

Originalism, the Declaration of Independence, and the Constitution: A Constitutional Right to Life?¹

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ABSTRACT

The role of the Declaration of Independence in constitutional interpretation is deeply contested among scholars. I argue that it does not play a unique role in constitutional interpretation but is one of many sources of the Constitution's original meaning. First, I lay out the background debate over the use of the Declaration in constitutional interpretation and review the ways in which appeals to the Declaration have periodically arisen during times of national moral crisis, such as those over slavery and civil rights. I also detail how scholars have relied on the Declaration to support dramatically inconsistent claims with regard to political morality and constitutional norms. Assuming an originalist perspective on constitutional interpretation, I then argue that the historical evidence from the framing and ratification of the Constitution shows that the Declaration is simply one source of the original meaning of the Constitution. In addition, I contend that the Declaration is not the interpretative key to the Constitution because these documents are inconsistent and because the Declaration cannot provide sufficient interpretative guidance. Lastly, I advance arguments to establish that the Declaration is not independently legally binding. In doing so, I rebut many of the common claims made by scholars ("Declarationists") who assert that the Declaration is more than simply one source of original meaning.

THE DECLARATION OF INDEPENDENCE'S ROLE in constitutional interpretation is deeply contested. Some argue that it is "at the heart

¹ Much of this paper was previously published: Lee J. Strang, "Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?" *Penn State Law Review* 111 (2006): 413.

of the Constitution,”² that the Declaration “is fundamental to a proper understanding of the Constitution,”³ and that Americans should interpret “the Constitution through the lens of the Declaration.”⁴ I will refer to these scholars as Declarationists.⁵ Others have argued that “the Declaration as the meaning of the Constitution is almost incomprehensible”⁶ because “the Declaration of Independence has no standing in constitutional interpretation whatsoever.”⁷

In this paper I will argue that the Declaration of Independence is one of many sources of the original meaning of the text of the Constitution. First, I will lay out the background debate over the role of the Declaration in constitutional interpretation and how appeals to the Declaration have periodically arisen during times of national moral crisis. I will also detail how scholars have relied on the Declaration to support dramatically inconsistent claims of political morality and constitutional norm.

Assuming an originalist perspective on constitutional interpretation, I will then argue that the historical evidence from the framing and ratification of the Constitution shows that the Declaration is simply one source of the Constitution’s original meaning. In addition, I will argue that

² Scott Douglas Gerber, *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation* (New York NY: New York Univ. Press, 1995), p. 3

³ Dan Himmelfarb, Note, “The Constitutional Relevance of the Second Sentence of the Declaration of Independence,” *Yale Law Journal* 100 (1990): 169, 170.

⁴ Timothy Sandefur, “Liberal Originalism: A Past for the Future,” *Harvard Journal of Law & Public Policy* 27 (2004): 489, 505.

⁵ Declarationists are those who believe that the Declaration has a role in constitutional interpretation greater than its being a source of the Constitution’s original meaning.

⁶ Patrick M. O’Neil, “The Declaration as Ur-Constitution: The Bizarre Jurisprudential Philosophy of Professor Harry V. Jaffa,” *Akron Law Review* 28 (1995): 237, 252.

⁷ “Interview by Lewis E. Lehrman with Benno Schmidt,” quoted in Lewis E. Lehrman, “On Jaffa, Lincoln, Marshall, and Original Intent,” in Harry V. Jaffa et al., *Original Intent and the Framers of the Constitution* (Washington, D.C.: Regnery, 1993), pp. 3, 5.

these two documents are inconsistent and that the Declaration cannot provide sufficient interpretative guidance. Lastly, I will advance various arguments to establish that the Declaration does not have independent legal validity.

One of the purposes of this paper is to respond to what I believe are relatively weak claims that the Declaration establishes a constitutional right to life of its own accord. In doing so, I hope to prevent the discrediting of stronger pro-life legal arguments and in the long run to strengthen the pro-life movement by advancing the strongest legal arguments on its behalf.

THE ROLE OF THE DECLARATION IN CONSTITUTIONAL INTERPRETATION

The Declaration of Independence is one of the most revered documents in American history. As a result, various political movements have appealed to it in order to garner support for the movement's proposed reforms—especially when the Constitution is widely thought to be at odds with or indifferent to the political goals of the social reformers. This is in contrast to how the document was originally viewed.

Originally, the Declaration was viewed primarily as a “proclamation of independence.”⁸ It provided the colonies with the moral and political justifications for separating from Great Britain. Rather than focusing on the rights phrase⁹ in the Declaration's second paragraph—as today's Declarationists do—the contemporaries of the document focused on its conclusion, which declared to the world that the thirteen colonies were independent,¹⁰ and on the specific charges lodged against King George III

⁸ Philip F. Detweiler, “The Changing Reputation of the Declaration of Independence: The First Fifty Years,” *William & Mary Quarterly* 19 (1962): 557-58.

⁹ The rights phrase in the Declaration is the phrase in the second paragraph of the Declaration: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain un-alienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”

¹⁰ Detweiler, p. 558.

in the Declaration's body.¹¹

At first, little attention was paid to the Declaration. Such silence towards the Declaration in the years following independence is understandable since the task facing the nation was no longer revolution but rather the construction of a new legal order. But silence regarding the Declaration was short-lived. Once the dust settled and a new legal order was firmly established, social reformers could not resist the urge to utilize the lofty language of the rights phrase to further their political causes.

The first social movement to extensively rely on the Declaration of Independence was the abolition movement. The Constitution, by itself, was widely seen as inadequate to accomplish the goals of the abolitionists because, as explained below, it explicitly accommodated slavery. In order to legitimize the antislavery movement, abolitionists turned to the Declaration's rights phrase.

