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THE DECLARATION OF INDEPENDENCE: A 225TH ANNIVERSARY RE-INTERPRETATION

Carlton F.W. Larson*

Abstract: The importance of the Declaration of Independence to American law has been obscured by dubious associations with natural rights jurisprudence. Legal scholars have therefore overlooked the numerous ways in which the Declaration is relevant to a host of legal issues. Ample textual and historical evidence demonstrates that the Declaration, not the Articles of Confederation or the Constitution, legally constituted the United States of America as a distinct nation in the world community. The Declaration was not the act of thirteen states declaring their individual independence, but the act of one American people announcing the birth of an American nation. Nor is the Declaration merely an abstract treatise on individual natural rights. The Declaration displays a deep concern for which forms of government will most effectively allow self-government to flourish. As such, the Declaration speaks in constitutional language that is far more precise than we are often led to believe.

The Declaration of Independence is 225 years old this month. All across the country, Americans will celebrate the Fourth of July with trumpet and song, with fireworks and good cheer. In the rarefied halls of the legal academy, however, such celebrations will undoubtedly be greeted with little more than an air of amused detachment. After all, we all know that the Continental Congress actually voted for independence on July 2, not on July 4. We all know that the Declaration was merely a propaganda paper of no legal significance whatsoever. We all know that its animating principle—natural law—is about as intellectually respectable as alchemy. We all know that there is no more certain way to get thrown out of court than to file a claim based on the Declaration of Independence. We all know, in short, that the Declaration is utterly irrelevant to our role as lawyers and as legal scholars.1


I am grateful to Akhil Reed Amar for his encouragement of this project and for his many thoughtful comments on my arguments. Pauline Maier graciously read the entire manuscript and I am thankful for her suggestions and support. Special thanks to David Armitage for lending me a copy of his forthcoming article and to the Historical Society of Pennsylvania for permission to quote from its manuscript collections. My thoughts on this subject have benefited from conversations with Steven Engel, Drew Hansen, Carl Larson, Robert Spoo, and John Turner. All errors, of course, are mine alone.

An earlier version of the Article was the co-recipient of the Benjamin Scharps Prize for best paper by a third-year law student at Yale Law School.

1. See, e.g., infra notes 15–20 and accompanying text.
This Article is an invitation to re-think our entire approach to the Declaration of Independence. I contend that a thorough understanding of the Declaration is critical to understanding major issues in American public law, and not simply in the trivial sense that the Declaration is some sort of “philosophical background” to the Constitution. The Declaration matters, and it is important that we bring to it the same level of critical analysis that we apply to the Constitution and to other legal texts.

This Article advances three main points. First, our view of the Declaration’s place in American law has been obscured by dubious judicial adventures in “natural rights.” The Lochner era produced a host of decisions linking the Declaration of Independence to extreme views of economic liberty. The lingering distrust of those decisions, and of the impulses that motivated them, has made legal scholars less willing to notice the numerous ways in which the Declaration has direct relevance to American law. These legal issues range from the determination of American citizenship to ownership of the seashore to the conditions under which the western states entered the union. Indeed, in at least two states, the “principles of the Declaration of Independence” appear to have been adopted as positive law. As a survey of the case law will demonstrate, the legal issues raised by the Declaration are numerous and complex and have been the subject of litigation for well over 200 years.

Second, the Declaration was not, as is often asserted, a declaration of thirteen states declaring their individual independence. Rather, it was the declaration of one American people declaring the existence of one American nation. It is therefore entirely appropriate to date the legal existence of the American nation from July 4, 1776, and not from the date of the Articles of Confederation or of the ratification of the Constitution. The American nation preceded both the Articles, which were merely declarative of that nation’s existence, and the Constitution, which “perfected” that nation. The Declaration alone legally constituted the United States of America as a distinct nation in the world community.

Third, the Declaration is not simply an abstract and irrelevant treatise on the purposes of government. Rather, it is deeply concerned with what I term “constitutional formalism,” that is, a careful and detailed attention to the structure of government and to the rule of law. Most significantly, the Declaration addresses at length what sort of “forms” are most likely

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2. See infra notes 73–75 and accompanying text.
to allow self-government to flourish. A close reading of the whole text of the Declaration suggests that 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. George III's violation of these rights—the basic rights of self-government—is what justified American independence from Britain. This reading rescues the Declaration from the Lochner-esque oblivion to which it has been consigned and restores self-government to its proper place as the Declaration's fundamental principle.

This Article is divided into four parts. Part I explores the Declaration's place in American law and in the legal academy. Part II argues, based on substantial textual and historical evidence, that the Declaration is best read as the act of one American people creating one American nation. Part III explains the Declaration's roots in "constitutional formalism." Part IV offers a brief summary and implications for modern legal doctrine.

I. THE DECLARATION OF INDEPENDENCE AND AMERICAN LAW

A. Prologue: A Nineteenth-Century Perspective

Four score and seven years after the adoption of the Declaration of Independence, Abraham Lincoln rose at Gettysburg to praise the Declaration as the governing statement of American political philosophy. It is easy to forget that Lincoln's enthusiasm for the Declaration was far from unprecedented. Two years earlier, Lincoln's arch-nemesis, Chief Justice Roger Brooks Taney, had sternly lectured Lincoln on the importance of the principles of the Declaration. In the aftermath of the surrender of Fort Sumter, Lincoln had suspended the

3. On the Gettysburg Address and Lincoln's views on the Declaration of Independence, see generally GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992). Wills's more extravagant claims, such as his assertion that Lincoln's speech was "one of the most daring acts of open-air sleight-of-hand ever witnessed by the unsuspecting," id. at 38, have been effectively rebutted by Pauline Maier. PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE xix–xx, 189–208 (1997) (tracing the ways in which Lincoln's speech tapped into larger cultural currents). If Lincoln's invocation of the Declaration was such a novelty, one wonders why, for example, in their oral arguments in the Amistad case twenty-two years earlier, Roger Baldwin and John Quincy Adams repeatedly invoked the principles of the Declaration of Independence as the founding principles of the American nation. See The Amistad, 40 U.S. 518, 549, 552, 556, 557 (1841).
writ of habeas corpus along the route between Washington and Philadelphia, and the army had imprisoned a Confederate sympathizer, John Merryman, in Baltimore’s Fort McHenry (the site of the battle that inspired Francis Scott Key to write “The Star-Spangled Banner”). In an opinion denying Lincoln’s power to suspend habeas corpus, Taney admonished the President that “[t]he constitution of the United States is founded upon the principles of government set forth and maintained in the Declaration of Independence.” One such principle was civilian control of the military, as evidenced by the Declaration’s charge that George III “had affected to render the military independent of, and superior to, the civil power.”

Taney’s invocation of the Declaration was not merely a clever riposte to Lincoln, who had himself invoked the principles of the Declaration throughout his political career; rather, the Declaration figured prominently in Taney’s view of the constitutional order. The most extensive discussion of the Declaration in a Supreme Court opinion is in none other than Taney’s infamous opinion in Dred Scott v. Sanford, in which Taney explained at great length why the Declaration did not resolve the issue of Dred Scott’s citizenship. Taney insisted that the words “all men” in the phrase “all men are created equal” simply could not be understood to apply to blacks. A contrary interpretation would have rendered the conduct of the men who drafted the Declaration “utterly and flagrantly inconsistent with the principles they asserted.” This was impossible, Taney argued, because “the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor and incapable of asserting principles inconsistent with those on which they were acting.”

To Lincoln, the Dred Scott decision was an abomination. Taney’s opinion, Lincoln argued, did “‘obvious violence to the plain

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5. Ex parte Merryman, 17 F. Cas. 144, 152 n.3 (C.C.D. Md. 1861) (No. 9487).
6. Id.
7. See, e.g., DONALD, supra note 4, at 269, 277; WILLS, supra note 3, at 100 (discussing Lincoln’s views on the Declaration).
9. See id. at 410.
10. Id.
11. Id.
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unmistakable meaning of the Declaration” such that if the Declaration’s framers were to “rise from their graves, they could not at all recognize it.” Taney’s interpretation of the Declaration has been quite properly consigned to the dustbin of history, but it is worth noting the efforts he expended in trying to distinguish away the language of the Declaration. Taney could have easily argued that the Declaration had no relevance to this issue. Justice Curtis said as much in his dissent, and Justice McLean, in a separate dissent, ignored the Declaration completely. But for Taney, as for Lincoln, it was inconceivable to reach a decision contrary to the Declaration of Independence. Despite all their differences, Lincoln and Taney shared one deeply held belief—that a proper understanding of the Declaration of Independence was essential to understanding the Constitution and laws of the United States of America.

B. The Declaration at the Millennium

To modern constitutional scholars, this notion seems as quaint as one of Matthew Brady’s faded daguerreotypes. As the introduction to this Article suggests, the position of the Declaration of Independence in recent constitutional thought is one of utter and complete irrelevance. Benno Schmidt, the former dean of Columbia Law School and former President of Yale University claims, “American constitutional law is positive law, and the Declaration of Independence has no standing in constitutional interpretation whatsoever.” The most recent volume of Laurence Tribe’s treatise on constitutional law mentions the Declaration only twice over the course of 1381 pages. One might expect that Bruce Ackerman’s comprehensive study of American constitutional

12. DONALD, supra note 4, at 201 (quoting 2 COLLECTED WORKS OF ABRAHAM LINCOLN 404 (Roy P. Basler ed., 1990)).
13. See Dred Scott, 60 U.S. (19 How.) at 574–75 (Curtis, J., dissenting) (arguing that although Taney’s interpretation of the Declaration was probably wrong, the issue was beside the point because the real issue was the status of free blacks at the time of the ratification of the Constitution).
14. See id. at 529 (McLean, J., dissenting).
development would refer to the document that affected the greatest constitutional transformation of all—American independence from Britain. But Ackerman cites the Declaration only five times over the course of two volumes, and never for any substantive point.\textsuperscript{17} For most legal academics, the Declaration is little more than a political puff piece,\textsuperscript{18} or a "propaganda manifesto," as Richard Hofstadter described it.\textsuperscript{19} It is of historical interest,\textsuperscript{20} perhaps, but of no more use to the world of law than the Pledge of Allegiance or the diary of Paul Revere.

The Declaration's disappearance from the world of legal scholarship contrasts sharply with its continued place of prominence in our nation's political life. One hundred years after the Gettysburg Address, Martin Luther King, Jr., stood on the steps of the Lincoln Memorial in Washington, D.C., and called on the nation to live up to its "creed" expressed in the Declaration of Independence.\textsuperscript{21} President Clinton has noted that he "reread[s]" the Declaration "on a regular basis"\textsuperscript{22} and has stated that "if you believe in the Declaration of Independence and the Constitution . . . then you are an American."\textsuperscript{23} On the opposite end of the

\begin{itemize}
  \item \textsuperscript{17} See \textsc{Bruce Ackerman}, \textit{We the People: Foundations} 142, 213, 216, 321 (1991); \textsc{Bruce Ackerman}, \textit{We the People: Transformations} 77 (1998).
  \item \textsuperscript{18} See Dan Himmelfarb, Note, \textit{The Constitutional Relevance of the Second Sentence of the Declaration of Independence}, 100 \textit{Yale L.J.} 169, 169 nn.2-5 (1990) (surveying the literature); see also \textsc{Walter Berns}, \textit{Taking the Constitution Seriously} 16 (1987) ("It has become common to hear scholars dismiss the Declaration as mere propaganda, or a clever lawyer's brief with a dash of natural law added for spice, a convenient weapon to wield against the British, and no more.").
  \item \textsuperscript{19} \textsc{Richard Hofstadter}, \textit{The Progressive Historians} 269 (1968).
  \item \textsuperscript{20} Even this might be doubted. The two greatest historical studies of the American Revolution, as fresh and compelling today as when they were first published over thirty years ago, ignore the Declaration almost entirely. \textsc{Bernard Bailyn}, \textit{The Ideological Origins of the American Revolution} (1967); \textsc{Gordon S. Wood}, \textit{The Creation of the American Republic}, 1776–1787 (1969). Such treatment from our most eminent historians helps to confirm the legal academy's view of the Declaration as trivial and unimportant.
  \item \textsuperscript{21} Martin Luther King, Jr., \textit{I Have a Dream} (Aug. 28, 1963), in \textit{The Penguin Book of Twentieth-Century Speeches} 330, 334 (Brian MacArthur ed., 1992).
  \item \textsuperscript{22} President William J. Clinton, Remarks to Senior Citizens Council (July 28, 1998), \textit{available at} 1998 WL 425314.
  \item \textsuperscript{23} President William J. Clinton, Remarks to Portland State Univ. Commencement (June 18, 1998), \textit{available at} 1998 WL 321814. Clinton's grasp of the Declaration, however, is far from firm. In one speech, Clinton observed that "we are bound together by a written Constitution that's 220 years old, going back to the Declaration of Independence," thus confusing the Declaration and the Constitution. President William J. Clinton, Remarks to the U.S. Agricultural Communicators Congress (July 16, 1996), \textit{available at} 1996 WL 399864. In another speech, he remarked, "The last time I checked, the Constitution said, 'of the people, by the people and for the people.' That's what the Declaration of Independence says," thus confusing the Declaration, the Constitution, and the
political spectrum, Republican presidential candidates Alan Keyes and Gary Bauer repeatedly argued that the practice of abortion violates the Declaration of Independence. Keyes declared that he stood "without apology for the principles articulated in the Declaration of Independence, and in particular for the unalienable right to life of all human offspring." Bauer contended that he would "put no justice on the court that does not understand the clear, moral idea found in the Declaration of Independence that is the basis of this country." In one presidential debate, all but one of the Republican candidates mentioned the Declaration of Independence as an essential item for any time capsule prepared for the twenty-first century. Representative Henry Hyde of Illinois, in closing arguments in the impeachment trial of President Clinton, appealed to "our country's birth certificate, our charter of freedom, our Declaration of Independence." A 1989 federal act described the Declaration as "one of the greatest documents in human history." Few Americans, I suspect, can recall any phrases from the Constitution, but almost everyone knows that "all men are created equal" and that they have a right to "life, liberty, and the pursuit of happiness." Indeed, in 2000 the New Jersey Senate passed a bill requiring schoolchildren to recite that portion of the Declaration of Independence each day along with the Pledge of Allegiance. And a rare

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25. Excerpts from GOP Debate, ASSOCIATED PRESS ONLINE, Jan. 6, 2000, available at 2000 WL 3303828. Bauer observed that "the first right [the Declaration] lists is the right to life." Id.


29. In the interest of our nation's forests, I have departed from the strict requirements of the Bluebook when citing to the Declaration of Independence. Adherence to the relevant citation rule would swell the footnotes to an intolerable length, with only an imperceptible benefit to the reader. As form should always follow function, even in the arcane world of legal citation, I have not provided footnotes for every quotation from the Declaration. Instead, the Declaration is reproduced in full in the Appendix, where the interested reader can peruse it at leisure. In cases where I have added emphasis to the text, however, a traditional footnote so noting has been included. I am grateful to the editors of the Washington Law Review for accommodating this approach.

