily requires the government to

(noting "the grievances recited against King George III in the Declaration of Independence").

152. John C. Eastman, *The Declaration of Independence as Viewed from the States*, *in* ORIGINS AND IMPACT, *supra* note 7, at 96, 96.

153. *See id. See also* ORIGINS AND IMPACT, *supra* note 7, at 267-96 (compiling relevant portions of various state constitutions).

154. *See* ORIGINS AND IMPACT, *supra* note 7, at 267-96.

155. *See, e.g.*, Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 207-08 (1796); The Antelope, 23 U.S. (10 Wheat.) 66, 90, 120 (1825); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 346-47 (1827) (Marshall, C.J., dissenting). Natural law was cabined by standards of legal reasoning, but was a legitimate consideration for the courts. *See* Roby v. Reaume, 3 Blume Sup. Ct. Trans. 376, 394-95 (Mich. 1819).

156. 515 U.S. 200 (1995).

157. 12 P.3d 1068 (Cal. 2000).

158. CAL. CONST. art. I, § 31.

159. *Hi-Voltage*, 12 P.3d at 1072.

burden others on account of their race. In its recent decision in *Grutter v. Bollinger*,[160] the Supreme Court held that government-run colleges and graduate schools may use race as a factor in student admissions because racial diversity increases students' exposure to different intellectual influences, thus improving the quality of education.[161] The race preference at issue in *Grutter* would give "bonus points" even to a black student whose family was from the upper socioeconomic class, while penalizing a lower-class white student.[162] This type of "bonus points" system implies a tacit assumption that blacks and whites are inherently different on an intellectual level solely because of their race. This assumption—that the content of one's character is determined by the color of one's skin—is inconsistent with the Declaration, which assumes that equality before the law is the birthright of all human beings *because they are human*, regardless of their race.

But while the Declaration's premises would preclude government from discriminating based on race, it does not require that the free choices people make must be rearranged by government to accomplish an equality of result. Things being equal do not make them interchangeable. The principle of equality is offended when government takes cognizance of race, but not when people establish, for instance, private community organizations or colleges designed to aid a particular minority group. This is because, while government bases its legitimacy on the consent of the governed, who have an equal right to give or withhold that consent, private organizations base their legitimacy on the agreement only of their *members*, and may ignore the wishes of non-members. The Declaration thus provides no mandate for government intervention designed to "equalize" the consequences of private decision-making. Indeed, private organizations have often been a convenient way for unpopular minority groups to find solutions for being deprived of a full range of opportunities.[163]

*Grutter* was a major blow to the principle of equality. While the

160. 539 U.S. 306 (2003). *See also* Grutter v. Bollinger, 288 F.3d 732, 764 (6th Cir. 2002) (Clay, J., concurring) (stating that "a comparably-situated white applicant is a 'different person' from the black applicant [because] this black applicant may very well bring to the student body life experiences rich in the African-American traditions").

161. *Grutter*, 539 U.S. 306 at 329-31.

162. *See Grutter*, 288 F.3d at 791 (Boggs, J., dissenting).

163. *See* Frederick Douglass, Address to the People of the United States (Sept. 25, 1883), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS, *supra* note 46, at 669, 672.

Declaration holds that all men are created equal, with an equal right to consent to government, and that government exists only to secure the rights of the governed, the *Grutter* Court held that creating racial "diversity" is a "compelling state interest."[164] The impact of this decision is difficult to gauge at present, but it will certainly be major. Where racial preferences were once justified on the grounds that they were necessary to undo the discriminatory policies of the past—thus, in a perverse way, serving the Declaration's principles—the Court has now declared racial balancing itself to be a legitimate object of government. Despite its bizarre 25-year "limitation,"[165] the Court has guaranteed that race will be a permanent feature of American public life. As Justice Thomas noted in dissent, the *Grutter* Court "has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause."[166]

### *B. Sexual Freedom and Public Morality*

Privacy rights and sexual freedom are important issues in the controversy over liberal originalism. One goal of some liberal originalists is to use the principles of the Declaration to mount a philosophical and legal attack on abortion. Hadley Arkes, for example, makes an explicit analogy between slavery and abortion, arguing that just as defenders of slavery dehumanized blacks in order to deny that they had rights, so defenders of abortion deny the humanity of fetuses in order to deny that they have rights.[167] The Declaration entitles all human beings to a right to life, Arkes continues; thus, there is not only no natural right to an abortion—despite the natural rights rhetoric often employed in defense of

164. *Grutter*, 539 U.S. at 330.

165. *Id.* at 342. *Cf.* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 495 (1989) ("The dissent's watered-down version of equal protection review effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race,' will never be achieved." (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 320 (1986) (Stevens, J., dissenting))).

166. *Grutter*, 539 U.S. at 364 (Thomas, J., dissenting). Note that the conservative originalist Justice Scalia joined in all parts of Justice Thomas' dissent *except* that paragraph which cites the Declaration. This is consistent with his view that the Declaration is not law. *See* Scalia, *supra* note 6, at 165.

167. *See* HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE 5, 73-111 (2002); James R. Stoner, *The Genteel Abolitionist*, 3 CLAREMONT REV. BOOKS 12, 13 (2003) (reviewing HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE (2002)) ("Between slavery and abortion, according to Arkes, there is not merely an analogy but an almost perfect repetition.").

abortion rights[168]—but quite the opposite: abortion violates the fetus's right to life.

While the slavery analogy has superficial appeal, it collapses on closer inspection. It is true that many leftists—whose defense of abortion rights posits a claim to natural rights style absolutism—often base their other legal arguments (particularly their defense of the regulatory welfare state) on *denying* natural rights and the substantive due process that protects them.[169] Arkes is right to note that leftist denunciations of *Lochner v. New York*,[170] for instance, are inconsistent with their defense of the natural rights claims of *Roe v. Wade*[171] and other abortion-rights cases.[172] But Arkes' view rests on the assumption that the Declaration's "right to life" language applies to single-celled organisms that do not have minds.[173] Denying that *these* have a right to life is *not* the same as the slaveowners' denial that mature adult black human beings have a right to life. The difference becomes clear when we recall John Quincy Adams' words defending his decision to introduce a petition from slaves on the floor of the House, "Sir . . . if a horse or a dog had the power of speech and of writing," said Adams, "and he should send him a petition, he would present it to the House; ay, if it were from a famished horse or dog, he would present it."[174] Adams saw the Declaration as applying to beings with the ability to reason about good and evil. Under this view,[175] the rights of the Declaration attach to human beings because

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168. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992).