Mainstream abolitionists considered the Declaration to be the expression of America's founding principles. They viewed it as the primary document of the nation's founding, which the Constitution was ratified to preserve. Thus, the Constitution, although allowing slavery, was ratified with a view towards its gradual elimination. Other, more radical abolitionists took the view that the Declaration had abolished slavery—made it illegal—or at least rendered it unconstitutional for the Federal Government to support slavery. The most radical abolitionists used the Declaration as a moral justification for their actions, which for some included overthrowing the current constitutional order which

¹¹ For example, during the ratification process of the Articles, New Jersey explained reservations the state had concerning Article VI. Article VI provided that Congress would determine when to station troops in a state for purposes of protecting the state. *The Articles of Confederation*, art. VI (1781). New Jersey sought the assent of nine states for the keeping of a "Body of Troops" because the constant upkeep of troops ran counter to the principals espoused in the Declaration: "In the memorable Act of Congress, declaring the United Colonies free and independent States, it is emphatically mentioned, as one of the Causes of Separation from *Great-Britain*, that the Sovereign thereof had kept up among us in Time of Peace, standing Armies without the Consent of the Legislatures." Merrill Jensen, *The Documentary History of the Ratification of the Constitution: Constitutional Documents and Records, 1776-1787* (Madison WI: State Historical Society of Wisconsin, 1976), p. 114.

sanctioned slavery.¹² Later movements similarly employed the Declaration for their own purposes.¹³

DIVERGENT CLAIMS ABOUT CONSTITUTIONAL INTERPRETATION

The amount of scholarly work in the field of constitutional interpretation is already staggering and yet constantly growing. Despite this enormous outpouring of scholarly effort, nearly all constitutional scholars pay little, if any, attention to the role of the Declaration. As Professor Scott Gerber, the best exponent of the Declarationist view, has noted, the Declaration “is now all but ignored.”¹⁴ A short review of the writings of major scholars in the area confirms Gerber’s observation.¹⁵

The vast majority of scholars do not include any role for the

¹² See Charles H. Cosgrove, “The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis,” *Univ. of Richmond Law Review* 32 (1998): 107, 117-18, giving these three divisions of the abolitionist movement.

¹³ See, e.g., Judith E. Harper, *Susan B. Anthony: A Biographical Companion* (Santa Barbara CA: ABC-CLIO, Inc., 1998), pp. 278-90, which describes the uses of the Declaration by Suffragettes; James Melvin Washington, ed., *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* (San Francisco CA: Harper & Row, 1986, pp. 94, 98, 217, which provides examples of King’s use of the Declaration; Hadley Arkes, *Natural Rights and the Right to Choose* (New York NY: Cambridge Univ. Press, 2002), pp. 20-26, 44, which refers to the Declaration in arguing against abortion.

¹⁴ Gerber, p. 2.

¹⁵ See, e.g., Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton NJ: Princeton Univ. Press, 2004), making no reference to the Declaration; Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York NY: Free Press, 1990), making no reference to the Declaration; Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge MA: Harvard Univ. Press, 1996), pp. 315, 318, noting only Justice Thomas’s references to the Declaration; Richard F. Fallon, Jr., *Implementing the Constitution* (Cambridge MA: Harvard Univ. Press, 2001), making no reference to the Declaration; Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton NJ: Princeton Univ. Press, 1997), p. 134, distinguishing between the “practical” Constitution and the “aspiration[al]” Declaration; Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence KS: Univ. of Kansas Univ. Press, 1999), making no reference to the Declaration.

Declaration in constitutional interpretation. What arguments do scholars who find no role for the Declaration in constitutional interpretation give for their position? Generally, most give no argument because the Declaration is simply not on their horizon.¹⁶

Another, smaller group of scholars gives some role to the Declaration in constitutional interpretation, although just what that role is—and its extent—are often left unclear.

Likely the strongest scholarly work on the interpretative impact of the Declaration on constitutional interpretation was written by Professor Scott Gerber, *To Secure These Rights*.¹⁷ Gerber advocates a “liberal originalism” that, like its counterpart “conservative originalism” acknowledges the importance of history to constitutional interpretation, but, unlike its conservative antagonist, liberal originalism recognizes that the Constitution was written “to establish a form of government that would provide better security for natural rights.”¹⁸

According to Gerber, the Declaration embodies the natural rights

¹⁶ See, e.g., Bruce Ackerman, *We the People: Foundations* (Cambridge MA: Harvard Univ. Press, 1991), pp. 6-7, 142, 213, 216, explaining his concept of dualist democracy and noting the Declaration in its historical context; Barnett, pp. 89-113, describing his originalist methodology without reference to the Declaration); Randy E. Barnett, “James Madison’s Ninth Amendment” in *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*, ed. Randy E. Barnett (1989); Bork, pp. 143-60, explaining his originalist methodology without noting the Declaration; Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York NY: Knopf, 2005), pp. 3-34, describing his interpretative “theme” of “active liberty” without noting a role for the Declaration; Fallon, pp. 4-12, discussing his view of how the Supreme Court should “implement” the Constitution with no discussion of the Declaration; Whittington, pp. 5-14, explaining his originalist interpretative methodology without reference to the Declaration.

¹⁷ See Gerber (1995). For a work that simply asserts that “the *Declaration* was the moral statement that would later become the foundation for the Constitution of the new nation” and then builds from that assertion, see Norman Geisler & Frank Turek, *Legislating Morality: Is it Wise? Is it Legal? Is it Possible?* (Minneapolis MN: Bethany House, 1998), p. 20.

¹⁸ *Ibid.*, p. 6.

philosophy of John Locke.¹⁹ This philosophy, in turn, is embodied by the Constitution.²⁰ As a result, the Constitution is the means to effectuate the ends ordained by the Declaration: to secure natural rights.²¹ Gerber does not, however, precisely delineate how a judge “appl[ies] the fundamental moral and political principles on which this nation is based to issues of present-day concern.”²² Instead, he reviews different areas of law and suggests the correct interpretation of the law in those areas in light of the Declaration’s principles.²³

In addition to coming to different conclusions regarding what role, if any, the Declaration should play in constitutional interpretation, scholars who conclude that the Declaration should play a role arrive at very different conclusions about the practical impact of the Declaration playing that role on issues such as abortion, homosexual marriage, euthanasia, and God in the public square. Not surprisingly, the impact of the Declaration falls roughly into liberal and conservative camps.

THE DECLARATION OF INDEPENDENCE AS ONE OF MANY SOURCES OF THE CONSTITUTION’S ORIGINAL MEANING

Interpretative Methodology: Originalism

The proper interpretative methodology for our Constitution is originalism. Originalists argue that the original meaning of the Constitution is its authoritative meaning. The Constitution’s original meaning is the publicly understood meaning of the text of the Constitution at the time it was ratified. To ascertain the original meaning of the Constitution one looks to its text, the use of similar words elsewhere in the Constitution, and the text’s historical context: contemporary discussions of the text,

¹⁹ Ibid., pp. 40-56.