30. Ron Marsico, Senate Clears Recitation of Declaration in School, STAR-LEDGER (Newark, N.J.), June 27, 2000, at 13, available at 2000 WL 23585492. Some opponents of the measure felt it "could send a wrong message to girls." Id. The measure should nonetheless please Gary Bauer; on
original printing of the Declaration recently sold for $8.1 million at a Sotheby’s auction. The buyer, television and movie producer Norman Lear, intends to make the printing the focus of a traveling exhibit and patriotic show.31

C. Noscitur a Sociis: The Taint of Lochner

Given the Declaration’s deep resonance in American public life, why do legal academics view it with such suspicion? The answer, I believe, is that the Declaration has been tainted by judicial decisions of dubious constitutional merit. The celebration of the Declaration in Dred Scott was followed by similarly fulsome praise in the decisions of the Lochner era. One of the earliest decisions in this mold was Butcher’s Union Slaughter-house & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-house Co.,32 in which two concurring justices invoked the Declaration to protect economic liberty. Justice Bradley argued that the “right to follow any of the common occupations of life is an inalienable right” secured by the Declaration of Independence.33 Justice Field was even more exuberant, announcing that the Declaration was a “new evangel of liberty to the people,” and explaining that the phrase “pursuit of happiness” meant “the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment.”34 These sentiments soon worked their way into governing law. In the 1897 decision of Gulf, Colorado & Santa Fe Railway Co. v. Ellis,35 the Supreme Court ruled that the state of Texas could not require railroads

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32. 111 U.S. 746 (1884).
33. Id. at 762 (Bradley, J., concurring); see also Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116 (1873) (Bradley, J., dissenting) (noting that the phrase “pursuit of happiness” in the Declaration of Independence is equivalent to “property”).
34. Butcher’s Union, 111 U.S. at 756–57 (Field, J., concurring).
35. 165 U.S. 150 (1897).
to pay attorneys' fees in tort actions. The Court, in an opinion by Justice Brewer, noted that the Declaration is the "thought and the spirit" of the Constitution and observed that "it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." In this case, the Court read the Declaration's statement that "all men are created equal" to mean that such tort legislation violated the "equality of rights which is the foundation of free government." Four years later, the Court relied on this language to strike down a statute governing the operations of large stockyards. Lower courts, too, wielded the Declaration in defense of laissez-faire constitutionalism. A district court in South Carolina proclaimed in 1907 that "the right of every citizen to work where he will, ... to select not only his employer, but his associates ... is one of those inalienable rights formulated in the Declaration of Independence." The Ninth Circuit ruled in 1937 that the National Labor Relations Board could not use its powers to protect unionized employees, because the term "liberty" as used "in the Fifth Amendment to the Constitution and in the Declaration of Independence included the right to freely contract." As late as 1943, the Supreme Court of North Dakota stated that a statute requiring the licensing of professional photographers was inconsistent with an individual's right to the "pursuit of happiness" under the Declaration of Independence.

This tight intertwining of the Declaration with the most extreme forms of Lochner-ism suggests why academics fear giving significant weight to the Declaration. The Declaration's sonorous phrases seem to provide little guidance in determining the scope of the liberty of which it speaks, and the document can be cited for the most dubious of causes. Indeed, many of the Declaration's most fervent supporters are precisely those people with whom the legal academy is least likely to sympathize. For years, tax protestors have unsuccessfully argued that the federal

36. Id. at 160.
37. Id. In an 1891 address at Yale Law School, Justice Brewer (who was Justice Field's nephew) contended, "When, among the affirmatives of the Declaration of Independence, it is asserted that the pursuit of happiness is one of the unalienable rights," it means that government cannot interfere with the "acquisition, possession and enjoyment of property." Justice David J. Brewer, Address at Yale Law School (1891), quoted in Owen M. Fiss, David J. Brewer: The Judge as Missionary, in PHILIP J. BERGAN ET AL., THE FIELDS AND THE LAW 53, 59 (Federal Bar Council 1986).
40. NLRB v. Mackay Radio & Tel. Co., 87 F.2d 611, 615 (9th Cir. 1937).
41. See State v. Cromwell, 9 N.W.2d 914, 918 (N.D. 1943).
income tax laws violate the Declaration of Independence.\textsuperscript{42} In 1972, a New York Court of Appeals judge contended that abortion was illegal under the Declaration of Independence, because the Declaration has the "force of law" and abortion violates the "natural law" that the Declaration invokes.\textsuperscript{43} Pro se litigants turn to the Declaration with disturbing regularity, invoking it as a palliative for almost every conceivable injury.\textsuperscript{44} Lacking any determinate or precise meaning, the

\textsuperscript{42} See, e.g., United States v. Collins, 920 F.2d 619, 623 (10th Cir. 1990) (noting that defendant in tax case filed an 84-page motion to dismiss, which was "lavishly larded with citations to the Declaration of Independence" and which argued that federal criminal jurisdiction was unconstitutional outside of the District of Columbia); Burroughs v. Wallingford, 780 F.2d 502, 503 (5th Cir. 1986) (rejecting argument that tax liens violated "unalienable" rights secured by the Declaration of Independence); Newman v. Schiff, 778 F.2d 460, 461 (8th Cir. 1985) (noting that tax protestor had written book entitled "The Tax Rebel's Guide to the Constitution and the Declaration of Independence"); United States v. Farber, 679 F.2d 733, 735 (8th Cir. 1982) (noting that tax protestor included copies of the Declaration of Independence and the Mayflower Compact in his return); United States v. Schmitz, 542 F.2d 782, 783, 785-786 (8th Cir. 1976) (rejecting argument that 1040 forms "interfere with and obstruct... duties and rights under the Declaration of Independence"); Koll v. Wayzata State Bank, 397 F.2d 124, 125 (8th Cir. 1968) (dismissing claim that bank had engaged in conspiracy to deprive claimant of "'rights, privileges and immunities' secured by the Declaration of Independence" and noting that the complaint consisted of "16 printed pages of disconnected, incoherent, and rambling statements" challenging the constitutionality of the income tax); McKenney v. Blumenthal, 1979 WL 1342, at *1 (N.D. Ga. Feb. 23, 1979) (rejecting claim that IRS procedures violated the Magna Carta and the Declaration of Independence); Steinbrecher v. Comm'r of Internal Revenue, 1977 WL 1287, at *1 (W.D. Tex Aug. 15, 1977) (rejecting challenge to tax laws that rested jurisdiction on, inter alia, the Declaration of Independence and the Northwest Ordinance of 1787).


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Declaration becomes little more than a Rorschach test, into which anything and everything might be read. The meaning of the Declaration is therefore best left to the elected branches of government, to the Lincolns of the world, rather than to the Taneys. The understanding of "liberty" in the Due Process Clause of the Fourteenth Amendment has created enough trouble; why encumber judges with the additional duty of figuring out, for example, what constitutes "the pursuit of happiness?"

The few academics who do emphasize the Declaration do nothing to dispel these concerns. These scholars focus almost exclusively on the second sentence of the Declaration, and they conclude that the Declaration is primarily about natural law and the protection of natural rights. Accordingly, the Declaration should be read in light of its natural law origins. "[T]he natural-rights principles embodied in the Declaration," one scholar tells us, "are at the heart of the Constitution."

Not surprisingly, arguments of this sort have been a resounding failure in the legal academy. Invoking "natural rights" in a modern law school is about as persuasive as citing Cotton Mather’s treatise on witchcraft. Legal Realism has effectively banished "natural rights" to a distant cage in Felix Cohen’s "menagerie of metaphysical monsters." Natural law has mystical overtones that seem out of place in a modern society, and cases that have invoked or implied natural law arguments are widely regarded as embarrassments.

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45. See, e.g., Derden v. McNeel, 978 F.2d 1453, 1456 n.4 (5th Cir. 1992) (noting that it is unhelpful to cite the Declaration of Independence since "general statements about inalienable rights . . . tell us little about the prerogatives of an individual in concrete factual situations").


47. Gerber, supra note 46, at 3. Philip Hamburger argues that “[i]n the eighteenth century, however, American ideas of natural rights and natural law” were “relatively precisely defined” and “circumscribed by their very character as natural rights.” Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L.J. 907, 908 (1993).


50. See, e.g., Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (“Nature herself . . . has always recognized a wide difference in the respective spheres and destinies of man and woman. . . .
Even scholars who attempt to minimize the Declaration's purported roots in natural law do little to alleviate academics' inherent suspicion of the document. In a recent book, Charles Black, Jr., argues that the Declaration protects what he terms "human rights." Black believes that a complete theory of human rights law can be based solely on the Declaration, the Ninth Amendment, and the Privileges or Immunities Clause of the Fourteenth Amendment. Although Black assiduously avoids the term "natural rights," his jurisprudence of "human rights" is largely indistinguishable from a jurisprudence of "natural rights," and it is doubtful that his argument does much to resolve any concrete dispute over the scope of these "human rights." Mark Tushnet also repeatedly invokes the Declaration (appropriately rephrasing certain terms to reflect modern sensibilities). In a recent book, Tushnet argues that the Declaration and the Preamble to the Constitution form what he terms the "thin Constitution." From this, he draws the startling conclusion that a proper adherence to the principles of the Declaration and the Preamble requires the abolition of judicial review.

D. The Law of the Declaration

The almost exclusive emphasis that has been placed on the Declaration's famous second paragraph has assured that the Declaration will always be seen as, well, a bit fluffy—fine for Fourth of July orations, but useless for any serious analysis of legal issues. Certain phrases of the Declaration are so familiar that it is easy to think that they are synonymous with the whole. Thus, an imagined familiarity with the

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This is the law of the Creator.


52. See id. at ix.


54. See id. at 129–76. A more sensible view of the Declaration is found in J.M. Balkin, The Declaration and the Promise of a Democratic Culture, 4-SPG WIDENER L. SYMP. J. 167 (1999). Balkin sees the Declaration as consisting of "promises," which are the "soul" of the Constitution. Id. at 169. One such promise is the promise of a democratic culture, made possible by the American Revolution's attack on monarchy. Id. at 170. However, the document seems more concerned with "tyranny" than with monarchy, and it never suggests that the two are synonymous. See infra Part III.C; see also Himmelfarb, supra note 18, at 175–76.

55. See, e.g., BLACK, supra note 51, at 5 (noting that he will consider only the Declaration's opening paragraphs); Himmelfarb, supra note 18 (arguing the constitutional significance of the Declaration solely on the basis of first sentence of the second paragraph).
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Declaration has bred a very real contempt for its supposed vagueness and malleability. Yet President Lincoln and Chief Justice Taney were both convinced that a proper understanding of the Declaration was desperately important to the world of law. Why might they have done so, and why might we still find the Declaration relevant to our role as lawyers? Consider the following ways in which the Declaration and law are intricately intertwined:

Justification for State Constitutions. By justifying the independence of the American colonies, the Declaration legitimated the drafting of new state constitutions. Many states accordingly cited the Declaration in the preambles to their constitutions, and New York included the complete text of the Declaration in its constitution of 1777.

Severance of English Common Law. Most American jurisdictions recognize that English statutes and common law decisions prior to July 4, 1776, are part of American common law. Courts have repeatedly held that the Declaration severed English common law from its American counterpart. English law after the Declaration has no force in America and must be pled as foreign law.

56. See, e.g., Saikrishna B. Prakash, America's Aristocracy, 109 YALE L.J. 541, 553–54 (1999) (reviewing Tushnet, supra note 53) ("The Declaration has a little more substance [than the Preamble to the Constitution], but that is not saying much. Though it gets the patriotic juices flowing . . . [its] principles tell us nothing concrete.").

57. See, e.g., MD. CONST. of 1776, pmbl.; N.C. CONST. of 1776, pmbl.; PA. CONST. of 1776, pmbl.; S.C. CONST. of 1778, pmbl.; VT. CONST. of 1777, pmbl.; see also Trs. of Phillips Exeter Acad. v. Exeter, 27 A.2d 569, 584 (N.H. 1940) (stating that "full statehood dated from the Declaration of Independence").

58. N.Y. CONST. of 1777, pmbl.

59. See, e.g., Hilton v. Guyot, 159 U.S. 113, 180 (1895); United Copper Sec. Co. v. Amalgamated Copper Co., 232 F. 574, 577 (2d Cir. 1916); Greer v. Paust, 279 N.W. 568, 570 (Minn. 1938); Gwathmey v. North Carolina, 464 S.E.2d 674, 679 (N.C. 1995) (stating that the "common law" to be applied in North Carolina is the common law of England to the extent it was in force and use within the State at the time of the Declaration of Independence); Richards v. Redelsheimer, 36 Wash. 325, 328, 78 P. 934, 935 (1904); see also R.I. GEN. LAWS § 43-3-1 (2000); Lowe v. Kansas, 163 U.S. 81, 85 (1896) ("What is due process of law depends upon the question whether it was in substantial accord with the law and usage of England before the Declaration of Independence, and in this country since it became a nation."); Manoukian v. Tomasian, 237 F.2d 211, 215 (D.C. Cir. 1956) ("British statutes antedating the Declaration of Independence have almost universally been regarded as having the effect of judicial precedent."). But see Penny v. Little, 4 Ill. (3 Scam.) 301, 302–03 (1841) (noting that the Illinois legislature dated American common law to the fourth year of the reign of James I when the first territorial government was established in America).

Title to Land. The Declaration of Independence transferred title to public lands from the Crown to the states, and fixed the boundaries of the original thirteen colonies. The Declaration also transferred western lands to the thirteen states. An 1827 Supreme Court decision held that title to the trans-Appalachian lands did not pass by cession from Great Britain in the 1783 Treaty of Paris; rather, these lands transferred by right to the United States with the signing of the Declaration of Independence.

Creation of American Citizenship. American law dates American citizenship to the Declaration of Independence. By contrast, English law holds that Americans remained British subjects until the Treaty of Paris in 1783. A person in the United States on July 4, 1776, is

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61. See, e.g., Phillips v. Delaware, 330 A.2d 136 (Del. 1974) (holding that title to lands held by William Penn terminated with the Declaration and transferred by sovereign succession to the state of Delaware); Town of Oyster Bay v. Commander Oil Corp., 677 N.Y.S.2d 746, 748 (N.Y. Sup. Ct. 1998) ("by the Declaration of Independence title to the lands under tidewaters which had been vested in the King passed to the states in which they were situated").

62. See New Jersey v. Delaware, 291 U.S. 361, 370 (1934) ("The Declaration of Independence had made Delaware a state with boundaries fixed as of that time."); Howard v. Ingersoll, 54 U.S. (13 How.) 381, 398 (1852) ("It is well known to all of us, when the colonies dissolved their connection with the mother country by the Declaration of Independence, that it was understood by all of them, that each did so, with the limits which belonged to it as a colony."); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 736–37 (1838).

63. See Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523, 527 (1827); see also Downes v. Bidwell, 182 U.S. 244, 302 (1901) (noting that the Declaration gave the United States power to acquire territory). Whether the western lands passed directly to individual states or to the Congress was a divisive issue, which was finally resolved with Virginia's cession to the United States of its remaining western claims. See Peter Onuf, The Origins of the Federal Republic 17 (1983). That the Declaration passed title to crown lands to the United States was well-recognized by contemporaries. See, e.g., To the Printers of the Pennsylvania Gazette, PA. GAZETTE, Aug. 15, 1781 ("By virtue of our Declaration of Independence, we stand possessed of all that property of the King of Britain in America, which he held by purchases from the Indians . . . ").