> It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view. . . . It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.

*Id.*

169. In his dissent in *Griswold v. Connecticut*, 381 U.S. 479, 511-12 (1965), Justice Black decried this fact and argued that the Court ought not to recognize a natural right to sexual privacy, just as it had already rejected the natural right to earn a living recognized in *Lochner v. New York*, 198 U.S. 45 (1905).

170. 198 U.S. 45.

171. 410 U.S. 113 (1973).

172. *See, e.g.*, *Casey*, 505 U.S. at 846 (stating that due process "bar[s] certain government actions *regardless of the fairness of the procedures* used to implement them") (citation omitted) (emphasis added).

173. This assumption has particular relevance in the current debate over whether to ban somatic cell nuclear transfer technique of "cloning."

174. CONG. GLOBE, 24th Cong., 2d Sess. 165 (1837).

175. It is not my contention that John Quincy Adams would himself have believed in abortion rights.

of their ability to reason, not to all human cells merely because of their genetic makeup.[176] This is consistent with Locke's explanation that it is the reasoning faculty which entitles people to rights.[177] Locke explains that children, or the mentally incompetent, lack their full measure of reason, and are therefore not entitled to the same liberty as mature adult human beings.[178] Criminals, too, who violate the rights of others, break the rule of reason by doing so, and may be treated like animals—by being caged or even killed.[179] Children and the mentally infirm have rudimentary reasoning ability, and therefore have rudimentary natural rights,[180] but a single human cell (or cluster of cells), unlike a black adult human being, has no mind, and no ability to reason about good and evil.[181] Its entitlement to rights under

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176. Indeed, a theory of rights which found that all cells containing 46 human chromosomes had rights would be unworkable, since this would include all somatic cells. As Ronald Bailey explains:

> [T]he embryos from which stem cells are derived are persons . . . [o]nly if *every* cell in your body is also a person. Why? Because scientific ingenuity now makes it logically (if not quite logistically) possible for each of your body's cells to become your twin. Each skin cell, each neuron, each liver cell is *potentially* a person. All that's lacking is the will and the application of the appropriate technology.

Ronald Bailey, *Are Stem Cells Babies?* REASON ONLINE (July 11, 2001), *at* http://reason.com/rb/rb071101.shtml.

177. "The *Freedom* then of Man, and Liberty of acting according to his own Will, is *grounded on* his having *Reason*, which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will." JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 311, 328-29, 352 (Peter Laslett, ed., rev. ed., Mentor Books 1965) (1690). *See also* Eric Mack, *The State Of Nature Has A Law of Nature to Govern It*, *in* INDIVIDUAL RIGHTS RECONSIDERED: ARE THE TRUTHS OF THE U.S. DECLARATION OF INDEPENDENCE LASTING?, *supra* note 123, at 87 (containing an excellent brief explanation of Lockean theory and its derivation from the faculty of reason).

178. *See* LOCKE, *supra* note 177, at 346-47.

> *Children*, I confess, are not born in this full state of *Equality*, though they are born to it. Their Parents have a sort of Rule and Jurisdiction over them when they come into the World, and for some time after, but 'tis but a temporary one. The Bonds of this Subjection are like the Swadling Cloths they are wrapt up in and supported by in the weakness of their Infancy. Age and reason as they grow up loosen them, till at length they drop quite off, and leave a Man at his own free Disposal.

*Id.*

179. *See id.* at 313-14, 319-20.

180. For instance, children may not be murdered, but they may be falsely imprisoned.

181. *See also* DENNETT, *supra* note 131, at 169.

> There are unfortunate human beings who for one reason or another cannot [cope in the world around us effectively] and they must live among us in a reduced status, rather like pets, at best, cared for and respected, restrained if necessary, loved and loving in their limited ways, but not full participants in the human social world, and, of course, lacking morally significant free will.

*Id.*

the Declaration's Lockean theory is therefore less than self-evident.[182]

Although this is not the place to fully develop a natural rights theory regarding abortion, these considerations suggest the weakness of Arkes' approach. In fact, interpreting the Constitution in light of the Declaration promises more for defenders of sexual freedom than many liberal originalists recognize. This is precisely why conservative originalists reject natural rights; Bork argues that "who says *Roe* must say *Lochner* and *Scott*."[183] Although the connection to *Dred Scott* is weak, Bork has a point about the likenesses between *Lochner* and *Roe*.[184] The natural right to earn a living free from government interference,[185] which lay at the heart of *Lochner* or *Adkins v. Children's Hospital*[186] is based on a fundamental principle that each individual owns himself or herself, and may therefore act in any way that he or she wishes, consistent with the natural rights of others. Unless opponents of abortion rights can prove that single-celled organisms without minds are necessarily included in the Declaration, its assertion of liberty would seem to lead to the conclusion that women also have the right to obtain abortions if they choose.[187]

This debate is also central in the area of homosexual rights. Because conservative originalists deny the role of natural rights under the Constitution, they claim that homosexuality can be banned simply

182. Gerber has elsewhere noted that the Declaration does not answer the abortion issue. *See* GERBER, *supra* note 2, at 181-84. But Gerber misapplies the concept of the right to life. In his view, "[i]f the unborn child *is* a 'life,' then there is *not* a natural right to abortion because 'the fundamental law of nature' is the preservation of life. . . . " *Id.* at 182. But as Locke explains, the law of nature is reason. *See* LOCKE, *supra* note 177. Locke nowhere acknowledges a right to life among creatures without minds; in fact, he explicitly acknowledges that animals have no rights because they do not possess reason. Indeed, Gerber acknowledges this implicitly when he notes that natural rights theory is consistent with the death penalty because "acting rationally is a condition in Locke's moral theory for being subject to natural law and the possessor of natural rights under that law." GERBER, *supra* note 2, at 177.