²⁰ Ibid., pp. 57-92.

²¹ Ibid., p. 58; see also *ibid.*, p. 59, stating that the “primary goal” of the Constitution “is to provide the institutional means to secure the natural-rights philosophical ends of the Declaration.”

²² Ibid., pp. 58-59.

²³ Ibid., pp. 164-95.

official action taken pursuant to the text, and use of the text elsewhere in society at the time. Determining the original meaning is, therefore, largely an historical inquiry.

The historical evidence that our society, in 1787-1789, meant for the original meaning of the Constitution to be the binding, authoritative meaning is strong, and I have discussed it elsewhere more fully.²⁴ This conclusion also has strong scholarly support.²⁵

Originalists further contend that judges are authorized to declare acts of the elected branches unconstitutional and hence void *only* when those acts conflict with the determinate original meaning of the Constitution's text.²⁶ Consequently, under our constitutional social ordering, judges may not, generally, directly appeal to natural law norms when adjudicating constitutional cases unless the positive legal materials—the text and original meaning of the Constitution—authorize such an appeal.²⁷ Given this commitment to originalism, the Declaration's role in constitutional interpretation is limited to being one of the sources of the constitutional text's original meaning.

²⁴ Lee J. Strang, "The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition," *Harvard Journal of Law, Ethics & Public Policy* 28 (2005): 909, 970-81.

²⁵ See, e.g., Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore MD: The Johns Hopkins Univ. Press, 2005), pp. 12-42, arguing that originalism was the predominant constitutional interpretative methodology during and after Ratification; Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law*, rev. ed. (Lanham MD: Rowman & Littlefield, 1994), pp. 17-38, reviewing the history of the Framing and Ratification and concluding that the originalist "rules for interpreting a constitution were so generally agreed upon that they were more or less noncontroversial or taken for granted."

²⁶ See Lee J. Strang, "The Role of the Common Good in Legal and Constitutional Interpretation," *Univ. of St. Thomas Law Journal* 3 (2005): 48, 67-74, explaining the authority of judges to invalidate laws.

²⁷ Some originalists, such as Randy Barnett, argue that the Constitution and its original meaning do, in fact, require judges to employ natural rights because of the Ninth Amendment and the Privileges and Immunities Clauses.

Original Understanding of the Role of the Declaration in Constitutional Interpretation

My research has uncovered very few explicit discussions of, and few more implicit references to, the Declaration during the period of Framing and Ratification, and none arguing that the Declaration would play a unique–explicit–role in constitutional interpretation. Review of the historical record leads to the conclusion that the Declaration of Independence was one source of the original meaning of the text of the Constitution, and that it had no special role in constitutional interpretation.

The vast majority of references to the Declaration during the framing and ratification were to the Declaration’s role in making the United States independent. One historian has concluded similarly that “[i]n the years immediately following the Revolution [the Declaration] was still viewed primarily as the act of independence.”²⁸

During the Constitutional Convention, the delegates referred to the Declaration of Independence infrequently, and the Constitution they created did not incorporate any of its language.²⁹ The delegates did not make any statements supporting the Declarationist view. Instead, delegates discussed the Declaration with reference to its practical impact. For instance, on June 19, 1787, Rufus King and Luther Martin debated the Declaration’s impact vis-à-vis independence. King stated that the states were not complete sovereigns because they could not make war, peace, alliances, or treaties.³⁰ Martin responded that the Declaration had instead “placed the 13 States in a state of Nature towards each other.”³¹ James Wilson rose to King’s defense as did Alexander Hamilton, arguing that

²⁸ Detweiler, p. 564.

²⁹ Detweiler, p. 562. The initial reference to the Declaration is made by Madison in his introduction to his notes from the Constitutional Convention. In these opening remarks, Madison provided a timeline for events leading to the Convention, including the Declaration and the Articles of Confederation. 5 Jonathan Elliot, *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, 2nd ed. (1996), p. 110.

³⁰ Notes of James Madison, June 19, 1787, remarks of Rufus King.

³¹ *Ibid.*, remarks of Luther Martin.

the Declaration created an independent nation, not nations.³²

The state ratification conventions also generally focused on the Declaration's role in independence—if the subject of the Declaration came up at all—and did not discuss any explicit role for the Declaration in constitutional interpretation.³³ In the Pennsylvania ratification convention, for example, Wilson stated his view that the Declaration created one national society.³⁴

Delegates to the state conventions also used the Declaration, not as a means to interpret the Constitution, but to argue for other contested propositions. One example of this is the debate over a bill of rights. On November 28, 1787, in the Pennsylvania Convention, John Smilie, an opponent of ratification, objected to Wilson's argument that a bill of rights was unnecessary.³⁵ Instead, Smilie found a bill of rights indispensable because it established parameters for those in power, and to support his position he quoted the Declaration.

In the broader public debate surrounding Ratification, references to the Declaration also centered on its impact vis-à-vis independence and not on a role in constitutional interpretation.³⁶

Joseph Story's *Commentaries on the Constitution of the United States*³⁷ was the nineteenth century's first major work on the Constitu

³² Ibid., remarks of James Wilson and Alexander Hamilton. The only other direct reference to the Declaration during the month of June came on the 28th by Randolph, who “proposed ... that a sermon be preached at the request of the Convention on the Fourth of July, the anniversary of Independence” Ibid., p. 254.

³³ See Detweiler, p. 561: “Everywhere men talked about government. But in all their constitutional experiments they seldom mentioned the preamble of the Declaration.”

³⁴ James Wilson, “Address in the Pennsylvania Convention” (Dec. 4, 1787), in *The Documentary History of the Ratification of the Constitution*, ed. Merrill Jensen, vol. 2 (1976), p. 472.

³⁵ Ibid.

³⁶ See Detweiler, pp. 562-63, noting the lack of discussion of the Declaration generally, and of its rights phrase particularly.