65. See Inglis, 28 U.S. (3 Pet.) at 121. A Pennsylvania law of Dec. 5, 1778, required office-holders to swear that they had never "since the Declaration of Independence, directly or indirectly aided, assisted, abetted, or in any wise countenanced the King of Great Britain," and that they had
presumed to be an American citizen, unless he actively took steps to retain his allegiance to Britain. Although these distinctions are of little consequence today, they figured in numerous eighteenth- and nineteenth-century inheritance disputes, because only citizens could inherit real property in America. The Declaration is also relevant to naturalization proceedings, as some courts have held that an understanding of the Declaration is an essential prerequisite to citizenship.

Treason. An important corollary to the law of citizenship is the law of treason. The Declaration made official what colonial Americans had been suggesting for some time—that adherence to the king of Great Britain was treason. The Declaration states that "we hold [our British brethren], as we hold the rest of Mankind, Enemies in War, in Peace, Friends." "Enemies," of course, has a technical meaning within the law of treason. The British were now officially the enemies, and the states would quickly respond with a host of treason statutes designed to punish those who aided the British cause.

Requirement for Admission to the Union. Since the latter half of the nineteenth century, Congress has required that territories seeking statehood create constitutions that are "not repugnant to... the principles of the Declaration of Independence." Such provisions were part of the Enabling Acts for the territories that became Hawaii, Alaska, New Mexico, Arizona, Oklahoma, Utah, North Dakota, South Dakota,

"ever since the Declaration of Independence... demeaned [themselves] as faithful citizen[s] and subject[s] of this, or some one of the United States." PA. GAZETTE, May 17, 1780.


67. See, e.g., Munro v. Merchant, 28 N.Y. 9 (1863); see also Lamoreaux v. Ellis, 50 N.W. 812, 815-16 (Mich. 1891) (evaluating citizenship of an individual's grandfather at time of Declaration to determine individual's eligibility for the office of sheriff); State ex rel. Phelps v. Jackson, 65 A. 657, 658 (Vt. 1907) (evaluating citizenship of an individual's great-grandfather at time of Declaration to determine individual's eligibility for the office of state's attorney).

68. See, e.g., In re Goldberg, 269 F. 392, 397 (E.D. Mo. 1920) (holding that "an acquaintance with, and working knowledge of, the principles of the Declaration of Independence" is "an indispensable prerequisite to naturalization").

69. See, e.g., Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 255 (1830) (Johnson, J., dissenting) ("The courts of this country all consider this transfer of allegiance as resulting from the declaration of independence.").

70. The Declaration confirmed, rather than created, the idea that treason could be committed against America. Although the treason statutes enacted subsequent to the Declaration were enacted at the state level, they are nationalist in flavor and draw upon the experience of colonists prior to the Declaration in punishing adherents to Britain as "traitors to their country." Carlton F.W. Larson, Constructing Treason in Revolutionary Pennsylvania 107 (1997) (unpublished A.B. thesis, Harvard University) (on file with the Harvard University Archives).
Montana, Washington, Colorado, and Nevada. In an early decision, the Oklahoma Supreme Court held that the Enabling Act has no force subsequent to statehood and was not intended to be "an irrevocable limitation on the sovereign powers of the state," but other states have rejected this narrow reading. The Supreme Court of Arizona has held that the Enabling Act is "the fundamental and paramount law" of Arizona; nothing in the Arizona Constitution can be "inconsistent with the Enabling Act." In other words, a constitutional amendment in Arizona is void if it conflicts with the "principles of the Declaration of Independence." In similar fashion, the Supreme Court of Colorado has explicitly ruled that various amendments to the Colorado constitution do not violate the principles of the Declaration, which suggests that the Declaration is also binding in Colorado.


72. Atwater v. Hassett, 111 P. 802, 813 (Okla. 1910); cf. Frantz v. Autry, 91 P. 193, 203–04 (Okla. 1907) (holding that whether proposed state constitution conformed with principles of Declaration was a political question for the President of the United States to determine). For the contrary view, see McCabe v. Atchison, Topeka & Santa Fe Ry., 186 F. 966, 984 (8th Cir. 1911) (Sanborn, J., dissenting) (citing the Declaration requirement in the Oklahoma Enabling Act and arguing that a state cannot violate with impunity the terms of its admission to the Union).


Justice Spencer of the Nebraska Supreme Court similarly argued that the Declaration is binding under the Nebraska Enabling Act. See DeBacker v. Sigler, 175 N.W.2d 912, 914 (Neb. 1970) (Spencer, J., dissenting); Nebraska ex rel. Belker v. Bd. of Educ. Lands & Funds, 175 N.W.2d 63, 69 (Neb. 1970) (Spencer, J., dissenting); State ex rel. Morris v. Marsh, 162 N.W.2d 262, 277 (Neb. 1968) (Spencer, J., dissenting). In none of these cases did his colleagues address this issue.

Any force the Declaration may have in these states is most likely a matter of state constitutional law. In Coyle v. Smith, 221 U.S. 559 (1911), the Supreme Court held that an Enabling Act provision
Declaration of Independence

Creation of a "Negative Constitution." The bulk of the Declaration of Independence consists of specific allegations against the King of Great Britain. In the Merryman case, Chief Justice Taney cited one of these allegations (that the King had attempted to "render the military independent of, and superior to, the civil power") to support his conclusion that neither President Lincoln nor the military could suspend the writ of habeas corpus. Taney assumed that the Constitution would not permit those acts that the Declaration had specifically cited as justifying revolution. In other words, the Declaration was a sort of "negative constitution," a source of structural limitations on the power of government. The charges against the King can be easily converted to positive restrictions on the government: "Thou shalt not render the military independent of, and superior to the civil power," for example. These commands are illustrative of the understanding of the proper role of government that animated the Constitution and can therefore have exceptionally persuasive weight, even if they technically lack binding authority.

This mode of reasoning has been a powerful force in American law since at least 1799. The charges against the King have been regularly invoked by American judges to limit the powers of government. Judges have argued that the charge, "He has refused his Assent to Laws, the most wholesome and necessary for the public Good," limits executive governing the location of the Oklahoma state capital was unenforceable once Oklahoma had been granted full statehood. Id. at 570. To hold otherwise, the Court stated, would be to create two tiers of states, those possessing the full powers traditionally reserved to states and those whose powers had been limited by Enabling Acts. Id. at 577. On the other hand, the Court has approvingly cited Enabling Act provisions that restrict state power over Indian tribes. See, e.g., McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 175-76 (1973); Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685, 687 n.3 (1965). The former provision is a much more egregious example of federal infringement on traditional state powers.

75. Under this view, Romer v. Evans, 517 U.S. 620 (1996), might have been decided on state law grounds. The Colorado Supreme Court could have ruled that the amendment violated the principles of the Declaration and was therefore invalid under the Colorado Enabling Act.

76. Ex parte Merryman, 17 F. Cas. 144, 152 n.3 (C.C.D. Md. 1861) (No. 9487).

77. See Williams' Case, 29 F. Cas. 1330, 1333 (C.C.D. Conn. 1799) (No. 17,708) (Ellsworth, C.J.) (noting that one of the charges against the King in the Declaration is that he had refused to permit the naturalization of aliens). In political debate, such use of the Declaration dates to at least 1783, when a writer in the Pennsylvania Gazette stated, "Let it be remembered, that one of the reasons assigned by Congress for the declaration of Independence was, 'the King of Great Britain had made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.'" PA. GAZETTE, Mar. 26, 1783.
veto power, that the charge, "He has affected to render the Military independent of and superior to the Civil Power," limits the power of the military; that the charge, "For depriving us, in many Cases, of the Benefits of Trial by Jury," limits the government's ability to restrict jury trials; and that the charge, "For transporting us beyond Seas to be tried for pretended Offences," limits the government's power to change venue in criminal prosecutions. Our judiciary has never tired of reminding us that one of the causes of the American Revolution was that George III had "made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."

Judicial opinions have been illuminated by even the most obscure charges of the Declaration: "He has called together Legislative Bodies at Places unusual... and distant"; "He has... sent hither Swarms of Officers..."

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82. See, e.g., Weiss v. United States, 510 U.S. 163, 198-99 (1994) (Scalia, J., concurring in part and concurring in the judgment); United States v. Will, 449 U.S. 200, 219 (1980); O'Donoghue v. United States, 289 U.S. 516, 531 (1933); Harline v. DEA, 148 F.3d 1199, 1203 (10th Cir. 1998); In re Clay, 35 F.3d 190, 191 (5th Cir. 1994); Oates v. Rogers, 144 S.W.2d 457, 459 (Ark. 1940); Lee v. Bd. of Pension Trs., 739 A. 2d 363, 341 (Del. 1999); Gordy v. Dennis, 5 A.2d 69, 72 (Md. 1939); Grimball v. Beattie, 177 S.E. 668, 676-77 (S.C. 1934) (describing the charge "[a]s almost a controlling influence on the decisions reached herein").


to harass our People, and eat out their Substance\textsuperscript{85}; \textit{“For quartering large Bodies of Armed Troops among us”}; \textsuperscript{86} \textit{“For taking away our Charters”}; \textsuperscript{87} \textit{“For... abolishing our most valuable laws”}; \textsuperscript{88} and \textit{“[He has incited] the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes and Conditions”}.\textsuperscript{89} This use of the Declaration to limit the powers of government was aptly summarized by a federal appellate court in 1899: \textit{“The Declaration of Independence is not, as has sometimes been flippantly asserted, a mere string of glittering generalities. It is a bill of rights which enters fundamentally into the structure of our Government.”}\textsuperscript{90}

\textit{Sovereignty.} The Declaration unambiguously ended British sovereignty over the American colonies. What the Declaration then did with that sovereignty is much less clear. Did it create thirteen independent, sovereign nations, or did it vest sovereignty in the Continental Congress, or the people of the states, or in some combination of both? The question is significant, because major issues in American federalism hinge on the status of the states at the time of the Constitution's ratification.\textsuperscript{91} The case law in this area, however, is

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\item \textsuperscript{87} See \textit{La. State Lottery Co. v. Fitzpatrick}, 15 F. Cas. 970, 980–81 (C.C.D. La. 1879) (No. 8541).
\item \textsuperscript{88} See \textit{Am. Historical Soc. v. Glenn}, 162 N.E. 481, 483 (N.Y. 1928).
\item \textsuperscript{89} See \textit{Coleman v. United States}, 715 F.2d 1156, 1157 (7th Cir. 1983).
\item \textsuperscript{90} \textit{Curry v. District of Columbia}, 14 App. D.C. 423, 440 (D.C. Cir. 1899).
\end{itemize}

An Ohio Supreme Court Justice, convinced that the Declaration must somehow be relevant but not sure precisely why, simply included the \textit{entire} Declaration of Independence in a dissenting opinion in a recent train accident case. See \textit{Gladon v. Greater Cleveland Reg'1 Transit Auth.}, 662 N.E.2d 287, 308–10 (Ohio 1996) (Douglas, J., dissenting). Similarly, Justice Black once suggested that the Supreme Court's jurisprudence under section 5 of the Fourteenth Amendment violated at least four of the Declaration's charges against the king. \textit{Perkins v. Matthews}, 400 U.S. 379, 407 n.7 (1971) (Black, J., dissenting).

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\item \textsuperscript{91} For example, the Supreme Court's recent sovereign immunity decisions seem implicitly to assume that the states were once thirteen independent nations. \textit{See Alden v. Maine}, 527 U.S. 706, 712 (1999) (holding that Congress may not subject a state to suit in its own courts without the state's consent); \textit{Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.}, 527 U.S. 666, 687 (1999) (holding that states are immune from suit under the Trademark Remedy Clarification Act); \textit{Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank}, 527 U.S. 627, 630 (1999) (holding that Congress may not abrogate state sovereign immunity under the Commerce and Patent Clauses and establishing strict requirements for abrogation under section 5 of the Fourteenth Amendment); \textit{Seminole Tribe v. Florida}, 517 U.S. 44, 47 (1996) (holding that Congress may not abrogate state sovereign immunity under the Indian Commerce clause).
\end{itemize}
incoherent and contradictory, and the Supreme Court has done nothing to clarify it.

The Declaration states that "these United Colonies are, and of Right ought to be, Free and Independent States... and that as Free and Independent States, they have full power... to do all... Acts and Things which Independent States may of right do." A number of courts have reasoned that the Declaration thereby created thirteen sovereign nations.\textsuperscript{92} Chief Justice Taney adhered to this view, arguing that "by the Declaration of Independence, [the colonies had] become separate and independent sovereignties, against which treason might be committed."\textsuperscript{93} However, in a 7-1 decision in 1936, the Supreme Court articulated a different conclusion, stating that as a result of the Declaration of Independence, "the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."\textsuperscript{94} The Second Circuit echoed this view in a recent case, noting that beginning with the Declaration of Independence... the member states had no more power to make war or enter into treaties of peace or alliance than they had had as colonies under the British Crown. The Articles of Confederation appear merely to have


\textsuperscript{93} Kentucky v. Dennison, 65 U.S. (24 How.) 66, 101 (1861); see also GARRY WILLIS, \textit{INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE} 332 (1978) ("Not one country, but thirteen separate ones, came into existence when the Declaration was at last made unanimous on July 19, 1776.").

\textsuperscript{94} United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936); see also \textit{State ex \textit{rel.} Mills} v. Dixon, 213 P. 227, 230 (Mont. 1923) (the states were "never in their individual capacity strictly" sovereign); Maynard v. Newman, 1 Nev. 271, 273 (1865) (noting that the Declaration of Independence was the act of "one nation, or one people"). The \textit{Curtiss-Wright} Court's holding that certain foreign affairs powers are inherent in the federal government is criticized in Charles A. Loigren, \textit{United States v. Curtiss-Wright Export Corporation: An Historical Reassessment}, 83 YALE L.J. 1 (1973).
confirmed, rather than to have originated, Congress’ peace-treating power. 95

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In all of these ways the Declaration is relevant to the world of law. Although the Declaration is reproduced in the United States Code as part of the “Organic Laws” of the United States, and although courts have occasionally held or suggested that the Declaration is “law,”96 the Declaration is not really “law” in the way that term is traditionally understood.97 Rather, the best understanding of the Declaration is that it is a legal document that has continuing significance in American law. As the examples above have demonstrated, this significance is pervasive and cuts to the core of some of our nation’s most difficult legal issues. It is therefore vitally important that we have a proper understanding of what the Declaration of Independence actually accomplished, and of what theories of government underlie it. It is to the first of those issues that I now turn.

II. THE DECLARATION OF INDEPENDENCE AND THE CREATION OF AN AMERICAN NATION

This Part argues that the Declaration of Independence was the act of one American people, creating an American nation. After the Declaration, America presented itself as one nation to the world. Well

95. Oneida Indian Nation v. New York, 691 F.2d 1070, 1088 (2d Cir. 1982).
96. See, e.g., Kowall v. United States, 53 F.R.D. 211, 214 n.2 (W.D. Mich. 1971) (stating that the Declaration “has never been repealed, and, is valid and binding on all governments of the United States, federal and state, as a primary obligation” and citing for support Lincoln’s Gettysburg Address and Second Inaugural as carved on the Lincoln Memorial); Perez v. Lippold, 198 P.2d 17, 30 (Cal. 1948) (Carter, J., concurring) (“The Declaration of Independence is a part of the law of our land.”); Fid. & Cas. Co. of N.Y. v. Union Sav. Bank Co., 163 N.E. 221, 222 (Ohio Ct. App. 1928) (“[T]he declaration is a part of the law of this state, as much so as its Constitution and statutes.