183. BORK, *supra* note 4, at 32.

184. Which Arkes concedes. *See* ARKES, *supra* note 97, at 22.

185. *See* Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207 (2003).

186. 261 U.S. 525 (1923).

187. A theory of natural rights which held that a single-celled organism without a mind was entitled to the Declaration's list of rights would also have to explain whether non-human animals are entitled to the same rights, and if not, how that line can be consistently drawn. Why should a single human cell have a right to life, but not a mature ape or dolphin? Further, it would have to explain how a fetus's rights would be valid against the mother. According to Lockean natural rights theory, one who attempts to deprive an innocent person of his right to life may be killed, not only by the likely victim in self defense, but by society, as a form of punishment. Thus, if Arkes is correct that the fetus has a right to life, he would also have to advocate the availability of the death penalty for women who seek to obtain abortions.

because it is distasteful to the majority.[188] The issue is not so easy for liberal originalists, for although they support natural rights, they are willing to forgo "individual liberty and limited government" in the private sphere in order to "avoid judicial activism."[189] However, the Declaration secures the concept of personal autonomy in the phrase "the pursuit of happiness." As all people are entitled to this right, nobody, and no government, may deprive another of it; one person's right to swing his fist ends where another's nose begins. The Declaration protects the right of people to seek their own happiness, even in ways that others find distasteful, so long as they respect each others' right to do so. In Thomas Jefferson's words, "the legitimate powers of government extend to such acts only as are injurious to others."[190]

While sexual freedom is not specified in the Bill of Rights, the Ninth Amendment refers to "other[]" rights which are "retained by the people."[191] Contrary to the dissembling of some conservative originalists,[192] the meaning of the Ninth Amendment is plain: the Bill of Rights is not intended to be exhaustive, but only illustrative.[193]

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188. *See, e.g.*, BORK, *supra* note 4, at 124 ("Moral outrage is a sufficient ground for prohibitory legislation."). Bork makes clear that, in his view, this is sufficient even where the legislators do not witness a morally outrageous act, but "just know what is taking place and . . . are appalled." *Id.* For an excellent critique of Bork's view, see Glenn H. Reynolds, *Sex, Lies and Jurisprudence: Robert Bork,* Griswold, *and The Philosophy of Original Understanding*, 24 GA. L. REV. 1045 (1990).

189. Dana Berliner, *Limits: Taking Issue with Ramesh Ponnuru,* NAT'L REV. ONLINE (Feb. 26, 2003), *at* http://www.nationalreview.com/comment/comment-berliner022603.asp.

190. Thomas Jefferson, *Notes on the State of Virginia, reprinted in* THOMAS JEFFERSON: WRITINGS, *supra* note 14, at 123, 285.

191. U.S. CONST. amend. IX.

192. *See, e.g.*, BORK, *supra* note 4, at 183 ("There is almost no history that would indicate what the ninth amendment was intended to accomplish.").

193. *See* James Wilson, Speech at the Pennsylvania Ratification Convention (Oct. 28, 1787), *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 436 (Jonathan Elliot ed., 1836).

> [A] bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. . . . If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.

*Id.*; THE FEDERALIST NO. 84, *supra* note 33, at 514 (Alexander Hamilton) (C. Rossiter ed., 1961).

> [A bill of rights] would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to

Although the primary protector of individual rights in the Constitution was the fact that it granted only limited powers,[194] the Bill of Rights was intended to reiterate the fact that the American Constitution was a charter of power granted by liberty.[195] Unless otherwise specified, individuals were left free to pursue happiness in ways that did not interfere with the rights of their neighbors.[196] The Constitution thus embodies the same presumption in favor of individual freedom that was announced in the Declaration of Independence.[197] The question is not, as conservative originalists would have it, one of whether the right to privacy is "in the Constitution"—this version of the question is foreclosed by the Ninth Amendment—but whether any legitimate government has a right to police such activity. The Declaration answers no.[198] There are things that are simply beyond the legitimate

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prescribe proper regulations . . . was intended to be vested . . . .

*Id.*; Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* JAMES MADISON: WRITINGS 418, 420 (Jack N. Rakove ed., 1999).

> My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration . . . because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude.

*Id.*; James Madison, Speech in Congress Introducing Constitutional Amendments (June 8, 1789), *in* JAMES MADISON: WRITINGS, *supra*, at 437, 448-49.

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration . . . . This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause [which became the Ninth Amendment].

*Id.*; *see also* Randy E. Barnett, *Reconstructing the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988) (describing history and purpose of Ninth Amendment).

194. *See* Roger Pilon, *Foreword: Restoring Constitutional Government* to 1 CATO SUPREME COURT REVIEW, at vii, x (2002).

195. *See* James Madison, *Charters*, NAT'L GAZETTE, Jan. 19, 1792, *reprinted in* JAMES MADISON: WRITINGS, *supra* note 193, at 502, 502.

196. It is often claimed that the residual sovereignty of the states, reflected in the Tenth Amendment, reserves in the states a power to regulate private consensual adult sexual activity. But the Declaration permits states only to do "[t]hings which Independent States may *of right* do." THE DECLARATION OF INDEPENDENCE para. 31 (1776) (emphasis added). The natural law thus places limits on state government in the same way that the Constitution limits the federal government. The Fourteenth Amendment then incorporates the natural rights philosophy of the Declaration against the states. *See* Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 7 (1998).

197. *See* Randy E. Barnett, *Necessary and Proper*, *in* THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM 157, 188-93 (Branford P. Wilson & Ken Masugi eds., 1998) (describing presumption of liberty).