³⁷ Joseph Story, *Commentaries on the Constitution of the United States* (reprint

tion's history, nature, and meaning.³⁸ In it, Story devoted a chapter to how one properly interprets the Constitution.³⁹ Story's interpretative methodology was originalist.⁴⁰ Despite providing a fairly in-depth analysis of how to interpret the Constitution, Story did not discuss or refer to the Declaration.⁴¹ The only references Story made to the Declaration in his *Commentaries* were regarding its historical and legal significance effecting separation from the United Kingdom.⁴²

Scholars who advocate for a role for the Declaration in constitutional interpretation focus almost exclusively on the first two sentences in the second paragraph, and more specifically, on the reference to the rights of "Life, Liberty and the pursuit of Happiness," what I call the rights phrase.⁴³ The vast bulk of the Declaration is not a natural law document. Instead, the body of the Declaration is a list of violations by the King—not of natural law norms—but of the conventional rights of Englishmen.⁴⁴ The Declaration was a "bill of indictment against the king, written in the language of British constitutionalism."⁴⁵ Consequently, scholars who concentrate on the rights language misplace their focus and distort the meaning of the Declaration's second paragraph. "[T]he Fathers, although they did not ignore the phrases of the preamble, viewed the Declaration

ed. 1987, 1833).

³⁸ For a discussion on Story's *Commentaries*, see H. Jefferson Powell, "Joseph Story's *Commentaries* on the Constitution: A Belated Review," *Yale Law Journal* 94 (1985): 1285. For a broader view of Story's legal views, see James McClellan, *Joseph Story and the American Constitution* (Norman OK: Univ. of Oklahoma Press, 1971).

³⁹ Story, pp. 134-62.

⁴⁰ *Ibid.*, pp. 135-36; see also O'Neill, pp. 21-22, describing Story's method of interpretation as originalist.

⁴¹ Story, pp. 134-62.

⁴² *Ibid.*, pp. 84, 88-89.

⁴³ *Declaration of Independence*, para. 2 (U.S. 1776).

⁴⁴ *Ibid.*

⁴⁵ Daniel Boorstin, *The Genius of American Politics* (Chicago IL: Univ. of Chicago Press, 1953), p. 84.

principally as a proclamation of independence.”⁴⁶ So, to use the Declaration’s second paragraph as a binding statement of natural law norms embodied by the Constitution is not faithful to the Declaration or the Constitution. As Carlton Larson has noted, it was the “specific charges laid against George III” that, “for the Continental Congress were the most important part of the Declaration.”⁴⁷

The historian Philip Detweiler has persuasively argued that the Declaration’s rights phrase played little role in public debate and discussion after independence, and only slowly came to occupy a more important position.⁴⁸ Initially, American focus was on the Declaration’s impact on independence.⁴⁹ Between the 1790s and 1820s American focus changed to include the Declaration’s rights phrase.⁵⁰

Professor Gerber has put forth what is likely the strongest scholarly argument that the original meaning of the Constitution (or at least some of its provisions) incorporated the Declaration.⁵¹ He adduces numerous quotes and statements from the founding and ratification about natural rights generally, and slightly more specifically about the role of government to protect those rights.⁵² However, Gerber fails to tie the general belief in natural rights during the founding and ratification period to the Constitution except in the most general way and therefore fails to support his specific contention that the Declaration should play an explicit, privileged role in constitutional interpretation. Further, even if one accepted Gerber’s argument that the Constitution was originally understood as the means to effectuate protection of the rights listed in the rights phrase, it does not necessarily follow—and Gerber fails to show that it did

⁴⁶ Detweiler, pp. 557-58.

⁴⁷ Carlton F. W. Larson, “The Declaration of Independence: A 225th Anniversary Re-Interpretation,” *Washington Law Review* 76 (2001): 701, 763.

⁴⁸ Detweiler, pp. 154-208.

⁴⁹ *Ibid.*, pp. 558-61.

⁵⁰ Detweiler, p. 565.

⁵¹ Gerber, pp. 60-92.

⁵² *Ibid.*

follow historically—that the meaning of the text of the Constitution is something other than its original meaning, a meaning somehow closer to the Declaration.

Subsequent Appeals to the Declaration Brought About by Moral Crises

I noted above how Americans have repeatedly turned to the Declaration of Independence and have argued in times of grave moral crisis that it has great significance for constitutional interpretation. These turns toward the Declaration are understandable. When individuals or societies are faced with a grave moral dilemma, they ask themselves who they are and they respond to the dilemma in light of the answer.

Our society is facing a number of grave moral crises. On issues such as abortion, the nature of marriage, and euthanasia, our society is deeply divided. Legal scholars and others responding to these dilemmas, like Americans in the past, have turned to the Declaration for answers. The resurgence in Declarationist arguments is likely attributable in some measure to this phenomenon. As a result, we should be wary of attributing to the framers and ratifiers the Declarationist view that the Declaration has a unique role in constitutional interpretation.

The Constitution Is Inconsistent with the Declaration

Beyond the historical evidence that the framers and ratifiers did not understand the Constitution to incorporate the Declaration, there are the dramatic inconsistencies between the various provisions of the Declaration and the Constitution. The most glaring instance of this inconsistency is regarding the status of slaves.

The Declaration has the inspiring phrase “all men are created equal.”⁵³ The original Constitution, by contrast, accommodated slavery.⁵⁴

⁵³ *Declaration of Independence* para. 1 (1776).

⁵⁴ Despite the Constitution’s accommodation of slavery the Constitution was not a pro-slavery document in the sense of a document creating a form of government one of whose purposes was to protect slavery. Arguably, the Constitution granted Congress the power to restrict and maybe even eliminate slavery legislatively through, for example, the Commerce Clause or Congress’s power to tax. Congress’s ability to restrict or eliminate slavery legislatively was recognized by southerners who, when it became clear that the North would gain a commanding

In Article I, § 2 the Constitution provided that slave states would benefit in their congressional representation by counting, for population purposes, “three fifths of all other Persons.”⁵⁵ The Constitution further accommodated slavery by helping slave masters recover escaped slaves through the Fugitive Slave Clause.⁵⁶ And the Constitution prohibited Congress, until at least 1808, from eliminating the supply of new slaves by ending the slave trade.⁵⁷

The Constitution’s accommodation of slavery and the denial of equality that it entailed makes it very difficult—if not impossible—to coherently interpret the Constitution through the lens of the Declaration. Even were one to assume that one *could* interpret the Constitution in light of the Declaration, one would still have to explain how the practice of slavery with its gross denial of equality existed—indeed, flourished—under the Constitution, a practice that was not ended except through the Civil War.