Courts have often used legal metaphors to describe the Declaration. It has been termed a “charter of our liberties,” Cooper v. Hindley, 70 Wash. 331, 336, 126 P. 916, 919 (Wash. 1912); a “national Magna Charta,” State v. Cutshall, 15 S.E. 261, 263 (N.C. 1892); a statement of the “American creed,” Bell v. Maryland, 378 U.S. 226, 286 (1964) (Goldberg, J., concurring); and as “the Magna Charta of our republican institutions,” United States v. Morris, 125 F. 322, 325 (E.D. Ark. 1903).

97. Cf. Troxel v. Granville, 530 U.S. 57, 91 (2000) (S Scalia, J., dissenting) (“The Declaration of Independence... is not a legal prescription conferring power upon the courts.”); Morehouse v. United States Dep’t of Justice, 1998 WL 320268, at *3 (N.D. Tex. June 8, 1998) (“The Declaration of Independence does not directly create rights that can be enforced through the judicial system.”); City of Anniston v. Court of County Comm’rs, 48 So. 605, 605 (Ala. 1909) (“The Declaration of Independence is in the printed volumes called the Code, and has been in the printed copies of every previous Code; but, of course, it is not a part of the Code proper.”).
before the Articles of Confederation were even drafted, much less ratified, the Continental Congress operated as a national government that possessed all the powers of external sovereignty. What the Declaration most certainly did not do was create thirteen separate nations, completely independent of each other.

My argument, however, is not that the Declaration created a unitary nation-state. If the definition of a nation is that of an entity with exhaustive power over all subjects, and in which a majority can bind a minority, we still do not live in an American nation. A minority of the American people govern in the Senate, and, as we are too well aware, a minority of the people can elect a President through the electoral college. Likewise, there are a variety of subjects over which the federal government has no constitutional authority to act. As James Madison recognized, the Constitution of 1789 was "neither a national nor a federal constitution; but a composition of both." The nation that was formed on July 4, 1776, may best be described as some sort of "confederate republic." It held all the powers of external sovereignty, although the details of its internal organization were less clear.


100. In the debates surrounding the Constitution, both Federalists and Anti-Federalists used Montesquieu's term "confederate republic" to describe both the proposed government under the Constitution and the old government under the Articles of Confederation. Douglas G. Smith, An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution, 34 SAN DIEGO L. REV. 249, 260 (1997).

In his speech to the Pennsylvania ratifying convention, James Wilson stated:

The United States may adopt any one of four different systems. They may become consolidated into one government, in which the separate existence of the states shall be entirely absorbed. They may reject any plan of union or association, and act as separate and unconnected states. They may form two or more confederacies. They may unite in one federal republic.

James Wilson, Speech Delivered on 26th November, 1787, at the Convention of Pennsylvania, in 2 THE WORKS OF JAMES WILSON 759, 766 (Robert Green McCloskey ed., 1967). This suggests that Wilson viewed both the Articles and the proposed Constitution as types of "federal republics," and not as fundamentally different entities.

Alexander Hamilton, relying on Montesquieu, described a confederate republic as an "assemblage of societies, or an association of two or more states into one state." THE FEDERALIST NO. 9, at 122 (Alexander Hamilton) (Isaac Kramnick ed., 1987). According to Hamilton, "the extent, modifications and objects of the federal authority are mere matters of discretion." Id. Thus, for Hamilton, there was no fundamental difference in the nature of the union between the government under the Articles of Confederation and the proposed Constitution.
Nor do I argue that the states necessarily lacked the legal authority to leave the American union after the Declaration. Article VII of the Constitution, for example, certainly contemplates that individual states might go their own way, and several of The Federalist Papers address the fear that the union might split into three or four separate confederacies. The important point is not so much when each state lost its power to leave the Union, but when the Union legally acquired all the great incidents of national sovereignty. These powers of sovereignty did not arise from the Articles of Confederation, ratified in 1781. Nor did they arise from the Constitution of 1789. Although the Constitution certainly created a "more perfect" American nation from an internal perspective, it was almost entirely irrelevant from an external perspective. By the time the Constitution was ratified, the Continental Congress had a lengthy history of conducting wars, negotiating treaties, governing vast federal territories, and adjudicating interstate disputes. The states did none of these things, and made no attempt to do so. If a state had wished to exercise any of the powers of external sovereignty, it would have had to withdraw affirmatively from the American union and declare itself a completely independent state.

In short, the Declaration was an act of all the American people, creating an entity, the United States of America, which presented itself as one nation to the world. This Part is dedicated to an exploration of this theme. Section A offers a brief discussion of the interpretive method employed in this Part and in Part Three. Sections B and C focus closely on the Declaration's text. Section B considers the problem of the voicing of the Declaration and argues that the American people as a whole declared American independence. Section C addresses what sort of entity or entities the Declaration created and argues that the Declaration

James Madison similarly pointed out that the states were regarded as "distinct and independent sovereigns" under the new Constitution, and that the principles of the Constitution were essentially an "expansion of principles which are found in the Articles of Confederation." THE FEDERALIST NO. 40, at 262 (James Madison) (Isaac Kramnick ed., 1987).

For an interesting discussion of the idea of a "compound republic" in the founding period, see PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REvolutions, 1776–1814 (1993).


created one American nation, at least with respect to the rest of the world. Section D argues that ample historical evidence supports the textual reading offered in Sections B and C.

A. A Preliminary Note on Method

The argument in the next two Parts will require a close attention to the text of the Declaration. Despite the recent publication of several important works on the Declaration,\textsuperscript{104} it remains true, as Gary Wills pointed out twenty years ago, that the Declaration has not been subject to the rigorous "construction" of legal analysis.\textsuperscript{105} It has been too easy to move quickly from the text of the Declaration to vague generalities about the nature of liberty or into the subtleties of eighteenth-century intellectual life. Yet the delegates to the Continental Congress knew they were composing a document that would justify their actions to the ages, and they accordingly spent an extraordinary amount of time editing Thomas Jefferson's draft of the Declaration. They excised sections, added new ones, and made minute adjustments to language.\textsuperscript{106} As Pauline Maier has put it, "By exercising their intelligence, political good sense, and a discerning sense of language, the delegates managed to make the Declaration at once more accurate and more consonant with the convictions of their constituents, and to enhance both its power and

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\item John Philip Reid, The Irrelevance of the Declaration, in LAW AND THE AMERICAN REVOLUTION AND THE REVOLUTION IN LAW (Hendrik Hartog ed., 1981), argues that the Declaration is primarily addressed to British constitutional issues. None of these works, however, speak directly to the legal aspects of the Declaration.
\item Garry Wills's controversial Inventing America, supra note 93, relates Jefferson's draft of the Declaration to the trans-Atlantic intellectual world of the Enlightenment. Although many of Wills's observations continue to be useful, his conclusion that Jefferson's primary intellectual debt was to the Scottish Enlightenment has not withstood scholarly criticism. See, e.g., Ronald Hamowy, Jefferson and the Scottish Enlightenment: A Critique of Garry Wills's Inventing America: Jefferson's Declaration of Independence, 36 WM. & MARY Q. 503 (1979).
\item WILLS, supra note 93, at xxv.
\item See MAIER, supra note 3, at 143-50.
\end{itemize}
its eloquence."  

Thus, it is important that we pay careful attention to the precise language the Congress employed—and not just in the famous second paragraph, but also in the more substantial charges against the King. As contemporaries recognized, these charges were the heart of the document, the legal basis that justified revolution.

A focus on the text of the Declaration requires, of course, that we have the correct text in front of us. There at least two documents with a strong claim to being the "official" text of the Declaration, and they differ from each other in caption, signature, capitalization, and punctuation. The first text is the printing prepared by Philadelphia printer John Dunlap at the direction of the Continental Congress on the night of July 4, 1776. It was through this printing, known as the "Dunlap broadside," that most Americans became acquainted with the Declaration. Congress sent copies of the Dunlap broadside to all of the states, and ordered that it "be proclaimed in each of the United States, and at the head of the army." The second text is the parchment copy now on display at the National Archives. This copy was prepared pursuant to a July 19, 1776, resolution of the Continental Congress, and, unlike the Dunlap broadside, it includes the signatures of all the delegates. However, this parchment copy was effectively a secret document, and it was not until January 18, 1777, after military success at Trenton and Princeton, that Congress sent copies to the states.

The Dunlap broadside has the better claim to our attention. It is the nearest text to the actual events of July 4, 1776. Moreover, as the widely disseminated public version of the Declaration, it is the text that most Americans came to know and celebrate. The subsequent publication history of the Declaration unfortunately tended to blend elements of the Dunlap broadside with elements of the parchment copy, with the result

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107. Id. at 150. For this reason, it is proper to say that Thomas Jefferson drafted the Declaration, but that the Continental Congress is its author.

108. MAIER, supra note 3, at 105. In the works of Harry Jaffa and Walter Berns, two scholars for whom the Declaration is a fundamental source of constitutional principles, the charges against the King seldom, if ever, make an appearance. See BERNS, supra note 18; JAFFA, supra note 46. The same can be said of Scott Gerber's recent work on the Declaration. See GERBER, supra note 46.


110. MAIER, supra note 3, at 130–31, 159.

111. Id. at 130.

112. Id. at 150–51.

113. Id. at 153.
that many modern printings of the Declaration confuse elements of the two texts. For the purposes of this Article, I will rely on the Dunlap broadside as the authoritative text and refer to the parchment only for secondary points. For the reader's convenience, the Dunlap broadside is reproduced in the Appendix.

This Article employs many of the interpretive devices that Akhil Amar describes as "intratextualism." Intratextualism is specifically concerned with how words and phrases in a document interact with and illuminate each other. As Amar puts it, intratextualism allows us to "squeeze more meaning" from a document than would an interpretive method that is strictly clause-bound. In a thoughtful article, Robert Spoo has observed that Amar's brand of intratextualism has an important aesthetic component and is a legal counterpart to the New Criticism that flourished in literary studies in the 1940s and 50s.


The Dunlap broadside is reprinted in JULIAN P. BOYD, THE DECLARATION OF INDEPENDENCE: THE EVOLUTION OF THE TEXT 78 (1945), and is transcribed in DUMBAULD, supra note 109, at 157-61. The parchment copy is transcribed in CARL L. BECKER, THE DECLARATION OF INDEPENDENCE 185-93 (1922).

116. See id. at 791-95.
117. Id. at 826-27.
118. See Robert Spoo, "No Word is an Island": Textualism and Aesthetics in Akhil Reed Amar's The Bill of Rights, 33 U. RICH. L. REV. 537, 573-76 (1999). Christopher Eisgruber has suggested that this sort of interpretation can quickly lead to what he terms the "Aesthetic Fallacy," that is, the belief that "the Constitution is like a poem, a symphony, or a great work of political philosophy," and that "[e]ach word and every phrase must come together to form a harmonious and pleasing composition." Christopher L. Eisgruber, The Living Hand of the Past: History and Constitutional Justice, 65 FORDHAM L. REV. 1611, 1617 (1997). A similar point is made in Adrian Vermeule & Ernest A. Young, Hercules, Herbert, and Amar: The Trouble with Intratextualism, 113 HARV. L. REV. 730, 770 (2000). Of course, taken to extremes, any form of constitutional interpretation can become ridiculous, as Amar well recognizes. See Amar, supra note 115, at 799 ("Carried to extremes, intratextualism may lead to readings that are too clever by half."). The solution, of course, is not abandonment of an interpretive method, but rather the use of good judgment in its application.

The connection between legal and literary interpretation has a durable pedigree. For example, James Wilson, a principal architect of the Constitution, signer of the Declaration, and Justice of the Supreme Court, observed in his 1793 opinion in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 454
sensibilities are even more useful in interpreting the Declaration of Independence, a self-consciously rhetorical document, than they are for the Constitution, and much of my interpretation will be conducted in the spirit of the New Critics. My goal, though, is not simply to offer a pleasing and elegant interpretation of the Declaration. Unlike the New Critics, an interpreter of the Declaration cannot consider the text in splendid isolation from the historical reality that surrounds it. The challenge is to provide an interpretation that makes sense historically and that conforms to the best understanding of what contemporaries took the Declaration to mean. Accordingly, I often turn to historical evidence to demonstrate the soundness of my interpretations.

B. Who Declared American Independence?

The first question to ask of any declaration is, “Who is doing the declaring?” That is, in whose voice does the document purport to speak? For the Declaration of Independence, this is a surprisingly difficult question to answer. In its voicing, the Declaration is a rhetorical mirror of the Constitution. The first paragraph of the Constitution begins in the first person (“We the People of the United States”), but then shifts abruptly to the third person (“All legislative powers herein granted”) and remains in the third person for the rest of the document. The voicing of the Declaration is exactly the reverse. It opens in the third person (“When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another”), but then shifts abruptly to the first person (“We hold these truths to be self-evident”) and remains in the first person for the rest of the document. The insistent use of the first person is one of the Declaration’s most conspicuous rhetorical devices:

*We* hold these Truths to be self-evident...
He has kept among us... Standing Armies, without the consent of our Legislatures ....

He has ... subject[ed] us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws ....

For quartering large Bodies of Armed Troops among us:
For cutting off our Trade with all Parts of the World:
For imposing Taxes on us without our Consent:
For depriving us ... of ... Trial by Jury:
For transporting us beyond Seas to be tried for pretended Offences ....

For taking away our Charters, abolishing our most valuable Laws and altering fundamentally the Forms of our Governments ....

Nor have we been wanting in Attentions to our British Brethren.

We have warned them ....
We have reminded them ....
We have appealed to their native Justice ....

[W]e have conjured them ....
We must, therefore, acquiesce ....

We ... Declare, That these United Colonies are, and of Right ought to be, FREE AND INDEPENDENT STATES ....

[W]e mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.\(^\text{121}\)

The Declaration is far from explicit, though, about precisely to whom or to what this pronoun “we” refers. What noun should we read into its place? The text admits of at least four possibilities. First, it may refer to the American states. Second, it may refer to the delegates to the Continental Congress. Third, it may refer to the people of the individual

\(^{121}\) (emphasis added).
states as separate political entities. Finally, it may refer to the American people acting as a whole. The following Subsections evaluate the arguments in favor of each of these alternatives, and conclude that the best reading is that "we" refers to the American people as a whole.122

I. The States

The best argument for a "We, the states" reading of the Declaration is based on the caption to the parchment copy. This heading describes the Declaration as "The unanimous Declaration of the thirteen united States of America."123 Certainly this seems like powerful evidence that the Declaration is purporting to speak in the voice of the states, a conclusion which finds some support in other parts of the text. For example, the Declaration accuses George III of sending "Swarms of Officers to harrass our People," and of destroying "the Lives of our People." The phrase "our People" most plausibly implies the voice of a state. Representatives might use this phrase, but it makes little sense for the people themselves, either in states or in the aggregate, to refer to "our people."