198. I am not denying that Eighteenth and Nineteenth Century governments regulated sexual morality; they did. Even Thomas Jefferson's revised code of laws for Virginia punished homosexuality by castration. This, however, was actually a liberalization of a

reach of any government.[199]

Jaffa has attempted to argue that even the Declaration's natural rights theory does *not* protect the right to engage even in consensual homosexual conduct.[200] He argues that there can be no natural right to do an unnatural thing, and since sex is designed by nature for the purposes of procreation but homosexual sex cannot accomplish procreation, *ergo,* there can be no natural right to engage in homosexuality. This is not the place to fully vindicate the rights of private consensual adult sexual activity, but one can spot the fallacy of this argument in the equivocation over the term "natural." "Natural" rights does not refer to rights conferred upon us by *biological* nature, but by our *human nature*—the quality or qualities that make us human.[201] Yet it is precisely the nature of human beings

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law which had punished "buggery" by capital punishment. Further, Jefferson also *eliminated* punishments for bestiality, because, he explained, "it cannot . . . be injurious to society in any great degree, which is the true measure of criminality in foro civili, and will ever be properly and severely punished, by universal derision." Thomas Jefferson, A Bill for Apportioning Crimes and Punishments, *in* THOMAS JEFFERSON: WRITINGS, *supra* note 14, at 349, 356 n. 25. Moreover, there is good reason to believe that such laws were not aimed at private homosexual activity. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2478-79 (2003); *see also* Brief of Amici Curiae The Cato Institute at 24, *Lawrence* (No. 02-102) ("No reported case in the United States between 1789 and 1868 clearly applied sodomy laws to conduct within the bedroom between consenting adults."). In any event, just as their principles required the eventual eradication of slavery and state-enforced religion, even though the framers' generation persisted in these things long after the Declaration was issued, so the Declaration is inconsistent with government regulation of private, consensual, adult sexual activity. *See also* Griswold v. Connecticut, 381 U.S. 479, 491-95 (1965) (Goldberg, J., concurring) ("To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy . . . may be infringed . . . is to ignore the Ninth Amendment and give it no effect whatsoever.").

199. *See Lawrence*, 123 S. Ct. at 2484. An excellent analysis of these issues from the Declaration's perspective is be found in *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992). *See id.* at 496 ("[I]mmorality in private which does 'not operate to the detriment of others,' is placed beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution.").

200. In one particularly embarrassing attempt, Jaffa likens consensual homosexual behavior to the rapes and murders of Ted Bundy—blatantly ignoring the issue of *consent*, which is, of course, the central point of the discussion. In a fictional dialogue between Bundy and a prospective victim, Jaffa has Bundy say

> I recognize that your life and your freedom are very valuable to you, but you must recognize that they are not so valuable to me. And if I must sacrifice your life and freedom to mine, why should I not do so? . . . [A] life without raping and murdering is not worth living to me. What right do you—or does anyone—have, to deny this to me?

Harry V. Jaffa, *Homosexuality and Natural Law*, *at* http://adnetsolfp2.adnetsol.com/ssl_claremont/publications/homosexuality.cfm (last visited Apr. 14, 2004). This, Jaffa argues, is analogous to the decision of two homosexual adults to have consensual sex with each other. While this essay certainly makes a valid argument against *rape,* one would have liked to see at least *some* recognition that there is a difference between *consensual* and *nonconsensual* sex!

201. Daniel C. Dennett refers to this equivocation as the "nudist fallacy," after the

that we take biologically-designed drives and turn them to our *own* purposes. For example, eating is a biological need that all animals have, but humans are capable of eating for reasons other than nourishment: to celebrate, or to worship, as in the Eucharist. Communication is another capacity that many animals have, due to biology, but human beings alone use this ability to talk *to themselves,* to write poetry. All animals have sex, for biological reasons, but it is precisely our human nature that enables us to use sex to express our love for one another, not to procreate. But by Jaffa's theory, sex as a means of expressing love would be supremely *unnatural*; indeed, one would have no natural right to kiss or hug—behaviors which lack any such biological justification.[202] Under Jaffa's interpretation, infertile couples like George and Martha Washington, or James and Dolley Madison, would be committing crimes against nature every time they engaged in sex. Jaffa's argument relies on *biology* to explain human nature, when human nature is to be found precisely in the fact that we, unlike all other known species, are liberated from our biological nature by our unique grasp of culture. Our humanity is in our minds, not in our genes.

More importantly, as Douglas Rasmussen has written, the notion that individuals ought to be free to do things that others find distasteful or even immoral is not a doctrine of amoral licentiousness, but instead embodies a profoundly important moral rule:

> There are many forms of human flourishing, but there is no single best form of human flourishing *period.* Rather, there is only the best form of human flourishing *for* an individual. . . . Since there are no a priori, universal rules that dictate the proper weighting of

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notion that because man is "naturally" naked, clothes are in some sense unnatural. But clothes are natural *for man*, because human beings, by our nature, alter the "intentions" of Mother Nature in order to accomplish our *own* intentions:

> What is nonsense is the idea that what Mother Nature intends is *ipso facto* good (for us now). . . . Myopia is natural, but thank goodness for eyeglasses. Mother nature intended us to eat all the sweet things we could lay our hands on, but this is not a good reason for going with that instinct. Many of the culturally evolved features of human life are quite obviously cost-effective correctives for one superannuated "instinct" or another—and other features, as we shall see, are correctives to those correctives, and so forth. The Darwinian processes are *launched* by the underlying competition among alleles in genomes, but in our species the adaptations leave the launching pad far behind.

DENNETT, *supra* note 131, at 185 (citation omitted).

202. Further, it is unclear why, on these premises, rape would be illegal. Rape is a crime because it violates the principle that people own their own bodies and thus have the right to consent, or refuse to consent, to sexual intercourse. But if procreation or biological drives are the only relevant qualities for determining "natural," and hence legitimate, sexual behavior, this reason for illegalizing rape would disappear.