Only a few radical abolitionists argued that the Constitution (without necessity of amendment) outlawed slavery. Most who opposed slavery argued instead for a federal law or constitutional amendment to end slavery, recognizing that the law as it stood did not eliminate slavery. The vast majority of Americans and nearly all lawyers and judges never questioned the orthodoxy that the Constitution accommodated slavery.

Further evidence that the Constitution did not incorporate the Declaration is that, following the Civil War, very few argued that the Constitution, properly interpreted in light of the Declaration, abolished slavery. Instead, the radical Republicans passed federal statutes and constitutional amendments to eliminate slavery. Given the complete victory of the North and the Republicans, one could easily imagine the abolitionists arguing that a properly interpreted Constitution outlawed slavery if that argument were remotely plausible.

majority in Congress, became more aggressive in their actions to protect slavery, up to and including war.

⁵⁵ *U.S. Constitution*, Art. I, § 2.

⁵⁶ *Ibid.*, Art. IV, § 2.

⁵⁷ *Ibid.*, Art. I, § 9.

The Declaration Cannot Offer Sufficient Guidance in Constitutional Interpretation

The Declaration is, at most, one source of original meaning in part because the Declaration cannot, by itself, offer sufficient guidance to judges interpreting the Constitution. As Carlton Larson has noted, “The Declaration’s sonorous phrases seem to provide little guidance in determining the scope of the liberty of which it speaks.”⁵⁸ Declarationists focus on the famous rights phrase,⁵⁹ which is too indeterminate to provide guidance to constitutional interpreters.⁶⁰

As I explained above, the rights phrase has been used by scholars of different political stripes to argue for their favored respective—and diametrically opposed—substantive policy goals. Scholars arrive at these different conclusions because they begin from differing philosophical premises. For example, regarding the term “happiness,” George Anastaplo has argued that “properly understood, [it] must be seen in terms of virtue.”⁶¹ Gerber, by contrast, argues that the “right to ‘pursue’ happiness entails claims one individual has on all others...to strive to attain his happiness.”⁶² Gerber grounds his understanding of “happiness” on the “Lockean natural-rights political philosophy” of the Declaration.⁶³

This deep, continuing disagreement on the meaning of the terms in the Declaration’s rights phrase shows that judges could derive little if any interpretative guidance from them. This is because a judge would first have to determine which of the competing interpretations of the terms the judge finds persuasive—no small feat in itself—and then, within that

⁵⁸ Larson, p. 709.

⁵⁹ See, e.g., Gerber, p. 2.

⁶⁰ See Larson, p. 711: “These scholars [who “emphasize the Declaration”] focus almost exclusively on the second sentence of the Declaration.” See also George W. Carey, “Natural Rights, Equality, and the Declaration of Independence,” *Ave Maria Law Review* (2005): 45, 60-66, discussing the meaning of “unalienable rights” and “all men are created equal.”

⁶¹ Anastaplo, p. 409.

⁶² Gerber, p. 54.

⁶³ *Ibid.*, p. 28.

interpretation, determine how the abstract term applies in the concrete case before him. Both of these determinations are complex and fraught with difficulty because they deal with the meaning of abstract, contested concepts.

In fact, judges have used the terms of the Declaration to reach controversial substantive goals. During the late-nineteenth and early-twentieth centuries—the *Lochner* era⁶⁴—judges frequently struck down state economic regulation on the basis of an interpretation of the term “liberty” in the Fourteenth Amendment.⁶⁵ Judges during this period interpreted “liberty” to include the liberty of contract, which states could abridge only for strong reasons. Judges founded this interpretation of the Fourteenth Amendment on, in part, the Declaration’s reference to the “pursuit of Happiness.”

Of course, the brute fact of disagreement does not, in and of itself, establish that there is no correct understanding of a legal text, nor does it establish that all interpretations are equally unreasonable.⁶⁶ In the context of contested concepts like “Life,” “Liberty,” and “pursuit of Happiness,” however, debate and not consensus on the meaning of those concepts is the norm, at least in pluralistic societies such as our own. As a result, we should have no expectation that the meaning of the terms in the rights phrase will achieve any sort of workable consensus in our pluralistic society.

Federal judges are no different. They have radically divergent views on most substantive moral and philosophical issues. Take, for instance, “Equality” and the debate over affirmative action. Justices Thomas and

⁶⁴ The label *Lochner* comes from the famous case of *Lochner v. New York*, 198 U.S. 45 (1905), where the Supreme Court struck down a state statute that limited the hourly workweek of laborers in bakeries because it violated the constitutional right to contract. *Lochner* has come to exemplify the era of economic substantive due process.

⁶⁵ See Herbert Hovenkamp, *Enterprise and American Law: 1836-1937* (Cambridge MA: Harvard Univ. Press, 1991), at pp. 171-204, where the author reviews the economic substantive due process period.

⁶⁶ Ronald Dworkin, *Law’s Empire* (Cambridge MA: Harvard Univ. Press, 1986), pp. 76-77, which argues that at the justification stage of interpretation one must choose the morally best interpretation.

Stevens argued that the equality demanded by the Fifth Amendment resulted in opposing conclusions regarding the legality of affirmative action in *Adarand Constructors, Inc. v. Peña*.⁶⁷ Justices Thomas and Stevens were both interpreting and applying the concept of equality as embodied in the Fifth Amendment.⁶⁸ Yet, they came to dramatically divergent conclusions because the concept of equality is contested.

Or consider the right to “Life” proclaimed by the Declaration in the context of abortion. As noted above, the Declarationists themselves strongly disagree on this issue. Hadley Arkes argues that the Declaration proclaims a right to life for all human beings.⁶⁹ Therefore, abortion is not only not a natural right, it is contrary to natural right.⁷⁰ By contrast, fellow Declarationist Timothy Sandefur claims that the Declaration’s right to life does not encompass what he calls “single-celled organisms that do not have minds.”⁷¹ Gerber takes up yet another position on the meaning of “Life” in the Declaration finding that since “scientists still disagree on when life begins” the “natural-rights political philosophy of the Declaration of Independence cannot determine whether a woman has a constitutional right to choose whether to have an abortion.”⁷²

The inability of the terms in the Declaration’s rights phrase to provide determinate answers to questions of their application to specific circumstances (e.g., in cases) should give one pause before concluding that the Framers and Ratifiers intended the Declaration to play a role in constitutional interpretation—absent strong evidence—or that the concepts “Life,” “Liberty,” and “pursuit of Happiness,” could practically play a role in constitutional interpretation.