The bulk of the text, however, dramatically undermines a "We, the states" reading, and reveals the sheer implausibility of the caption to the parchment copy. The Declaration repeatedly uses the third person to refer to the states. For example: "Such has been the patient sufferance of these Colonies; and such is now the Necessity which constrains them to alter their former Systems of Government."

122. Another possibility is that there is no consistent subject in the Declaration, and that the meaning of the first person pronouns changes from sentence to sentence. Such a lurching quality is inconsistent with everything we know about the effort that went into drafting the Declaration, see MAIER, supra note 3, at 97-153, and is so highly unlikely that it does not merit further discussion.

123. BECKER, supra note 114, at 185.

124. This intriguing phrase might also be pointed to by a defender of a "We, the States" reading. The use of the term "Necessity" relates the phrase back to the preamble ("it becomes necessary for one people"), and thus links "these Colonies" with the act of separation. An important distinction must be made, however, between creating new state governments and effecting independence from Britain. On May 10, 1776, the Continental Congress recommended that the states form new governments, a step which marked the beginning of state constitution-making. 4 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, 342 (Worthington C. Ford ed., 1906). Although this had many of the practical effects of a declaration of independence, it did not formally sever the connection with Britain. It is this process of state-level constitution-making to which the Declaration refers with the phrase "such is the Necessity which constrains them [the Colonies] to alter their former Systems of Government." The reference is to a process that is already occurring, not to the formal act of separation that the Declaration effects.
absolute Tyranny over these States”; “HE has endeavoured to prevent the Population of these States”; “introducing the same absolute Rule into these Colonies”; “as Free and Independent States, they have full Power to . . .” Likewise, in many places a “We, the states” reading is nonsensical: “For depriving us [the states], in many Cases, of the Benefits of Trial by Jury”; “For transporting us [the states] beyond Seas to be tried for pretended Offences.” Nor can states really pledge “to each other our Lives, our Fortunes, and our sacred Honor.”

So why does the parchment copy claim that the Declaration is “The Unanimous Declaration of the thirteen united States of America?” The original caption, which was widely disseminated in the first printed broadsides of the Declaration, read, “A Declaration by the Representatives of the United States of America in General Congress Assembled.” There is no direct evidence of why the Continental Congress ordered this change when it directed the preparation of the parchment copy. However, the change is most likely a result of the peculiar circumstances surrounding the Declaration’s adoption. New York initially abstained from voting for independence, and its delegates were not given permission to approve the Declaration until a week after its adoption. By this time, however, the text of the Declaration had already been issued. The Congress almost certainly wanted to emphasize the unanimity of the states in some fashion on the new parchment copy. However, since the body of the Declaration’s text could not be readily altered, the only real alternative was to tinker with the caption. One option would have been simply to insert the word “unanimous”: “The Unanimous Declaration by the Representatives of the United States of America . . .” But that was not strictly accurate, as two delegates abstained from voting. The only real option was to say something about a unanimous declaration of the states, even if that meant directly contradicting the voicing of the Declaration’s text.

Rhetorical considerations may also have played a role. The initial phrasing, “A Declaration by the Representatives of the United States of

125. (emphasis added).
126. But see WILLS, supra note 93, at 340 (“These new states pledge to each other their honor, that honor accruing to sovereignties as they take their ‘free and equal station’ with other nations.”). Although this might perhaps explain how states could have “honor,” a traditionally personal virtue, Wills does not explain why states would pledge to each other their “lives,” nor does he address the many other places in which a “we, the states” reading is simply implausible.
127. MAIER, supra note 3, at 45.
128. Id.
America in General Congress Assembled,” is a bit clumsy, piling clause upon clause (by... of... of... in) to no real effect. The opening indefinite article is weak and does nothing to distinguish this declaration from any other the Congress might issue. That the representatives are in “General Congress Assembled” conveys a legalistic point about the legitimacy of the Declaration, but has little rhetorical power. The altered caption is shorter and more direct: “The unanimous Declaration of the thirteen united States of America.” This emphasizes the critical point of unanimity, a point heightened by the resonance between the words “unanimous” and “united.”

Nonetheless, the parchment caption is wildly misleading as a description of the Declaration’s text. The states are simply not the active voice in the Declaration. The delegates may have recognized this in the change from “A Declaration by” to “The Unanimous Declaration of.” “By” implies agency; “of” has a more passive connotation. The Declaration may be “of” the thirteen states, without really being “by” them.

Rhetorical considerations also explain the two uses of the phrase “our people,” which most strongly suggest the voice of the states. In both instances, a plural first person pronoun would have been awkward and inappropriate in a document that was meant to be read aloud. The formulation, “He has... sent hither Swarms of Officers to harrass us” would be an ungainly tongue-twister. “Harrass our People” is much better. Likewise, only someone with a tin ear for language would write, “He has plundered our Seas, ravaged our Coasts, burnt our Towns, and destroyed our Lives.” Not only do persuasive documents rarely purport to speak from beyond the grave, the rhythm of this clause demands a longer concluding phrase. Again, “destroyed the Lives of our People” is much better.

2. The Delegates to the Continental Congress

A more plausible argument can be made that the persistent “we” of the Declaration is the voice of the delegates to the Continental Congress. The Declaration concludes with the majestic phrase, “we mutually

129. Jay Fliegelman has insightfully discussed the Declaration’s dichotomous approach to agency. The Declaration repeatedly portrays the colonists’ actions as “impelled” by “necessity,” but portrays George III as possessing absolute will (“He has... He has... He has...”). See FLIEGELMAN, supra note 104, at 140–64. The modified caption is a good example of Fliegelman’s general point.
pledge to each other our Lives, our Fortunes, and our Sacred Honor.” On
the parchment copy, the delegates signed their names immediately
beneath this phrase. Moreover, in the one place in which the Declaration
provides a clear appositive phrase for the pronoun “we,” it identifies the
pronoun with the delegates: “WE, therefore, the Representatives of the
UNITED STATES OF AMERICA, in GENERAL CONGRESS,
Assembled . . . .” This echoes the caption to the Dunlap broadside: “A
Declaration By the Representatives of the United States of America, In
General Congress Assembled.”

These arguments, although forceful, are not ultimately persuasive.
The identification of “we” with the delegates is restricted by a critical
modifying phrase: “WE, therefore, the Representatives of the UNITED
STATES OF AMERICA, in GENERAL CONGRESS, Assembled . . . do, in
the Name of, and by the Authority of the good People of these Colonies,
solemnly Publish and Declare . . . .” The key phrase is “in the Name
of.” In this context, “in the Name of,” is not simply rhetorical reiteration
of “by the Authority of.” Rather, it states that the Declaration is the
Declaration of “the good People of these Colonies.” This clause
specifically names the voice that has been speaking throughout. The
Declaration was not made in the “Name of” the delegates, but of the
“good People of these Colonies.”

Moreover, identifying the delegates as the “we” of the Declaration is
inconsistent with both the preamble of the Declaration and the theory of
popular sovereignty that the Declaration lays down in its famous second
paragraph. The preamble states, “WHEN in the Course of human Events,
it becomes necessary for one People to dissolve the Political Bands
which have connected them with another . . . a decent Respect to the
Opinions of Mankind, requires that they should declare the causes which
impel them to the Separation.” This sentence is immediately followed
by the first use of the pronoun “We”: “We hold these Truths . . . .” The
implication could not be more clear. The voice that announces itself in
the second paragraph is the voice of the one people who are required by
“a decent Respect to the Opinions of Mankind” to issue a declaration

130. (emphasis added).
131. For example, the Constitution twice employs the phrase “ordain and establish,” but it is
unlikely that any meaningful distinction is intended between “ordaining” and “establishing.” U.S.
CONST. pmbl. & art. III, § 1. Likewise, the Declaration refers to both “the Laws of Nature and of
Nature’s God,” a rhetorical flourish that is certainly not intended to suggest the existence of two
separate bodies of law. MAIER, supra note 3, at 132–33.
132. (emphasis added).
justifying independence. Of course, practicality will dictate that such a declaration be made through representatives, but that does not make it any less a declaration by the people.

This interpretation is bolstered by the political theory of the second paragraph, which states "that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it." In other words, it is the people, and only the people, who have the right to overthrow a government. Independence from Britain could only be effected by the people themselves; thus, it is entirely appropriate that the document justifying the exercise of this right be in the voice of the people.

3. One People or Many?

Determining that the Declaration is in the voice of "the good People of these Colonies" only partly resolves the issue. What does "good People" mean in this context? Does it mean the people of each colony acting in their capacity as members of that colony, or does it refer to the American people en masse? I believe that the best interpretation is that the voice is that of all the American people, acting together, to announce themselves as "one people," at least with respect to the rest of the world.

We can best approach this subject by recognizing that the term "people" had a very distinct meaning in the eighteenth-century. To the twentieth-century ear, "people" often suggests the undifferentiated mass of mankind. The Continental Congress, by contrast, would have understood the term as applying only to members of a distinct political community. This long-standing sense of the term is captured in the first definition offered in the Oxford English Dictionary: "A body of persons

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133. (emphasis added).

134. Stephen Lucas identifies another reason for rejecting a "We, the delegates" reading. He notes that the Declaration's statement, "In every stage of these Oppressions we have Petitioned for Redress in the most humble Terms," clearly refers to events that happened before the Continental Congress convened in 1774, which suggests that "we" refers to the colonists in general. Lucas, Justifying America, supra note 104, at 109.

135. This point is a corollary to the arguments advanced in Part II.B, which describe the Declaration as creating one American nation, at least with respect to the rest of the world.

136. See 11 THE OXFORD ENGLISH DICTIONARY 505 (1989) (noting "men or women indefinitely" as sixth definition of "people").
composing a community, tribe, race or nation.” The Declaration employs the term “people” in this sense. When the Declaration refers to other groups of individuals, it uses different terms and uses them precisely: “Men,” “mankind,” and “human,” refer to all persons throughout the earth; the term “inhabitant” refers to any person who happens to be within a particular geographical area.

The preamble states, “WHEN in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another . . . a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.” Here the Declaration clearly distinguishes “one People” from “another” people (the British) and from the larger “Mankind” to whom independence must be justified. This distinction is amplified in the second paragraph: “WE hold these Truths to be self-evident, that all Men are created equal . . . that to secure these Rights, Governments are instituted among Men . . . [and] it is the Right of the People to alter or abolish [a form of government that is destructive of these ends].” The phrase “among Men” echoes the preamble’s phrase “among the Powers of the Earth.” In this context, “among” implies a clear separation of entities, just as the Constitution allows Congress to regulate commerce “among the several States.” By instituting governments, “Men” divide themselves into “Peoples.” It is these “People,” not “Men” in general, who have the right to alter their form of government. While all men can claim the “inalienable rights” of “life, liberty, and the pursuit of happiness,” only members of a particular political community can exercise the more specific right of revolution. Exercising this right meant that the British were no longer part of the same “People” as the Americans, and accordingly the Declaration states

137. Id. at 504. It is noteworthy that the Oxford English Dictionary’s principal definition of “nation” is “[a]n extensive aggregate of persons, so closely associated with each other by common descent, language, or history, as to form a distinct race or people, usually organized as a separate political state and occupying a definite territory,” thus reinforcing the connection between a “people” and a “nation.” 10 THE OXFORD ENGLISH DICTIONARY 231 (1989) (emphasis added).

138. (emphasis added).

139. (emphasis added).

140. U.S. CONST. art I, § 8, cl. 3.

141. Similarly, the Declaration notes that, upon the suspension of colonial legislatures, the “Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise,” and that the king has refused to pass “Laws for the Accommodation of large Districts of People.” These are both unmistakable references to “people” in their distinctively political capacity.
that the British will now be treated “as “the rest of Mankind, Enemies in War, in Peace, Friends.” 142

The Declaration charges that British troops were protected “from Punishment for any Murders which they should commit on the Inhabitants of these States,” and that the King had “endeavoured to bring on the Inhabitants of our Frontiers, the merciless Indian Savages.” 143 The use of “Inhabitants” in the latter clause distinguishes the Indians from the “People” who are exercising the right of revolution. Similarly, the condemnation of George III for murders committed on “Inhabitants” includes a variety of persons who may not be full members of the political community: children, Indian tribes friendly to the colonial cause, and aliens temporarily resident in the United States. 144

The special meaning of the term “people” is well-evidenced in the Constitution of 1787, which carefully distinguishes between “people” and “persons.” The two instances of the term “people” both denote a specific political group making a specific political choice. The preamble states, “We, the People of the United States . . . do ordain and establish this Constitution for the United States of America,” 145 and Article One requires that “[House members shall be] chosen every second Year by the People of the several States.” 146 The Constitution employs the term “Persons” to describe members of Congress (“the Names of Persons voting for and against the Bill shall be entered on the Journal”) 147 and to describe candidates for the presidency (“ [The electors] shall vote for two Persons . . . . And they shall make a List of all the Persons voted for”). 148 Most notoriously, the term is used in calculating representation

142. (emphasis added).
143. (emphasis added).
144. The meaning of these terms is of more than antiquarian interest. In the 2000 presidential election, voters unsuccessfully challenged the right of Texas electors to vote for both George W. Bush and Richard Cheney, arguing that Cheney was not an “inhabitant” of another state, as required under the Twelfth Amendment to the Constitution. See Jones v. Bush, 122 F. Supp. 2d 713 (N.D. Tex. 2000). The court, incorrectly in my view, equated “inhabitant” with modern concepts of domicile, tying it to the narrow issue of public assessments. The problem with the court’s approach is that it collapses the constitutionally distinct terms “citizen” and “inhabitant.” The Eleventh Amendment prohibits federal jurisdiction over suits between one of the United States and “Citizens of another State.” The framers of the Twelfth Amendment rejected the term “Citizen” when formulating the restriction on voting in the electoral college, relying instead on the broader term “inhabitant.”
146. Id. art. I, § 2, cl. 1 (emphasis added).
147. Id. art. I, § 7, cl. 2 (emphasis added).
148. Id. art. II, § 1, cl. 3 (emphasis added).
in the House of Representatives: "by adding to the whole Number of free Persons . . . three fifths of all other Persons."\(^{149}\)

So who are "the good People of these Colonies" in whose name the Declaration speaks? I believe that they are one American people, announcing their separation from the British people of whom they used to be a part.\(^ {150}\) As Section II.B argues, the Declaration created an American nation. It thus makes eminent sense for the Declaration to speak in the voice of the constituent members of that nation. The American people that effect this change are a "People," in the distinct sense of members of a political community. This sense is aptly captured in the Declaration's opening lines: "WHEN in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another . . . ."\(^ {151}\) The phrase "one people" is singular. It is not only that the Americans are united into "one"; they are united into one people. It is this one aggregate body—this one People—that now rises to assert independence from Britain. The singular sense of "one People" is reiterated when the Declaration asserts that George III is "unfit to be the Ruler of a free People."\(^ {152}\) Interestingly, the delegates did not sign the parchment copy of the Declaration as representatives of states; their signatures (unlike those of the Constitution) are undifferentiated and random.\(^ {153}\) Indeed, as if to

\(^{149}\) Id. art. I, § 2, cl. 3 (emphasis added).