> the goods and virtues of human flourishing, a proper weighting is only achieved by individuals having practical insight at the time of action. They need to discover the proper balance *for themselves.*[203]

The Declaration sets an "ethical grounding" for the state without prescribing a moralistic government; rather, the right to pursue happiness reflects the principle that individuals should be free to discover the natural law, and its implications, for themselves. "[T]he aim of the right to liberty is to secure the possibility of human flourishing, but in a very specific way: *through seeking to protect the possibility of self-direction.*"[204]

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203. Douglas B. Rasmussen, *Why Individual Rights?*, *in* INDIVIDUAL RIGHTS RECONSIDERED: ARE THE TRUTHS OF THE U.S. DECLARATION OF INDEPENDENCE LASTING?, *supra* note 123, at 113, 119-26. The notion of self-directed personal flourishing that Rasmussen describes was most consistently asserted by Justice Blackmun:

> We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'"

Bowers v. Hardwick, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting) (alteration in original) (citation omitted). *Cf. Lawrence*, 123 S. Ct. at 2478 ("[A]dults may choose to enter upon [a sexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice."). It is not by accident that Robert Bork centers his legal theory on an attack on this passage from Justice Blackmun's *Bowers* dissent: "That view of the individual and his obligations can hardly be taken seriously," he writes. BORK, *supra* note 4, at 121. "In [the conservative originalist] view of morality and responsibility, no husband or wife, no father or mother, should act on the principle that a 'person belongs to himself and not to others.' No citizen should take the view that no part of him belongs to 'society as a whole.'" *Id.* at 121-22. A comparison to Bork's view is found in a letter from Thomas Jefferson to James Monroe:

> If we are made in some degree for others, yet in a greater we are made for ourselves. It were contrary to feeling & indeed ridiculous to suppose that a man had less right in himself than one of his neighbors or indeed all of them put together. This would be slavery & not . . . liberty . . . . Nothing could so completely divest us of that liberty as the establishment of the opinion that the state had a *perpetual* right to [its] members. This to men of certain ways of thinking would be to annihilate the blessing of existence . . . .

Letter from Thomas Jefferson to James Monroe (May 20, 1782), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 14, at 777, 779.

204. Rasmussen, *supra* note 203, at 129-30. To put it another way, the law of nature is enforced by Nature herself. Since the good life requires the activity of the soul in conformity with reason, *see* ARISTOTLE, *Nichomachean Ethics*, *reprinted in* THE BASIC WORKS OF ARISTOTLE, *supra* note 57, at 935, 943, the person who indulges in unreasonable behavior or excess will suffer psychologically or physically, rather than flourish. *See id.* at 980-83. Thus the law of nature enforces itself, as the poet Auden described in his poem, "The Hidden Law":

> Its utter patience will not try
> To stop us if we want to die:
> When we escape It in a car,
> When we forget It in a bar,
> These are the ways we're punished by
> The Hidden Law.

On this point, Garrett Ward Sheldon's brief summary in *The Political Theory of the Declaration of Independence* is unsatisfying. Sheldon argues that "[f]rom Locke's perspective . . . human equality [is] based in physical 'faculties,'" which Sheldon describes as a "biological approach," noting that Locke studied medicine at Oxford.[205] But Locke did not base his argument on biology; indeed, he disclaimed biology as a basis for his theory, writing:

> Though I have said . . . *That all Men by Nature are equal*, I cannot be supposed to understand all sorts of *Equality: Age* or *Virtue* may give Men a just Precedency: *Excellency of Parts and Merit* may place others above the Common Level: *Birth* may subject some, and *Alliance* or *Benefits* others, to pay an Observance to those to whom Nature, Gratitude or other Respects may have made it due; and yet all this consists with the *Equality*, which all Men are in, in respect of Jurisdiction or Dominion one over another, which was the *Equality* I there spoke of, as proper to the Business in hand, being that *equal Right* that every Man hath, *to his Natural Freedom*, without being subjected to the Will or Authority of any other Man.[206]

Sheldon errs further by stressing the Christian aspects of Locke's theory too strongly. While it is true that Locke's theory was consistent with seventeenth century English Protestantism,[207] the theory was not dependent on Christianity. As Jaffa has noted, "[w]hile not supposing for a moment that the Founders did not believe in the actual existence of God, their assumptions about Equality—which include assumptions about the subhuman and the superhuman—are independent of the validity of any particular religious beliefs."[208]

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W.H. AUDEN, *The Hidden Law*, *reprinted in* COLLECTED POEMS 264, 264 (Edward Mendelson ed., 1976). But the *state*, on the other hand, may only enforce violations of the law of nature when they harm some unconsenting third party. This rule allows us to discover the laws of nature without unjust interference from outsiders.

205. Garrett Ward Sheldon, *The Political Theory of the Declaration of Independence*, *in* ORIGINS AND IMPACT, *supra* note 7, at 17.

206. LOCKE, *supra* note 177, at 346.

207. Indeed, Locke's political views are quite similar to those of John Milton. *See, e.g.*, JOHN MILTON, *The Tenure of Kings and Magistrates*, *reprinted in* THE STUDENTS' MILTON 754, 756 (Frank Allen Patterson ed., rev. ed. 1933) ("No man, who knows aught, can be so stupid to deny, that all men naturally were born free, being the image and resemblance of God himself, and were, by privilege above all the creatures, born to command, and not to obey . . . .").

208. HARRY V. JAFFA, *Equality as a Conservative Principle*, *in* HOW TO THINK ABOUT THE AMERICAN REVOLUTION 13, 42 (1978). *But cf.* AYN RAND, *Man's Rights*, *in* THE VIRTUE OF SELFISHNESS 124, 126 (1964).