⁶⁷ Compare *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring), with *ibid.* at 243-49 (Stevens, J., dissenting).

⁶⁸ See *Bolling v. Sharpe*, 347 U.S. 497 (1954), ruling that the Fifth Amendment Due Process Clause has an equal protection component.

⁶⁹ Arkes, pp. 5, 7-11.

⁷⁰ *Ibid.*

⁷¹ Sandefur, p. 523.

⁷² Gerber, pp. 182-83 (emphasis deleted).

The Declaration Does Not Play a Privileged Role in Constitutional Interpretation Because of Its Own Legal Authority

The Declaration of Independence does not have legal significance greater than its input into the original meaning of the Constitution because the Declaration is not legally binding. Laws have, among other characteristics,⁷³ the characteristic of ordering society toward the common good. The Declaration does not, today, order members of our society toward effective pursuit of the common good.⁷⁴ At most,⁷⁵ the Declaration was legally binding when it effected separation of the colonies from the mother country.⁷⁶ Prior to July 4, 1776,⁷⁷ the British colonies were part of

⁷³ See St. Thomas Aquinas, *Summa Theologica* I-II, at 1-2, q. 90, a. 4. (Benzinger Bros., 1947) [hereinafter *Summa Theologica*], stating that law is “[1] an ordinance of reason [2] for the common good, [3] made by him who has care of the community, and [4] promulgated.”

⁷⁴ For a review of the history of the United States, including its independence, its first constitution, and the framing and ratification of our current Constitution, see Lee J. Strang, “The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition,” *Harvard Journal of Law & Public Policy* 28 (2005): 909.

⁷⁵ In fact, it is arguable whether the Declaration even ordered society on July 4, 1776. The Declaration is not the English colonists’ first declaration of independence. On July 2, 1776, the Second Continental Congress declared independence from the United Kingdom. *Journals of the Continental Congress, 1774-1789*, vol. 5, ed. Worthington C. Ford et al. (Washington, D.C., 1904-31). Assuming that the Second Continental Congress had the authority to legislate for the colonies, which is not clear, then it is the July 2 adoption of the Resolution for Independence that reordered the colonies from union with Great Britain to independence from it. Consequently, it, and not the Declaration of Independence, was—if any document was—the ordering legal declaration of independence.

⁷⁶ And it may not have done that because the Declaration’s legality depended on the authority of the Second Continental Congress to legislate.

⁷⁷ I have not come to a conclusion whether, in fact (if not de jure), the British colonies became one separate, united society upon independence. One’s conclusion will depend on the criteria one uses to determine when a society exists. One could argue, for example, that there existed prior the July 4, 1776, a society because in fact the officially-British colonies were pursuing their own, distinct, common good separately from the United Kingdom. On this reading of

the British empire, and recognized themselves as such. The colonies were subject to laws passed by Parliament, rule by the King, and decisions by British courts. The colonies participated in the common enterprise of the Empire. The Declaration at most changed the relationship of the colonies to the rest of the Empire by making the colonies a separate society, separately pursuing the common good of its members. In this change from unity to separation, the Declaration constituted law.

Once the separation between the colonies and the Empire was complete, and the newly-independent states were separately pursuing the common good, the Declaration's legal effect was spent. It no longer, of its own accord, ordered the members of American society to effective pursuit of the common good. The Declaration did not, for instance, change how people acted in 1782. It did not coordinate the activities of Americans because the separation was a past event that later legal norms and social practices superseded.

By 1782, the Articles of Confederation were in force creating a national government that enabled American society to (rather ineffectively) pursue the common good and to do so separately from Great Britain.⁷⁸ The Declaration no longer created the independence of the United States from Great Britain, as it does not today. If tomorrow Congress passed and the President signed a law that stated, "The Declaration of Independence is not in force," the effect would not be immediate reunion with Great Britain. Instead, the law would have no effect because the Constitution would continue in operation and would

history, the Declaration simply declared de jure what was already de facto the case. See Larson, p. 737, arguing that the Declaration effected the creation of one nation. On the other hand, one could argue that the Declaration, of its own accord, did not create a separate society but instead created thirteen separate societies that did not become one society, coherently pursuing the common good, until some time later. See Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence KS: Univ. of Kansas Press, 1985), p. 150, offering this view. There are other possible interpretations of the historical record as well. Regardless of the effect of the Declaration beyond independence from Great Britain, all agree that by the time of the Ratification of the Constitution, one American society existed.

⁷⁸ See *The Articles of Confederation*, Art. III (1781), stating that the purpose of the Confederacy was to secure "their mutual and general welfare."

continue to mandate that the federal government pursue the common good of the United States separately from that of the United Kingdom.⁷⁹

As an analogy consider a law passed by a state (the Highway Law) that ordered the executive of the state to bring eminent domain proceedings against the private owner of a particular parcel of land and acquire title to the parcel (Blackacre) for the state. The land was to be part of a new highway across the state. The executive brought the action and the court ordered the owner to convey title to the state in exchange for just compensation. At this point the Highway Law has ceased to govern, of its own accord, the relations of members of society because it has had its full effect and now the state owns Blackacre.

If the state later enacted a law declaring the Highway Law void, it would not change the relationships between the state, Blackacre, and the original owner because the state's law of property now governs those relations. The state owns Blackacre and the executive could not, absent some additional authorizing provision, return Blackacre to the original owner; and the original owner could not simply retake possession (much less ownership) of Blackacre because the state's property law protects the state's ownership of Blackacre and authorizes the state to bring causes of action to stop the original owner from repossessing Blackacre.

The Highway Law hypothetical shows that the legal effect of some legislation is short lived. Some laws alter the relationships of individuals and entities in society and then cease to have effect because other legal norms (or quasi-legal or nonlegal social practices) apply to the relationships—as altered by the original law—to maintain the social ordering brought about by the law. To make this even more clear in the Highway Law hypothetical, assume that the state enacted legislation (the Highway Construction Act) that directed the construction of the highway across Blackacre and created regulations for the operation of vehicles on the highway (e.g., a speed limit, weight and size limits, safety and environmental regulations, etc.).