\(^{150}\) Prior to the revolution, few Americans would have doubted that they and the British were part of one people. For example, the New York Committee of Correspondence had resolved on July 19, 1774:

That we are one people, connected by the strongest ties of affection, duty, and interest, and that we lament as the greatest misfortune, every occurrence which has the least tendency to alienate or disturb that mutual harmony and confidence, which, if properly cultivated, could not fail rendering the British empire the admiration and envy of all the world.

Proceedings of the Committee of Correspondence, July 19, 1774, PA. Gazette, July 27, 1774 (emphasis added). The Declaration itself refers to "our British Brethren" and to the "Ties of our common Kindred."

\(^{151}\) (emphasis added).

\(^{152}\) (emphasis added). In Jefferson's draft, the phrase was "a people who mean to be free"; Congress's tightening of the phrase increased its rhetorical power. See MAIER, supra note 3, at 147. Congress did not, however, change the singular to a plural—powerful evidence that the singular represents a conscious congressional choice.

\(^{153}\) This point is obscured by some printed editions of the Declaration that insist on grouping the delegates by state and inserting the name of their state as a heading. Although such alterations perhaps bring clarity to the document, and render its form closer to that of the Constitution, they nonetheless wreak editorial violence on the text. For the signatures as they actually appear on the parchment copy, see BECKER, supra note 114, at 192–93.
emphasize the unitary nature of the American people, the Declaration never mentions any state by name.

This reading best makes sense of the Declaration's text. The Declaration is clearly not in the voice of the states or of the delegates to the Continental Congress. Nor can it comfortably sustain the proposition that it refers to thirteen independent peoples completely separating themselves both from each other and from the larger people of which they were once a part. The historical sources in Section II.C confirm that this reading is not simply a modern contrivance, but is amply supported by contemporary evidence.

B. What Kind of Independence Did They Declare?

The second part of the textual puzzle is to determine precisely what sort of legal change the Declaration effected. Plausible arguments might be made that the Declaration created one unitary nation-state, or that it created thirteen separate nations, completely independent of each other. The best reading of the text, however, is that the Declaration created a union of states, a confederated republic, which stood as one nation with respect to the rest of the world. It was the Declaration, not the Articles of Confederation or the Constitution, that initially united the colonies and gave birth to an American nation.

The debate, to the extent there is one, revolves primarily around this passage from the final paragraph of the Declaration:

We... solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all Allegiance to the British Crown, and that all political Connection between them and State of Great-Britain, is and ought to be totally dissolved; and that as FREE AND INDEPENDENT STATES, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which INDEPENDENT STATES may of right do.

From this language it is easy to conclude that the Declaration created thirteen independent states.\(^{154}\) After all, it refers to "Free and Independent States," not to one nation. And the passage strongly suggests that each state individually has the right to do all things which "Independent States" may of right do.

\(^{154}\) See, e.g., supra notes 92-93 and accompanying text.
This conclusion is much too quick, and the passage cannot support the weight that the thirteen nations argument would place on it. In its final paragraph, the Declaration declares “these United Colonies” to be “Free and Independent States.” Elsewhere, the Declaration simply refers to “these Colonies.” Yet here, the Declaration reiterates that the Colonies are united. Although the Declaration refers to the colonies as “Free and Independent,” in context this simply means that the colonies are free and independent of Great Britain; it does not at all follow that they are independent of each other. Interestingly, the Declaration never once applies the term “sovereign” to the states, and the passage most suggestive of state sovereignty is capable of an alternate reading. “They” (these Colonies), the Declaration claims, have “full Power to levy War,” and so on. But if the Declaration meant to create thirteen independent states, a much better formulation would have been that “each” has the “full Power to levy War,” and so on. In this context, “they” is ambiguous, and even restrictive. For example, one might say of members of the House of Representatives, “they have the power to impeach the President of the United States,” but no one would interpret that phrase as meaning that any individual member of the House has the power to impeach the President. They can only operate as a group; likewise, the Declaration most plausibly means that they (the colonies) can only levy war, and so on, as a group. It is surely of some significance that no state ever individually asserted any of the powers to which the thirteen nations argument would entitle them. No state on its own declared war; no state on its own contracted Alliances; and no state on its own established Commerce with foreign powers. Not one of the state constitutions drafted after the Declaration said one word about war, peace, or treaties. It was clear that these powers belonged to the Continental Congress, not to the states.

Twentieth-century orthography has blinded us to another powerful piece of textual evidence in this passage. In formal writing of the late eighteenth-century, nouns generally were capitalized; adjectives and pronouns were not. This rule is followed throughout the

155. (emphasis added).


157. See, e.g., THE PAPERS OF BENJAMIN FRANKLIN xii: JANUARY 1 THROUGH DECEMBER 31, 1768 (Leonard W. Labaree ed., 1959) (discussing Benjamin Franklin’s insistence on capitalizing all nouns). The Constitution displays such capitalization. For example, the Constitution repeatedly refers to a “supreme Court,” not to a “Supreme Court.” U.S. CONST. art. II, § 2, cl. 2; art. III, § 1;
The adjective/noun rule, for example, is evident in "separate and equal Station," "unalienable Rights," "light and transient Causes," "absolute Despotism," "former Systems," "direct Object," "public Records," "manly Firmness," "pretended Legislation," "undistinguished Destruction," and "native Justice." The pronoun rule is evident in phrases such as "they should declare," "they are endowed," "alter or abolish it," and "neglected to attend to them." The adjective/noun rule is seemingly violated only in twelve places, five of which occur in the Declaration's final passage. These five are "General Congress, Assembled," "Supreme Judge of the World," "United Colonies," and, twice, "Free and Independent States." The other seven are "Political Bands," "Legislative Bodies," "Representative Houses," "Legislative Powers," "Judiciary Powers," "Standing Armies," and "Armed Troops." Yet these anomalies can be explained quite simply. These adjectives function not as separable adjectives, but as integral parts of the nouns themselves. In context, all of these noun phrases describe particular entities. A modern example might help illustrate the point. We do not capitalize "cuckoo clock," but if nouns were required to be capitalized, the phrase would appear as "Cuckoo Clock."

This evidence from elsewhere in the Declaration explains the significance of the capitalized phrases "United Colonies" and "Free and Independent States." They must be read as complete noun phrases, not as nouns modified by adjectives. Thus the "United Colonies" are a distinct entity, not merely a group of colonies who happen to be united. The Declaration creates an entity, "Free and Independent States," not States that happen to be free and independent. These "Free and Independent States" are an entity as surely as the "United States of America" of art. III, § 2, cl. 2. Although the capitalization rule has disappeared from modern English, it remains the rule in modern German.

158. In only three places does the Declaration fail to capitalize a noun: the word "causes" in the preamble, the word "consent" in the charges, and the word "act" in the conclusion to the charges. I can think of no logical reason for failing to capitalize these nouns; each appears capitalized elsewhere in the Declaration. This lapse is most likely an inadvertent oversight by the printer, who may have carelessly construed these words as verbs.

The argument here rests on the Dunlap broadside. The parchment, by contrast, leaves many nouns uncapitalized, see Becker, supra note 114, at 191-92, a peculiarity that may reflect the personal quirks of its preparer. However, the parchment does capitalize "Free and Independent States," and to the extent that this secret document is relevant at all, see supra note 113 and accompanying text, it does not undercut my argument.
which the Constitution speaks. 159 Because we have lost the understanding of capitalization that was common knowledge in the eighteenth century, it is less obvious to us that the Declaration created an American nation. Yet many people pointed to precisely this final passage of the Declaration to support a nationalist reading. 160 It does not seem implausible that capitalization played some role in their arguments.

The case for a nationalist reading of the Declaration’s concluding passage is bolstered by other passages in the document. Most telling is the preamble: “WHEN in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s God entitle them ....” This passage describes the American people as doing two distinct things. First, they are dissolving the political bands which have connected them with another. This is consistent with both the one-nation and the thirteen-nation argument. Second, they are assuming a “separate and equal Station” among the “Powers of the Earth.” This language, however, is almost impossible to reconcile with a thirteen-nation thesis. The people themselves are asserting a claim to an equal station (note the singular form) as a “Power[] of the Earth.” 161 This “one People” asserts equality with the nations of the world. 162 It is hard to imagine a more striking endorsement of the nationalist view. If the Declaration were creating thirteen independent nations, it ought to say “separate and equal Stations.” Furthermore, the Declaration charges George III with constraining “our fellow Citizens taken Captive on the high Seas to bear Arms against their Country.” 163 To what “Country” does this refer? Obviously, the country cannot be Great Britain. It must refer to America as a whole, a point nicely amplified in the phrase “fellow Citizens,” which connects Americans in all the states with the bonds of citizenship.

159. The Constitution specifically states that the United States is a singular entity when it extends federal judicial power to controversies “to which the United States shall be a party.” U.S. CONST. art. III, § 2, cl. 1 (emphasis added).
160. See Subsection II.C.2, infra.
161. Cf. Lucas, Justifying America, supra note 104, at 82 (“[T]he Laws of Nature and of Nature’s God’ refers to the doctrine of eighteenth-century international law that all nations are by nature ‘free, independent, and equal’ and entitled to the same rights and privileges.”).
163. (emphasis added).
Finally, it is worth noting that some of the language in the final paragraph of the Declaration comes directly from Richard Henry Lee’s motion in the Continental Congress of June 7, 1776. Lee’s motion stated, “That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.”164 In debate, Lee explained what he thought his motion would accomplish: “Let this happy day give birth to an American Republic!”165 Lee clearly saw his motion as creating a singular republic, not a multitude of independent states. This view is reiterated in the Declaration that Congress ultimately approved.

C. The Historical Evidence

The argument thus far has been grounded almost exclusively in the text of the Declaration. Interpreting the Declaration as the act of one American people creating an American nation best makes sense of the Declaration’s text and structure. But is such an interpretation grounded in historical reality? Although the evidence is not unambiguous, there is compelling historical support for this interpretation. This article does not undertake an exhaustive survey of the historical sources and does not aim to resolve conclusively any historical issues. Rather, I wish to assuage doubts that my reading of the Declaration is somehow deeply antithetical to its historical understanding.

Subsection One examines the understanding of the Declaration during the Revolution itself. Subsection Two addresses the debates surrounding the drafting and ratification of the Constitution. Subsection Three considers Independence Day celebrations in the early republic. Subsection Four analyzes the treatment of the Declaration in the earliest reported judicial decisions. Subsection Five focuses on the seminal work of Joseph Story, whose Commentaries on the Constitution address many of the issues investigated in this Article. Subsection Six evaluates the Articles of Confederation. Subsection Seven summarizes the main points of this Section.

164. 5 JOURNALS OF THE CONTINENTAL CONGRESS 425 (Worthington Ford ed., 1906). Note the change in the final version, which capitalized “free” and “independent.”

1. The Declaration in the Throes of the Revolution

Pauline Maier has carefully traced how the momentum for independence grew in towns and villages across America. The "authority" of the people of the United States that the delegates to the Second Continental Congress invoked was firmly grounded in the actions of these communities, in which the people themselves debated and resolved the pressing issue of independence. On May 27, 1776, the town of Malden, Massachusetts, instructed its delegate that "it is now the ardent wish of our soul that America may become a free and independent state" and called for the creation of "an American republic." Topsfield, Massachusetts, expressed its hope that Congress would "declare America to be independent of the Kingdom of Great Britain." The Pennsylvania Provincial Conference declared its willingness to "concur in a vote of the Congress declaring the United Colonies free and independent States, provided the forming of the Government, and the regulation of the internal police of this colony, be always reserved to the people of the said Colony." This statement clearly implies that a Declaration of Independence would effect the creation of a new nation, with the states reserving power over their internal affairs only.

That the Declaration had done precisely this was apparent from the very beginning. On July 4, 1776, the Continental Congress appointed Benjamin Franklin, John Adams, and Thomas Jefferson to design a great seal for the United States of America, a truly odd assignment if the Declaration had merely created thirteen independent nations. John Hancock, President of the Continental Congress, sent copies of the Declaration to the several states, observing, "The important Consequences to the American States from this Declaration of

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166. See MAIER, supra note 3, at 47–96.
167. See Morris, supra note 156, at 1069–71 (discussing the legitimacy of the Continental Congress's claim to powers delegated directly from the people).
169. Resolution of the Town of Topfield, Massachusetts, June 21, 1776, reprinted in MAIER, supra note 3, at 233–234.
Independence, considered as the Ground & Foundation of a future Government, will naturally suggest the Propriety of proclaiming it in such a Manner, that the People may be universally informed of it.\textsuperscript{172} Ezra Stiles, who two years later would become President of Yale College, received his copy of the Declaration on July 13, 1776. Upon reading it, he declared, “Thus the CONGRESS have tied a Gordian knot, which the Parliament will find they can neither cut nor untie. The thirteen united Colonies now rise into an Independent Republic among the kingdoms, states and empires on earth.”\textsuperscript{173} Savannah, Georgia, celebrated the Declaration on August 10, 1776. The President and the Council of Georgia read the Declaration in the Council chamber.\textsuperscript{174} They then proceeded to a square in front of the Assembly House and read the Declaration “before a great Concourse of people.”\textsuperscript{175} They read the Declaration again in front of the Georgia Battalion.\textsuperscript{176} Finally, they proceeded to the Battery and read the Declaration for a fourth time.\textsuperscript{177} That evening the Council buried a representation of George III and roused the people with their understanding of what the now very familiar Declaration meant: “America is free and independent; that she is, and will be, with the blessing of the Almighty, great among the nations of the earth.”\textsuperscript{178}

The state constitutions adopted after the Declaration did nothing to contradict this. None of these constitutions claimed any power over war and peace or any other incident of national sovereignty. Indeed, ten of these constitutions specifically prescribed methods for electing delegates to the Continental Congress, an implicit recognition of Congress’s legitimacy and authority.\textsuperscript{179}

In a 1776 speech in the Continental Congress, Benjamin Rush, a signer of the Declaration, noted that “We are now a new Nation,” and

\begin{itemize}
  \item \textsuperscript{172} Letter from John Hancock to Certain States (July 6, 1776), \textit{in 4 LETTERS OF DELEGATES TO CONGRESS} 396 (Paul H. Smith ed., 1979).
  \item \textsuperscript{173} \textit{2 THE LITERARY DIARY OF EZRA STILES D.D., L.L.D., PRESIDENT OF YALE COLLEGE} 23–24 (Franklin Bowditch Dexter ed., 1901), \textit{reprinted in SPIRIT OF SEVENTY-SIX, supra note 168, at 322.}
  \item \textsuperscript{174} Account of Savannah, Georgia, \textit{reprinted in SPIRIT OF SEVENTY-SIX, supra note 168, at 322.}
  \item \textsuperscript{175} Id.
  \item \textsuperscript{176} Id.
  \item \textsuperscript{177} Id. at 323.
  \item \textsuperscript{178} Id.
  \item \textsuperscript{179} See Morris, \textit{supra} note 156, at 1071.
\end{itemize}
proclaimed himself a "Citizen of America." To Rush, it was clear that
the states were "dependent on each other—not totally independent
states." Rush’s views were far from atypical. In 1777, before the
Articles of Confederation were even proposed to the states, much less
ratified, the Continental Congress, after a lengthy debate, found itself
equally divided on the issue of whether states had an inherent right to
meet with each other without the approbation of Congress. If the
Declaration had simply created thirteen independent nations, that issue
should have been easily resolved.