> The Declaration of Independence stated that men 'are endowed by their Creator with certain unalienable rights.' Whether one believes that man is the product of a Creator or of nature, the issue of man's origin does not alter the fact that he is

Indeed, conservative critics of the Declaration decry it precisely because of the equivocal nature of its religious claims. The Declaration does refer to God, but a God of "divine providence" — a watchmaker more than a corporeal manipulator of human affairs. The God of the Declaration is "nature's God," not the God of Abraham. The Declaration certainly is consistent with some versions of Christianity, but it is not an *essentially* Christian document. No doubt it would take a volume in itself to thoroughly describe the Lockean theory underlying the Declaration, but it is misleading to describe the Declaration, as Sheldon does, as "a prime example of obedience to Christ . . . ."[209] Although many of the founding fathers were Christians, they acknowledged, at least in one instance, that "the Government of the United States of America is not, in any sense, founded on the Christian religion."[210]

In sum, conservative originalists have good reason to distrust natural rights theory: it protects the very principles of personal autonomy that their politics negates. Even some liberal originalists cannot deny that the Declaration's premises forbid government from regulating behaviors that conservatives find morally repugnant. Here, Robert Bork is right: those seeking to regulate private, consensual, adult sexual activity will find no support in the Declaration of Independence.

### *C. Economic Equality*

Conservative originalists also tend to shy away from the Declaration due to the way the concept of equality has been harnessed by advocates of wealth redistribution to serve schemes of economic leveling.[211] David Thelen describes some of these movements, and how they have "filled the chasm between the Declaration's sentiments and American practice by rewriting the Declaration to comprehend their quests. . . . buttress[ing] struggles to produce a more democratic

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> an entity of a specific kind—a rational being—that he cannot function successfully under coercion, and that rights are a necessary condition of his particular mode of survival.

*Id.*

209. Sheldon, *supra* note 205, at 24.

210. Treaty of Peace and Friendship Between the United States of America, and the Bey and Subjects of Tripoli, of Barbary, Nov. 4, 1796, art. 11, 8 Stat. 154, 155.

211. *See, e.g.*, Lyndon Johnson, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965), *in* 2 PUB. PAPERS: LYNDON B. JOHNSON, 1965, at 635, 636 (1966) ("We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.").

future . . . ."[212] Of course, the distinction between equality of opportunity and equality of result has been made clear often enough in the past,[213] and even John Locke warned against conflating the two.[214]

But the Declaration does have something to offer us in interpreting the Constitution's relationship to the modern regulatory welfare state. In particular, the Privileges and Immunities Clause of Article IV has been famously interpreted with reference to the natural rights concepts found in the Declaration.[215] Further, debates surrounding the writing of the Fourteenth Amendment reveal that the Privileges or Immunities Clause of the Amendment was intended to protect natural rights against interference by state legislatures.[216]

The Privileges or Immunities Clause was "meant to be the centerpiece of section 1 of the Fourteenth Amendment . . . and a link to the natural rights principles of the Declaration of Independence . . . ."[217] If, as I and many others have argued, the time is ripe for the Privileges or Immunities Clause to be revived as a meaningful protection of individual liberty, the Declaration would serve as an essential reference on how to administer a constitutional provision that has remained dormant for well over a century.[218] As Mark David Hall notes, since the New Deal, "justices have written only two opinions connecting economic liberty to the Declaration, and in both instances the opinions were dissents and were quoting previous cases."[219]

In this connection, the recent case of *Troxel v. Granville*[220] suggests an interesting glimpse of conflicts to come. *Troxel* involved a challenge to a Washington state law that required parents to allow their children's grandparents visitation irrespective of parents' wishes.

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212. Thelen, *supra* note 41, at 209-10.

213. Note that for Russell Kirk, this distinction was irrelevant. *See* Russell Kirk, The Injustice of Equality, The Heritage Lectures #478 (Oct. 15, 1993), *at* http://www.townhall.com/hall_of_fame/kirk/kirk478.html ("Yet don't I believe in equality of *opportunity?* No, friends, I do not.").

214. *See* LOCKE, *supra* note 177, at 346.

215. *See* Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

216. *See* John C. Eastman, *Re-evaluating the Privileges or Immunities Clause,* 6 CHAP. L. REV. 123, 125 (2003); Sandefur, *supra* note 185, at 228-29; Shankman & Pilon, *supra* note 196, at 7; Thomas, *Higher Law Background, supra* note 78, at 63-67.

217. Shankman & Pilon, *supra* note 196, at 7.

218. Of course, it has remained dormant as a consequence of the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872). *See* Hall, *supra* note 150, at 155-56 (discussing the *Slaughter House Cases*).

219. *Id.* at 157.

220. 530 U.S. 57 (2000).

The Supreme Court struck this down as violating the fundamental right of parents to manage the upbringing of their children, as guaranteed under the Fourteenth Amendment's Due Process Clause. Justice Thomas joined the majority, but Justice Antonin Scalia, with whom Thomas usually agrees, dissented. In a brief concurrence, Justice Thomas suggested that he did not believe the Due Process Clause was intended to serve as a substantive guarantor of individual rights against the state,[221] but noted in a footnote that "[t]his case also does not involve a challenge based upon the Privileges and Immunities Clause and thus does not present an opportunity to reevaluate the meaning of that Clause."[222] This is consistent with Thomas's interpretation of the Clause as the proper source of Constitutional protections for natural rights, including the right to raise one's children without unreasonable state interference. In a direct challenge to Justice Thomas' view, Justice Scalia dissented, explaining:

> In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men . . . are endowed by their Creator. . . . " The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution [does not] authoriz[e] judges . . . to enforce [rights] against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.[223]

Justice Scalia's suspicion of judicial activism is well taken, but he fails to address Justice Thomas's citation to the Privileges and Immunities Clause, and consequently overlooks what in Thomas's view is the very source of that judicial power.

If the Privileges or Immunities Clause is revived in the future, it could serve to guarantee a set of economic rights which have languished since the New Deal. This would entail a thorough

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221. *See id.* at 80 (Thomas, J., concurring).

222. *Id.* at 80 n. In this footnote, Justice Thomas cited his dissent in *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999). *See Troxel*, 530 U.S. at 80 (Thomas J., concurring).

223. *Troxel*, 530 U.S. at 91-92 (Scalia, J., dissenting).

reevaluation of the constitutional limitations on government. Indeed, as Charles Kromkowski has written, the Declaration defines "the content and boundaries of governmental legitimacy."[224] The Declaration limits the legitimate powers of government to the securing of the rights to life, liberty, and the pursuit of happiness: "[w]ith government limited to these few ends, and with the presumption of individual liberty, a society . . . will be characterized by self-rule from top to bottom."[225] Thus government which forces some to work to support others who do not exceeds these boundaries.