Persons using the highway across Blackacre after passage of the

⁷⁹ See *U.S. Constitution*, Art. I, § 8, specifying the scope of Congress's legislative power to pursue the "general Welfare"; *ibid.*, Art. VI, identifying the Constitution as the "supreme Law of the Land."

Highway Construction Act are governed, not by the Highway Law, but instead by the Highway Construction Act. This situation is similar to today and the relationships of Americans to the Declaration and the Constitution. The Declaration, like the Highway Law, re-ordered relations. The Declaration did this through separating the colonies from Great Britain and the Highway Law did this through transferring ownership of Blackacre to the state. But with the passage of subsequent legislation both the Declaration and the Highway Law lost their status as the law that was then-ordering members of society toward the common good. Today the Constitution shapes the conduct of our society's governments, subsidiary communities, and individual members. Similarly, the Highway Construction Act shaped the actions of persons using the highway across Blackacre.

In sum, the Declaration of Independence does not have independent legal significance today. Its significance comes only as a source of the meaning of the Constitution that contains the ultimate legal norms for our society.⁸⁰

One particularly strong piece of evidence showing that the Declaration has no independent legal significance is the First Congress' re-enactment of the Northwest Ordinance.⁸¹ The Second Continental Congress enacted the Northwest Ordinance in 1787, prior to completion of the Federal Convention.⁸² The Northwest Ordinance was the great legislative triumph of the Continental Congress in that it created the structure of western settlement and eventual statehood of Ohio, Michigan,

⁸⁰ *U.S. Constitution*, Art. VI.

⁸¹ For a review of the history of the Northwest Ordinance, see Denis P. Duffey, Note, "The Northwest Ordinance as a Constitutional Document," *Columbia Law Review* 95 (1995): 929, 934-51. For a discussion of the Confederation Congress's ordinances more generally, see Richard P. McCormick, "Ambiguous Authority: The Ordinance of the Confederation Congress, 1781-1789," *American Journal of Legal History* 41 (1997): 411.

⁸² The Northwest Ordinance was enacted on July 13, 1787, the Philadelphia Convention ended on September 17, 1787, and the Constitution did not take effect until June 21, 1788, when nine states had ratified it. The last state, Rhode Island, ratified the Constitution on May 29, 1790.

Indiana, Illinois, and Wisconsin.⁸³

After the Constitution went into effect, the First Congress—in the *eighth* act that it passed—re-enacted the Northwest Ordinance.⁸⁴ Congress recognized that it had to re-enact the Northwest Ordinance because, absent re-enactment, the Ordinance had no authority under the Constitution. This was because of the Supremacy Clause, which provided that only the Constitution, laws made pursuant to the Constitution, and treaties were law of the United States.⁸⁵ The First Congress stated in the Act that “in order that the [Northwest] Ordinance *...may continue to have full effect*, it is requisite that certain provisions should be made to adapt the same to the present Constitution.”⁸⁶ In other words, with the ratification of the Constitution, previous legislation by the Second Continental Congress (other than treaties) became inoperable.

The Declaration, like the Northwest Ordinance, was enacted by the Second Continental Congress. It too, absent re-enactment—and assuming it retained independent, ongoing legal force after independence, which I argued above it did not—ceased to have legal force. Of course, the Declaration was never re-enacted and hence, after the ratification of the Constitution, did not have legal force.

The re-enactment of the Northwest Ordinance also shows how the First Congress and President Washington understood the relationship between the Constitution and previous legislation. It shows that the original understanding of the Constitution (and specifically the Supremacy Clause) was that the Constitution superseded all pre-Constitution legislation (with the exception of treaties) including the Declaration. This understanding supports my argument that the Declaration is a source of the Constitution’s original meaning but it does not have legal significance beyond that.

⁸³ The Northwest Territory also contained a portion of what became Minnesota.

⁸⁴ An Act to Provide for the Government of the Territory Northwest of the river Ohio, Aug. 7, 1789, 1 Stat. 50.

⁸⁵ *U.S. Constitution*, Art. VI.

⁸⁶ An Act to Provide for the Government of the Territory Northwest of the river Ohio, Aug. 7, 1789, 1 Stat. 50, at 50-51.

Further, its placement in the *U.S. Code* shows that the Declaration is not a binding legal document. Declarationists regularly argue that the Declaration's placement at the beginning of the *United States Code* under the heading, "Organic Laws of the United States," establishes that the Declaration is, in the words of Walter Berns, a "law of the United States."⁸⁷

The first subject matter codification of federal statutes was the *Revised Statutes* enacted in 1878.⁸⁸ The *Revised Statutes* collected and organized federal statutes that had previously been collected chronologically in the *Statutes at Large*.⁸⁹ However, after 1878 Congress failed to incorporate later enactments into the *Revised Statutes* leading to calls for another codification effort.⁹⁰ These calls bore fruit with the 1926 *U.S. Code*.⁹¹ The *U.S. Code* is a compilation of fifty titles each focused on a particular subject matter. Title one governs general provisions and contains, as its first document, the Declaration.⁹² While its placement at the beginning of the *Code* could signal that the Declaration has independent legal validity, a look at the background context of the 1926 recodification shows that the opposite is the case.

On June 30, 1926, Congress enacted the law that created the 1926 *U.S. Code*.⁹³ The Act ordered that the "general and permanent laws of the

⁸⁷ Walter Berns, *Taking the Constitution Seriously* (New York NY: Simon and Schuster, 1987), p. 23; see also Kmiec, p. 101: "[T]he United States Code includes the Declaration of Independence as one of the Organic Laws upon which all statutory law rests."

⁸⁸ An Act providing for Publication of the Revised Statutes and the Laws of the United States, 18 Stat. 113 (1974).

⁸⁹ *Ibid.*

⁹⁰ For an earlier effort at recodification see Joint Resolution Authorizing the printing of the bill to consolidate, codify, revise, and reenact the general and permanent laws of the United States, 41 Stat. 370 (1919).

⁹¹ An Act to consolidate, codify, and set forth the general and permanent laws of the United States in force December seventh, one thousand nine hundred and twenty-five, 44 Stat. 1 (1926).

⁹² 1 U.S.C. at 1-5.