In 1778, a writer to the Pennsylvania Gazette requested that the
newspaper republish the Declaration of Independence. The writer stated:

Too much cannot be said in Favour of this excellent Composition.
It is to the true Whig what the Bible is to the true Christian—it
contains his Right to the fair Inheritance of true Liberty. It cannot
be too much admired, nor too often read by every American . . . In
order to excite the good People of the United States to a Remembrance of their Birth into a world of Freedom [you are
requested to re-publish the Declaration].

For this writer, the Declaration was about the “birth” of the “People
of the United States.” With the Declaration, the People of the United States
had announced themselves on the world stage.

Another writer in the Pennsylvania Gazette discoursed on the relation
between the states in 1780, at which point the Articles of Confederation
had not yet gone into effect. Maryland had enacted a law that, read
literally, seemed to prohibit the export of provisions from Maryland to

181. Id. at 247. Peter Onuf points out that after the Declaration, “The American states did not behave as independent sovereignties were expected to behave; they did not act like true states.” PETER ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 3 (1983). With regard to territorial disputes, “state sovereignty was identified not with the will to make and enforce claims but with claims that could be made by right, and that should be upheld by all the states, individually and collectively.” Id. at 7.
182. RAKOVE, supra note 102, at 165–66.
183. PA. GAZETTE, June 13, 1778. The phrase “Birth into a world of Freedom” foreshadows similar natal imagery in Abraham Lincoln’s Gettysburg Address: “Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. . . . We here highly resolve that this nation, under God, shall have a new birth of freedom.” Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in ABRAHAM LINCOLN: GREAT SPEECHES 103–04 (John Grafton ed., 1991) (emphasis added).
the other states.184 The writer defended the Maryland statute, arguing that it could not possibly have such a meaning. Invoking the first line of the Declaration of Independence, he argued:

We are but one people, from one end of the continent to the other (I speak only of the United States) though under our respective forms of government: The union, the confederacy, necessarily imply mutual assistance and free intercourse and commerce. . . . An act of any State to the purpose would be void in itself, as being against the fundamental laws of the union. . . . Every man knows that no State can constitutionally enact a law contrary to the spirit of the Union with the other States.185

This writer recognized that the “one people” of America were largely governed by their respective state governments, but he also recognized that there were “fundamental laws of the Union” that the states could not breach. Since the Articles were not yet in effect, he could have been referring only to the Declaration of Independence or the nationalism that it affirmed. If this proposition had been at all remarkable, it is doubtful the writer would have claimed that “every man” knew it to be true.

A year earlier the Congress had officially asserted that it possessed “the supreme sovereign power of war and peace.” This power gave Congress the right “ultimately and finally to decide on all matters and questions touching the law of nations.” Since the Articles of Confederation had not yet gone into effect, the source of this power could only be the Declaration of Independence.

In December of 1780, the Continental Congress affirmed the importance of the Declaration to the governance of America by appointing a committee “to collect and cause to be published 200 correct copies of the declaration of independence, the articles of confederation and perpetual union, the alliances between these United States and his Most Christian Majesty, with the constitutions or forms of government of the several states.” Were the Declaration simply the “propaganda

184. See PA. GAZETTE, Feb. 9, 1780.
185. Id.
187. Id. at 284. The Congress and its ambassadors in Europe also issued passports and oaths of citizenship in the name of the United States. Morris, supra note 156, at 1087.
188. 18 JOURNALS OF THE CONTINENTAL CONGRESS 1217 (Gaillard Hunt ed., 1910). The final product was UNITED STATES CONTINENTAL CONGRESS, supra note 114. Subsequent collections of the federal and state constitutions included the Declaration as their first document. See, e.g., THE
statement” that later scholars have declared it to be,\textsuperscript{189} its inclusion in this collection of governing documents would have been most inappropriate.

2. \textit{The Debates Surrounding the Drafting and Ratification of the Constitution}

The Constitutional Convention and the subsequent ratification struggle raised important questions about the relation between the states and the union. These debates helped bring the Declaration into proper focus, as both proponents and opponents of the new Constitution were called on to explain just what the Declaration stood for.

The meaning of the Declaration was discussed in an important exchange in the Constitutional Convention on June 19, 1787. In the course of a debate about the scope of state authority, Massachusetts delegate Rufus King observed that the states “were not ‘Sovereigns’ in the sense contended for by some.”\textsuperscript{190} They lacked the “peculiar features of sovereignty, they could not make war, nor peace, nor alliances, nor treaties.”\textsuperscript{191} A “Union of the States,” King noted, “is a Union of the men composing them, from whence a \textit{national} character results to the whole.”\textsuperscript{192} If the states had “formed a confederacy in some respects—they formed a Nation in others.”\textsuperscript{193}

Maryland’s Luther Martin, who would become a virulent Anti-Federalist, responded that the Declaration had authorized no such thing. For Martin, the Declaration had “placed the 13 States in a state of Nature towards each other” and created thirteen independent sovereignties.\textsuperscript{194} This notion was immediately denounced by James Wilson of Pennsylvania, one of America’s most brilliant lawyers and one of the

\begin{thebibliography}{99}

\bibitem{1} See, e.g., \textit{Hofstadter}, \textit{supra} note 19, at 269.
\bibitem{2} Id.
\bibitem{3} Id. at 1053.
\bibitem{4} Id.
\bibitem{5} \textit{id.} (remarks of Luther Martin).
\end{thebibliography}
Convention’s most able men.\textsuperscript{195} Wilson, one of only six men to sign both the Declaration and the Constitution, replied that Martin fundamentally misunderstood what the Declaration meant. Wilson noted that the Declaration of Independence preceded the state constitutions.\textsuperscript{196} He could “not admit the doctrine that when the Colonies became independent of Great Britain, they became independent also of each other.”\textsuperscript{197} Wilson read the Declaration of Independence and observed that “the United Colonies were declared to be free and independent States” and that they were “independent, not individually but Unitedly.”\textsuperscript{198} Alexander Hamilton heartily agreed.\textsuperscript{199}

Both Hamilton and Wilson expressed similar views outside the Convention. In February of 1787, Hamilton explicitly tied the Declaration to nationhood in a speech in the New York Assembly. Hamilton read verbatim the sentence of the Declaration that declared the United Colonies “free and independent states.”\textsuperscript{200} To Hamilton, this meant that

the union and independence of these states are blended and incorporated in one and the same act; which taken together clearly, imports, that the United States had in their origin full power to do all acts and things which independent states may of right do; or in other words, full power of sovereignty.\textsuperscript{201}

In the Pennsylvania ratifying convention, Wilson articulated a strong nationalist view of the Declaration:

I consider the people of the United States, as forming one great community; and I consider the people of the different states as forming communities again on a lesser scale. . . .

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196. Notes of Robert Yates, June 19, 1787, in Drafting the Constitution, supra note 190, at 75 (remarks of James Wilson).
197. Notes of James Madison, June 19, 1787, in Drafting the Constitution, supra note 190, at 1053 (remarks of James Wilson).
199. Notes of James Madison, June 19, 1787, in Drafting the Constitution, supra note 190, at 1053, 1057 (remarks of Alexander Hamilton).
201. Id.
\end{flushleft}
... I view the states as made for the People, as well as by them, and not the People as made for the states; the People, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please; or to accommodate them to another; and by this means preserve them all; this, I say, is the inherent and unalienable right of the people, and as an illustration of it, I beg to read a few words from the Declaration of Independence, made by the representatives of the United States and recognized by the whole Union.202

James Madison can likewise be counted among those with a nationalist interpretation of the Declaration. In The Federalist No. 45, he asked,

Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt ... not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States ... might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty?203

For Madison, to ask the question was to answer it. Much later in life, Madison conferred with Thomas Jefferson on the appropriate subjects of study for the University of Virginia Law School. Madison’s sketch of a course outline began, “And on the distinctive principles of the Government of our own State, and that of the U. States, the best guides are to be found in—1. The Declaration of Independence, as the fundamental act of Union of these States.”204

Charles Cotesworth Pinckney, a signer of the Constitution, offered a similar reading of the Declaration in the South Carolina convention in 1788. Pinckney argued, “[T]he Declaration of Independence ... sufficiently refutes the doctrine of the individual sovereignty and


204. Letter from James Madison to Thomas Jefferson (Feb. 8, 1825), in 9 THE WRITINGS OF JAMES MADISON 218, 221 (Gaillard Hunt ed., 1910) (emphasis added).
independence of the several States."\textsuperscript{205} He noted, "The several States are not even mentioned by name in any part, as if it was intended to impress the maxim on America that our freedom and independence arose from our union," and urged his colleagues to "consider all attempts to weaken this union, by maintaining that each State is separately and individually independent, as a species of political heresy."\textsuperscript{206}

In \textit{The Federalist No. 2}, John Jay stated:

To all general purposes we have uniformly been one people—each individual citizen everywhere enjoying the same national rights, privileges and protection. As a nation we have made peace and war—as a nation we have vanquished our common enemies—as a nation we have formed alliances and made treaties, and entered into various compacts and conventions with foreign states.\textsuperscript{207}

The text of the Constitution confirms the nationalist reading of the Declaration of Independence that was offered during the ratification debates. Article One of the Constitution requires Representatives to have been citizens of the United States for seven years, and Senators to have been citizens for nine years.\textsuperscript{208} Because the Constitution was drafted in 1787, these requirements logically require United States citizenship to have existed in 1778. There must therefore have been an entity called the United States of which an individual could be a citizen. If so, this status would have nothing to do with the Articles of Confederation, which were ratified in 1781, but could only be a result of the Declaration of Independence. Indeed, that the Declaration created American citizenship is clearly recognized in American law.\textsuperscript{209} Article Six of the Constitution states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."\textsuperscript{210} This means that treaties executed prior to the Constitution are valid and binding. There is nothing to suggest that treaties made by the United States prior to the Articles of Confederation would be excluded from this clause. The United States entered into many treaties prior to the

\textsuperscript{205} 1 \textit{JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES} 150 (Boston, Little & Brown 1873) (1st ed. 1833) (quoting \textit{DEBATES IN SOUTH CAROLINA}, 1788, at 43 (Charleston, A.E. Miller 1831)) [hereinafter \textit{1 JOSEPH STORY}].

\textsuperscript{206} \textit{Id.}


\textsuperscript{208} U.S. \textit{CONST.} art. I, § 2, cl. 2 & art. I, § 3, cl. 3.

\textsuperscript{209} \textit{See supra} notes 64–68 and accompanying text.

\textsuperscript{210} U.S. \textit{CONST.} art. VI, cl. 2 (emphasis added).
ratification of the Articles in 1781, and since treaties were traditionally only entered into between sovereign nations, the clear implication is that the United States, as one entity, possessed all the powers of external sovereignty at least since the Declaration of Independence. Finally, it was worth noting how the opening and closing phrases of the Constitution evoke the Declaration of Independence. The phrase “We the People” is not significantly different from the “one people” that announces itself in the preamble to the Declaration. The Constitution closes by citing the Declaration as a temporal reference point: “Done in convention . . . in the year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.”

3. The Celebration of Independence Day

Fourth-of-July celebrations have seldom generated much interest among legal scholars, yet they are a fascinating window into how early Americans perceived the Declaration of Independence. Americans celebrated the anniversary of the Declaration with energy and enthusiasm beginning in 1777 and continuing until the present day. No one celebrated the days on which the colonial legislatures had authorized their congressional delegates to vote for independence; no one celebrated July 2, the date Congress actually voted for independence; no one celebrated the date of the ratification of the Articles of Confederation; no one celebrated the dates of the signing or ratification of the Constitution; no one celebrated the dates on which the new federal government under the Constitution began operating. But Americans consistently celebrated the anniversary of the Declaration, telling evidence of the importance of the Declaration in the development of American national identity.

The first anniversary of the Declaration in 1777 was celebrated with cannon salutes, decorated navy ships, military parades, ringing church

211. Id. art VII.

Of course, Article VII also provides that the ratification of only nine states would be sufficient for establishing the Constitution between those nine states. Although the Constitution does not specify the status of a non-ratifying state, it presumably would have been free to go its own way. See THE FEDERALIST NO. 43, at 286 (James Madison) (Isaac Kramnick ed., 1987) (noting the “merely hypothetical” prospect of non-ratifying states). This demonstrates not so much that the United States was not one nation, at least to the great attributes of sovereignty, but that it was not yet “one nation, indivisible.”
bells and extravagant fireworks across the eastern seaboard.212 One Pennsylvania newspaper declared, "Thus may the fourth of July, that glorious and ever memorable day, be celebrated through America, by the sons of freedom, from age to age till time shall be no more."213 By the time of the drafting of the Constitution, the Fourth of July and the Declaration had become tied to a strong sense of American national identity. The Pennsylvania Herald observed in 1787 that the "auspicious Fourth of July, which crowned the toils of America with freedom and sovereignty has been commemorated in every district of the continent, with the fullest demonstrations of joy and gratitude."214 The paper expressed its hope that the Federal Convention would produce "a system of government adequate to the security and preservation of those rights, which were promulgated by the ever-memorable Declaration of Independency."215 In 1788, the "largest, most lavish procession ever seen in the United States" was held in Philadelphia on the Fourth of July.216 The "Grand Federal Procession," as it was called, was over a mile and half long and involved over five thousand people.217 Intended as a massive propaganda display on the part of Pennsylvania Federalists, the procession pointedly linked the proposed new Constitution with the celebration of the Declaration of Independence.218 The event ended with a speech by James Wilson before a crowd of approximately 17,000 people.219 As Francis Hopkinson subsequently wrote to Thomas Jefferson, "Nothing can equal the Rejoicings in the Cities Towns & Villages thro’out the States on the late fourth of July in Celebration of the Declaration of Independence & the Birth of the new Constitution."

213. Id. at 24 (quoting PA. EVENING POST, July 5, 1777).
215. Id.
216. TRAVERS, supra note 212, at 71.
217. Id. at 71–72.
218. Id. at 78.
219. Id. at 77. The speech was not a complete success. "Owing to some mistake, the cannon began firing just as he began to speak, so that no one could understand anything he said." Id. (quoting CHARLES BIDDLE, THE AUTOBIOGRAPHY OF CHARLES BIDDLE, VICE-PRESIDENT OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA 226 (Philadelphia, E. Claxton 1853)).
220. Letter from Francis Hopkinson to Thomas Jefferson (July 17, 1788), in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 270, 271 (John P. Kaminski & Gaspare J. Saladino eds., 1995). One such celebration was in New Haven, Connecticut, where the Declaration of Independence was read in a ceremony with "uncommon splendour." Id. at 235.
When George Washington was attempting to discern the protocol suitable to his new office as President of the United States, Alexander Hamilton recommended limiting public entertainments, but insisted that an entertainment be held on the “day of the Declaration of Independence.”