Noting that one reason the Declaration is viewed with skepticism by the legal establishment is that "[t]he *Lochner* era produced a host of decisions linking the Declaration of Independence to extreme views of economic liberty," and the "lingering distrust" of economic liberty cases,[226] Carlton Larson has tried to sever the connection between the free market and the Declaration. The *Lochner* era Court misunderstood the Declaration, Larson contends, because it believed the Declaration protects individual rights, when instead "the 'rights' about which the Declaration is most concerned are not so much individual natural rights, but the collective rights of the American people to self-government."[227] On this assumption, Larson claims that "[t]here is not one line in the Declaration about the empowerment of minorities against popular majorities."[228] Yet the Declaration says that *"all men"* (not all *peoples*) are created equal, and that their rights are "unalienable," concluding "that whenever *any* form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it." For Larson—as for Stephen Douglas before him—the Declaration is a charter of pure majoritarianism, and the rights of which it speaks are simply the right of the majority to govern the minority.

Thomas Jefferson wrote that "[a]n *elective despotism* was not the government we fought for,"[229] and "that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal

224. Kromkowski, *supra* note 88, at 121.

225. West, *supra* note 98, at 76.

226. Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 702 (2001).

227. *Id.* at 703.

228. *Id.* at 785.

229. Jefferson, *supra* note 190, at 245.

law must protect, and to violate would be oppression."[230] What Jefferson understood was that while self-government was a blessing, it was not the ultimate goal of political rule. The ultimate goal of political rule was, in the words of the Declaration, "safety and happiness,"—safety being public, and happiness being private. These can be violated by majorities, as Madison emphasized, as well as by kings.[231] Indeed, when Larson makes the claim that "the people's right to self-government through representative legislatures [is] far more important to the Declaration than the rights, for example, of butchers and bakers to carry on their livelihood in whatever fashion they saw fit,"[232] one is reminded of James Madison's rhetorical question in *Federalist* 45:

> Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the old world, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the new, in another shape—that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form?[233]

It was butchers and bakers who fought the Revolution, and they did not do it to establish the tyranny of the majority, but to establish their right to freely pursue happiness. The Declaration explains that rights are each person's natural dessert, not privileges conferred by government. It also assumes that there is a difference between "just powers" of government and powers which are unjust. The just powers of government are limited "to secur[ing] these rights." Whenever any government exceeds these limits, it has gone beyond the boundary of

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230. Jefferson, *supra* note 14, at 492-93.

231. *See, e.g.*, Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* JAMES MADISON: WRITINGS, *supra* note 193, at 418, 421.

> In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *cheifly* [sic] to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.

*Id.* James Madison, Speech in the Virginia Constitutional Convention (Dec. 2, 1829), *in* JAMES MADISON: WRITINGS, *supra* note 193, at 824, 824 ("In republics the great danger is, that the majority may not sufficiently respect the rights of the minority.").

232. Larson, *supra* note 226, at 785.

233. THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961).

justice, as well as the consent of the governed, since the people can only consent to just powers.[234] This is why "it cannot be presumed" that the people would "entrust a Legislature with SUCH powers" as to pass "a law that takes property from A. and gives it to B."[235] B, after all, has only consented to a government which shall protect his right to life, liberty, and the pursuit of happiness. By depriving B of his property, in order to grant property or favors to A, the regulatory welfare state exceeds the just powers of government because it violates the social compact—the principle of consent. It has become "destructive of these ends." Indeed, it creates vast, unaccountable government bureaucracies that make a mockery of government-by-consent, which "harass our people and eat out their substance."[236] Finally, presuming that A may live at the expense of B simply because he has more political power or is more "deserving" in the eyes of the state violates the principle of equality.[237]

Larson's attempt to mold the Declaration into a majoritarian document, to make it palatable to those who distrust economic liberty, fails for the same reason that Stephen Douglas' argument fails: by ignoring the limits the Declaration clearly prescribes on the types of government that the people may choose. In Larson's interpretation, the Declaration sets forth an unlimited principle of "popular sovereignty:"[238] the principle, to paraphrase Lincoln, that if the majority wish to deprive a worker of overtime, force him to support the vast redistributionist welfare state, give his earnings to those who do not work, take his retirement out of his control and put it in the hands of the massive pyramid scheme of Social Security, prevent him from getting a business license, confiscate his earnings through taxation, and give those earnings to B—that no other man should object.[239] These precepts are contrary to the philosophy of the Declaration.

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234. *See* JAFFA, *supra* note 29, at 94-95 (arguing that the people have no right to consent to an unjust regime).

235. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

236. DECLARATION OF INDEPENDENCE para. 2 (1776). *See generally* CLINT BOLICK, GRASSROOTS TYRANNY (1993) (arguing that local initiatives can reduce liberty just as much as national regulation).

237. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

238. Larson, *supra* note 226, at 732, 784.

239. Charles Sumner described the "ever-present motive power" of slavery as "simply to *compel the labor of fellow-men without wages!*" CONG. GLOBE, 36th Cong., 1st Sess. 2592 (1860).

### *D. Federalism*

Mark David Hall has written on the effect of the Declaration of Independence in Supreme Court decisions. Although he notes that the Declaration has often been cited as a rhetorical flourish rather than as a binding legal document,[240] he finds several areas in which the Declaration can make a difference in our understanding of the Constitution, namely federalism,[241] separation of powers,[242] and in First Amendment jurisprudence.[243] Of these, federalism is probably the most presently relevant. Recent cases finding constitutional protections for sovereign immunity in the Eleventh Amendment are based on the theory that states retain the attributes of sovereignty which devolved to them upon declaring independence from England. The Declaration of Independence, writes Hall, "caused sovereignty to pass from the Crown of Great Britain to the people of America. Following this logic, *Chisolm v. Georgia*[244] concluded that the Constitution was created by the sovereign American people—it was not, in other words, a compact between the states."[245] As Hall notes, this conclusion is consistent with Justice Sutherland's view in *United States v. Curtiss-Wright Export Corp.*,[246] that "the investment of the federal government with the powers of external sovereignty *did not depend* upon the affirmative grants of the Constitution."[247] Since the States did not declare themselves independent of each other when declaring independence from England, the union "existed before the Constitution . . . . [and] was the sole possessor of external sovereignty . . . ."[248] That power remained in the union "without change save in so far as the Constitution in express terms qualified its exercise. . . . It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."[249]

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240. *See* Hall, *supra* note 150, at 142.