⁹³ An Act to consolidate, codify, and set forth the general and permanent laws of

United States” be codified.⁹⁴ In section one of a companion statute, Congress provided for printing the *Code* and other materials.⁹⁵ In section two of the companion statute, Congress authorized the House Committee on the Revision of the Laws to prepare for publication “as *ancillaries* thereto”—that is ancillary to the general and permanent laws of the United States—a list of materials.⁹⁶ Here is the list:

(1) Preface. (2) Table of Contents. (3) Parallel Reference Tables to the Revised Statutes.... (4) Parallel Reference Tables to the Statutes at Large.... (5) Parallel Reference Tables to the United States Compiled Statutes.... (6) Parallel Reference Tables to the Federal Statutes. (7) The Declaration of Independence. (8) The Articles of Confederation. (9) The Ordinance of 1787. (10) The Constitution of the United States and amendments. (11) Appendix.... (12) Index.⁹⁷

The Sixty-Ninth Congress recognized that the Declaration was not of independent legal significance in a number of ways. First and most importantly, Congress did not include the Declaration among the “general and permanent laws of the United States.” This shows that the Declaration, although important historically, culturally, and in other ways, was not legally binding subsequent to independence. Congress explicitly recognized the nonlegal status of the Declaration by labeling it “ancillar[y].” Second, the list of “ancillar[y]” materials includes documents that are clearly nonlegal in nature: the Preface, Table of Contents, and the reference tables were never legal. Therefore, the mere fact of placement in the *U.S. Code* does not lead to the conclusion that the document is legally authoritative. Third, the list of “ancillar[y]” materials includes documents that are clearly no longer legally binding. The list contains the

the United States in force December seventh, one thousand nine hundred and twenty-five, 44 Stat. 1 and 77 (1926).

⁹⁴ *Ibid.*

⁹⁵ An Act To provide for the publication of the Act to consolidate, codify, and set forth the general and permanent laws of the United States in force December 7, 1925, with index, reference tables, appendix, and so forth, 44 Stat. 778 (1926).

⁹⁶ *Ibid.* (emphasis added).

⁹⁷ *Ibid.*

Articles of Confederation and the Northwest Ordinance which were both superseded by the Constitution. Consequently, placement in the *U.S. Code* does not show that the Declaration retained its legally binding force, even assuming that it was, at one time, legally binding. Fourth, the list of “ancillar[y]” materials includes documents that are clearly legally binding regardless of placement in the *U.S. Code*. The most prominent example is the Constitution. So again, placement in the *Code* does not *necessarily* signify that the Declaration is legally binding. Lastly, the purpose of printing the Declaration, Articles, Northwest Ordinance, and Constitution, in addition to the general and permanent laws of the United States, was to give pride-of-place to those documents that had a profound impact in shaping our nation. These are the laws that “define and establish [our] government,” as *Black’s Law Dictionary* defines organic documents.⁹⁸ Congress’ purpose in placing them in the *Code* was not to identify any continuing legal validity of the documents, but instead to recognize the contributions they had made to our nation’s government.

PROPER ROLE OF DECLARATION IN CONSTITUTIONAL INTERPRETATION

The proper role of the Declaration of Independence in constitutional interpretation is as one source of the original meaning of the Constitution’s text. For example, the Sixth Amendment protects the right to trial by jury in criminal prosecutions.⁹⁹ The right to trial by a jury of one’s peers in criminal prosecutions has deep roots in English and American law.¹⁰⁰ In the period of conflict leading up to the Revolution, the right to a criminal jury trial was one of the rights threatened by the Crown.¹⁰¹ The Stamp Act of 1765 provided that admiralty courts—which did not have juries—would be the forum of enforcement.¹⁰² And the Coercive Acts of

⁹⁸ *Black’s Law Dictionary* (7th ed. 1999), p. 1126.

⁹⁹ *U.S. Constitution*, Amendment VI.

¹⁰⁰ See Leonard W. Levy, *Origins of the Bill of Rights* (New Haven CT: Yale Univ. Press, 1999), pp. 210-226, reviewing the history of the double jury system.

¹⁰¹ *Ibid.*, pp. 224-27.

¹⁰² *Ibid.*, p. 226.

1774 provided for trial of some violations in England.¹⁰³

The colonists' response to Crown infringements on the right to a criminal jury trial were strong. The Stamp Act Congress protested the denial of criminal jury trial by the Stamp Act and the First Continental Congress protested the same denial by the Coercive Acts.¹⁰⁴ The Declaration of Independence, approved by the Second Continental Congress, is part of this American reaction to systemic Crown incursion on colonists' rights. The Declaration declares, as one of the charges against King George III, that he "depriv[ed] us, in many cases, of the benefit of trial by jury."¹⁰⁵

Following the Revolution, every state constitution protected the right to a jury trial and the absence of similar protection in the proposed federal Constitution nearly prevented its ratification.¹⁰⁶ The famous Federalist concession of a bill of rights to secure ratification led eventually to James Madison's introduction of amendments that became the Bill of Rights, including a provision in the Sixth Amendment protecting the right to a trial by jury in criminal proceedings.¹⁰⁷

Consequently, the Declaration is one source of the original meaning of the right to jury trial in the Sixth Amendment. The Declaration sheds light on why Madison proposed the provision, and points to the common law background of the right.

This short discussion on the proper role of the Declaration in constitutional interpretation does not detract from the other roles that the Declaration does and should play. The Declaration is a source of national pride. It has a justly prominent role in our nation's annual celebration of its birth.¹⁰⁸ The Declaration's language is beautiful. And the Declaration has many legal roles to play, outside of the context of constitutional

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ *Declaration of Independence*, para. 20.

¹⁰⁶ Levy, pp. 227-28.

¹⁰⁷ Ibid., pp. 227-30.

¹⁰⁸ See Larson, pp. 750-53, discussing the early celebrations of Independence Day on July 4.

interpretation. For example, many states date the severance of their common law from England's to the Declaration.¹⁰⁹

CONCLUSION

I believe that abortion is the taking of innocent human life and that our society should legally protect unborn human life. In this paper I presented arguments against claims commonly made by pro-life Americans. My goal in doing so was to advance our society toward legal protection of unborn humans by eliminating what I believe are relatively weak arguments that may otherwise provide an opportunity for pro-choice Americans to rebut and then claim victory in the battle of ideas.

¹⁰⁹ See Larson, pp. 713-20, discussing the continuing legal roles of the Declaration.