241. *See id.* at 146.

242. *See id.* at 147.

243. *See id.* at 149-59. Although Hall does not address it, one of the most intriguing—if abstruse—issues raised by interpreting the Constitution through the lens of the Declaration is the suggestion that a constitutional Amendment could itself be unconstitutional. *See* Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1991).

244. 2 U.S. (2 Dall.) 419 (1793).

245. Hall, *supra* note 150, at 146.

246. 299 U.S. 304 (1936).

247. *Id.* at 318 (emphasis added).

248. *Id.* at 317.

249. *Id.* at 317-18.

Justice Sutherland was correct, but this interpretation suggests a conclusion that many conservatives would no doubt find disturbing: recent federalism cases that find unwritten constitutional support for state sovereign immunity are fundamentally wrong.[250] If the Revolution caused sovereignty to devolve upon the "union of the states, not thirteen sovereign entities,"[251] then there ought to be no bar to Congress's power to waive sovereign immunity. The notion of state sovereign immunity rests on the assumption that "each State is a sovereign entity in our federal system" and that "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'"[252] But the Constitution is a compact between the people, not sovereign states,[253] and moreover, the Declaration states that the "one people" of America—the same "We, the People" who ordained the Constitution—are sovereign, not the states. More fundamentally, the very concept of sovereign immunity contradicts the principle of equality. What Richard Epstein has written in the context of the Fifth Amendment is equally applicable here: "If the state obtains its authority only from the rights of those whom it represents, it can never claim exemption from the duty to compensate on the ground that it is the source of all rights. The natural rights theory behind the Constitution precludes that result."[254] If, as the Declaration commands, the state's legitimate sovereignty flows from the social compact then legitimate government is like any other man-made organization, existing within the boundaries of justice. Just as a corporation cannot exempt itself from the laws on the grounds that the shareholders agreed to violate the laws, so the state cannot exempt itself from the claims of justice on the grounds that the sovereign makes the law.[255] This would be the kind of legal positivism the Declaration rejects; indeed, the most prominent feature of the

250. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999) (holding that state sovereign immunity is fundamental to the principle of state sovereignty); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that the Eleventh Amendment presupposes that each State is a sovereign entity in the federal system).

251. Hall, *supra* note 150, at 147.

252. *Seminole Tribe*, 517 U.S. at 54 (quoting Hans v. Louisiana, 134 U.S. 1, 13 (1890)).

253. *See* James Wilson, Speech at the Pennsylvania Ratification Convention (Dec. 4, 1787), *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 193, at 457 (quoting Declaration and concluding that "State sovereignty, as it is called, is far from being able to support its weight").

254. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 42 (1985).

255. *See* City of Denver v. Madison, 351 P.2d 826, 830-31 (Colo. 1960) (Frantz, J., dissenting).

Declaration is its insistence that government can never be above the law.[256] If "all men are created equal," and if governments only "derive their just powers from the consent of the governed," then states cannot claim to be the origin of justice; consequently, states cannot be immune from claims by citizens when those states violate the rights of citizens.[257]

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256. *See* Fowler v. City of Cleveland, 126 N.E. 72, 78 (1919) (Wanamaker, J., concurring) ("Indeed governmental sovereignty denying natural rights was the very basis of that Declaration."); *see also* LOCKE, *supra* note 177, at 402.

> Though the Legislative . . . be the *Supream* Power in every Common-wealth; yet . . . . [i]t is *not*, nor can possibly be absolutely *Arbitrary* over the Lives and Fortunes of the People. For it being but the joynt power of every Member of the Society given up to that Person, or Assembly, which is Legislator, it can be no more than those persons had in a State of Nature before they enter'd into Society, and gave up to the Community. For no Body can transfer to another more power than he has in himself; and no Body has an absolute Arbitrary Power over himself, or over any other, to destroy his own Life, or take away the Life or Property of another.

*Id.*

257. In his dissent in *Seminole Tribe,* Justice Stevens wrote that sovereign immunity was based on "a belief that 'the king can do no wrong,'" which Stevens characterized as "absurd:" "Even if the fiction had been acceptable in Britain, the recitation in the Declaration of Independence of the wrongs committed by George III made that proposition unacceptable on this side of the Atlantic." 517 U.S. at 95 (Stevens, J., dissenting). While I agree that this belief was absurd, it is not the wrongs that George III committed that undermine the doctrine of sovereign immunity as a *factual* matter. Rather, it is the fact that all men are created equal that undermines the doctrine as a *political* matter.

## VII. CONCLUSION

The Declaration of Independence is a noble document giving voice to America's highest aspirations. But more, it is one of the organic laws of the United States, as well as a statement of the principles embraced by those who fought the American Revolution and established our Constitution. Understanding our history requires understanding the principles enunciated in the Declaration of Independence, and how it has interacted with the "one people" of the nation that it created. Those principles are permanent, unchanging principles of humanity. In 1858, Abraham Lincoln described the principles of the Declaration as "the electric cord . . . that links the hearts of patriotic and liberty-loving men together . . . as long as the love of freedom exists in the minds of men throughout the world."[258] As such, those principles reach forward through the pages of the Constitution to touch us today, in subjects as vital as federalism, civil rights, and economic opportunity. If we are attentive to these timeless principles, they will not only explain our past, but draw guidelines for our future.

258. Abraham Lincoln, Speech at Chicago, Ill. (July 10, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 8, at 484, 500.