By 1791, people were referring to the Fourth of July as a “natal day,” and, at least by 1815, it was common to speak of the Fourth as “the National Birth Day.” Thomas Jefferson referred to Fourth of July celebrations as “an anniversary assemblage of the nation on its birthday,” and to the Fourth of July as “our nation’s birthday.” As Jefferson explained, the Declaration of Independence “made us a nation.” In 1821, Secretary of State John Quincy Adams attended the celebration of the Fourth of July in Washington, D.C. He read from the original Declaration of Independence that was in the custody of the Department of State, and observed,

The interest, which in this paper has survived the occasion upon which it was issued; the interest which is of every age and every clime; the interest which quickens with the lapse of years, spreads as it grows old, and brightens as it recedes, is in the principles which it proclaims. It was the first solemn declaration by a nation of the only legitimate foundation of civil government. . . . It announced in practical form to the world the transcendent truth of the unalienable sovereignty of the people.

This theme was echoed in the last letter Thomas Jefferson ever wrote. Referring to the upcoming fiftieth anniversary of the Declaration of

222. INDEPENDENT GAZETTEER, July 2, 1791, quoted in TRAVERS, supra note 212, at 110.
223. BOSTON GAZETTE, July 15, 1815, quoted in TRAVERS, supra note 212, at 4. In 1871, Congress specifically declared that July 4, 1776, was the “birthday of the nation.” Act of Mar. 3, 1871, ch. 105, 16 Stat. 470.
227. JOHN QUINCY ADAMS, AN ADDRESS DELIVERED AT THE REQUEST OF A COMMITTEE OF THE CITIZENS OF WASHINGTON, ON THE OCCASION OF READING THE DECLARATION OF INDEPENDENCE ON THE FOURTH OF JULY, 1821 (Washington, 1821), quoted in Detweiler, supra note 202, at 574 (emphasis added).
Independence, Jefferson stated, "May [the Declaration] 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." Jefferson urged, "let the annual return of this day forever refresh our recollections of these rights, and an undiminished devotion to them."

In 1831, John Quincy Adams again spoke at a Fourth of July ceremony and affirmed that the "declaration was joint, that the united colonies were free and independent states, but not that any one of them was a free and independent State, separate from the rest." Rather, "The Declaration of Independence announced the severance of the thirteen united colonies from the rest of the British Empire, and the existence of their people, from that day forth, as an independent nation."

In all of these Fourth of July celebrations, Americans affirmed their understanding of the Declaration as grounded in the inherent sovereignty of the American people. They did not understand the Declaration as having created thirteen independent nations; rather, the Declaration marked the Americans’ birth as a new people and as a new nation.

4. Early Court Cases

Further evidence of the role of the Declaration in establishing one American nation can be found in the earliest decisions of American courts. The cases, although not unambiguous, strongly suggest that American courts recognized the Declaration as the act of one people creating an American nation.

228. Letter from Thomas Jefferson to Roger Weightman, June 24, 1826, quoted in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, supra note 226, at 665–66. Both Thomas Jefferson and John Adams would die on July 4, 1826, the fiftieth anniversary of the Declaration of Independence, a coincidence which Americans imbued with mystical significance. See TRAVERS, supra note 212, at 220.


230. 1 JOSEPH STORY, supra note 205, at 150 n.3. (quoting John Adams).

231. Id. Justice Scalia recently echoed this view in his dissent in Lee v. Weisman, 505 U.S. 577 (1992), where he describes the Declaration as “the document marking our birth as a separate people.” Id. at 633 (Scalia, J., dissenting) (emphasis added). Scalia’s description is similar to that of Justice Bradley, who, in the Slaughter-House Cases, referred to the Declaration as “the first political act of the American people in their independent sovereign capacity.” Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116 (1873) (Bradley, J., dissenting).
The first discussion of the Declaration in the Supreme Court appears in Chief Justice Jay's opinion in *Chisholm v. Georgia*. In that case, the Court unanimously held that Article III of the Constitution subjected states to suit in federal court by citizens of another state. Jay's opinion addressed the legal effect of the Declaration of Independence:

The revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time providing for their more domestic concerns by state conventions, and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed not to the people of the colony or states within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the revolution, combined with local convenience and considerations; the people nevertheless continued to consider themselves, in a national point of view, as one people; and they continued, without interruption, to manage their national concerns accordingly.

Jay's opinion confirms the idea that the Declaration was a national act of one people, creating one nation, at least with respect to "national affairs."

The 1795 case of *Penhallow v. Doane's Administrators* raised the issue of the status of the Declaration in even more pointed fashion. The case arose out of a New Hampshire admiralty dispute dating back to 1777. In 1779 and 1783, the Continental Congress had asserted its

232. 2 U.S. (2 Dall.) 419 (1793).
233. Id. at 424. This particular holding was altered by the ratification of the Eleventh Amendment. But it is unlikely that the Supreme Court misinterpreted Article III. Two of the five justices who heard the case, James Wilson and John Blair, had been delegates to the Constitutional Convention, where Wilson took a leading role. Chief Justice John Jay was one of the authors of *The Federalist Papers*, and Justice William Cushing had played a prominent part in the Massachusetts ratifying convention. Although this is not the place to enter into the thicket of Eleventh Amendment controversies, the best interpretation is that the Eleventh Amendment simply limits a particular class of diversity cases, not federal question suits brought against states. See Amar, supra note 101, at 1474–75.
235. 3 U.S. (3 Dall.) 54 (1795).
power, through its Committee of Appeals, to review the earlier New Hampshire state court decisions in the case. The 1795 proceedings forced the Supreme Court to determine the validity of this jurisdiction, and by extension, the powers of the Continental Congress prior to the Articles of Confederation. Both parties were represented by exceptionally able counsel, and oral arguments extended over eight days.

The plaintiffs in error contended that the Continental Congress lacked the power to review prize decisions of the state courts: "The colonies, totally independent of each other before the war, became distinct, independent states, when they threw off their allegiance to the British crown, and congress was no longer a convention of agents for colonies, but of ambassadors from sovereign states." The Declaration, they contended, "made no difference as to the sovereignty of the several States"; Congress was merely an advisory body and possessed only the power to recommend.

The defendants in error vehemently challenged these assertions. As they saw it, "On the declaration of independence, a new body politic was created; congress was the organ of the declaration; but it was the act of the people, not of the state legislatures, which were likewise nothing more than organs of the people." The Continental Congress had a "national sovereignty" and derived its authority "from the whole people of America, as one united body." The plaintiff's arguments, they

237. See id. at 394.
238. Penhallow, 3 U.S. (3 Dall.) at 67–68. Justice Paterson's notes of the oral arguments confirm that the appellants specifically linked this argument to the Declaration of Independence. See William Paterson's Notes of Arguments in the Supreme Court (Feb. 6, 1795), in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, supra note 236, at 428, 431.
239. William Paterson's Notes of Arguments in the Supreme Court (Feb. 10, 1795), in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, supra note 236, at 448–49.
240. Penhallow, 3 U.S. (3 Dall.) at 76.
241. Id. In the original notes, the argument is phrased "On the decl'n of independance, the sovereignty was vested in Congress," William Paterson's Notes of Arguments in the Supreme Court (Feb. 11, 1795), in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, supra note 236, at 457–58, and "The King of Britain was formerly Sovereign of U.S. The people divested the King, of it, & placed it in Congress," William Tilghman's Notes of Arguments in the Supreme Court (Feb. 11, 1795), in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, supra note 236, at 461, 463.
pointed out, led to the fairly ridiculous conclusion that the Declaration had actually *lessened* the power of the Continental Congress.\textsuperscript{242} If there was no national government until the Articles of Confederation were ratified in 1781, as the plaintiffs maintained, then "How did we get along?" the defendants asked sarcastically. "Were there 13 different wars?"\textsuperscript{243}

The Supreme Court was thus squarely confronted with the legal status of the Declaration. The Court minced no words in upholding the power of the Continental Congress prior to the Articles of Confederation and the importance of the Declaration in forming one American nation. The opinion of Justice William Paterson (who had proposed the New Jersey plan at the Constitutional Convention and was certainly no enemy of state rights) stated,

\begin{quote}
[I]t became necessary for the people or colonies to coalesce and act in concert... they accordingly grew into union, and formed one great political body, of which congress was the directing principle and soul. As to war and peace, and their necessary incidents, congress, by the unanimous voice of the people, exercised exclusive jurisdiction, and stood, like Jove, amidst the deities of old, paramount, and supreme. The truth is, that the states, individually, were not known nor recognised as sovereign, by foreign nations, nor are they now.\textsuperscript{244}
\end{quote}

For Paterson, "These high acts of sovereignty were submitted to, acquiesced in, and approved of, by the people of America."\textsuperscript{245} Justice John Blair agreed. He observed that the Continental Congress "in short, acted in all respects like a body completely armed with all the powers of war; and at all this, I find not the least symptom of discontent among all the confederated states, or the whole people of America."\textsuperscript{246} Indeed, "congress were universally revered, and looked up to as our political fathers, and the savours of their country."\textsuperscript{247} Justice Iredell recognized

\begin{footnotes}
\item[242] See William Paterson's Notes of Arguments in the Supreme Court (Feb. 9, 1795), in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, supra note 236, at 434, 439.
\item[243] Id. at 440.
\item[244] Penhallow, 3 U.S. (3 Dall.) at 81 (Paterson, J.).
\item[245] Id. at 80. According to Paterson, the only way New Hampshire could have avoided the power of the Continental Congress was to withdraw completely from the union. Id. at 82.
\item[246] Id. at 111 (Blair, J.).
\item[247] Id.
\end{footnotes}
the Committee's jurisdiction on slightly different grounds. Iredell felt that any authority exercised by the Continental Congress could only be conveyed by the people of each state acting individually, not "by all the people in the several provinces, or states, jointly." Nonetheless, Iredell found it "unquestionable" that Congress, with the "acquiescence of the states" exercised the "high powers" of "external sovereignty," and that the "articles of confederation amounted only to a solemn confirmation of it." A state could only avoid this power by "withdrawing from the confederation" completely.

These views did not go completely unchallenged. In the 1796 case of Ware v. Hylton, Justice Chase suggested that the Declaration did not mean that the "united colonies jointly, in a collective capacity, were independent states... but that each of them was a sovereign and independent state." Nonetheless, Chase conceded that the Continental Congress was effectively the organ of one nation, admitting that "the several states retained all internal sovereignty; and that congress properly possessed the great rights of external sovereignty." In "deciding on the powers of congress... before the confederation," Chase "[saw] but one safe rule, namely, that all the powers actually exercised by congress, before that period, were rightfully exercised, on the presumption not to be controverted, that they were so authorized by the people they represented."

In the early nineteenth century, lawyers repeatedly cited the nationalist implications of the Declaration. As William Rawle argued in 1805, "The independence of America was a national act. The avowed object was to throw off the power of a distant country; to destroy the

248. Id. at 94 (Iredell, J.).
249. Id. at 91.
250. Id. at 96.
251. Id. at 95.
252. 3 U.S. (3 Dall.) 199 (1796).

In oral argument, John Marshall contended both that "Virginia... was an independent nation" in 1777, and that "America... must, from the 4th of July 1776, be considered as independent a nation as Great Britain." Ware, 3 U.S. (3 Dall.) at 210–11 (oral argument of John Marshall).

On the other side, Mr. Lewis contended that the revolutionary war was "waged against all America, as one nation." Id. at 219 (oral argument of Attorney Lewis) (emphasis added).

254. Ware, 3 U.S. (3 Dall.) at 232 (Chase, J.).
255. Id.
political subjection; *to elevate ourselves from a provincial to an equal state in the great community of nations.*"256 Another lawyer argued that, "By the declaration of independence, the colonies became a *separate nation* from Great Britain."257 In an 1817 case, an attorney pointed out that "by express decisions on the point, the principle was settled that our existence as an independent nation commenced with our declaration of independence in 1776."258 Chief Justice John Marshall, sitting on circuit, agreed with that proposition.259

5. *The Treatise of Joseph Story*

The first great American constitutional law treatise is the 1833 treatise by Joseph Story, one of the towering figures in the history of American law. Story's treatise synthesized many of the elements discussed in this section and firmly endorsed the nationalist understanding of the Declaration of Independence.

Story argued that the Continental Congress derived its powers directly from the people, and exercised its authority "not as the delegated agents of the governments *de facto* of the colonies, but in virtue of original powers derived from the people."260 The period surrounding the adoption of the Declaration was important, Story maintained, because of its relevance to "several very important considerations respecting the political rights and sovereignty of the several colonies."261 For Story, the Declaration was manifestly the act of one American people:

[The Declaration of Independence] was not an act done by the State governments then organized; nor by persons chosen by them. It was emphatically the act of the whole *people* of the united


257. Lambert's Lessee v. Paine, 7 U.S. (3 Cranch) 97, 125 (1805) (oral argument of Attorney Mason) (emphasis added); see also id. at 114 (oral argument of Francis Scott Key) ("[B]y... the declaration of independence... a new sovereignty was created."); Kilham v. Ward, 2 Mass. 236, 256 (1806) (oral argument of Nathan Dane) (arguing that a person became an American citizen on July 4, 1776, the date of "the birth of the American nation") (emphasis omitted).


259. See id. However, Marshall found that this did not mean that the American judiciary was free to recognize as a foreign nation any entity that had issued a declaration of independence; rather, the courts could only recognize those foreign nations that the executive had already recognized. See id. at 441–42.

260. STORY, supra note 205, at 140.

261. *Id.* at 144.
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colonies, by the instrumentality of their representatives, chosen for that, among other purposes.... It was an act of original, inherent sovereignty by the people themselves, resulting from their right to change the form of government, and to institute a new one, whenever necessary for their safety and happiness.... The people of the united colonies made the united colonies free and independent states, and absolved them from all allegiance to the British crown. The declaration of independence has accordingly always been treated, as an act of paramount and sovereign authority, complete and perfect per se, and ipso facto working an entire dissolution of all political connection with and allegiance to Great Britain. And this, not merely as a practical fact, but in a legal and constitutional view of the matter by courts of justice.  

Story forcefully rejected the notion that the American people had created thirteen independent states. The Declaration placed the states "under the dominion of a superior controlling national government, whose powers were vested in and exercised by the general congress with the consent of the people of all the states." Accordingly, "[f]rom the moment of the declaration of independence... the united colonies must be considered as being a nation de facto, having a general government over it created, and acting by the general consent of the people of all the colonies."

6. A Note on the Articles of Confederation

At first glance, the Articles of Confederation would seem to contradict the idea that an American nation emerged with the adoption of the Declaration of Independence. The second Article states, "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." This section, and other provisions of the Articles (such as voting by states), suggest that the Declaration had created thirteen independent nations. With the Articles, these nations confederated together for limited purposes, but each nonetheless retained the fundamentals of

262. Id. at 149–50.
263. Id. at 152.
264. Id. at 152–53.
265. ARTICLES OF CONFEDERATION art. II.
nationhood. Although there is much to be said for this argument, it does not necessarily undermine the idea that the Declaration created one nation, at least with respect to the rest of the world. Indeed, the most plausible reading of the Articles is that they are merely declarative of what the Declaration had already accomplished.

The first thing worth noting about the Articles is that we got along quite well without them. The Continental Congress did not bother to approve them until November 15, 1777, and they did not go into effect until March of 1781. Yet throughout this period, the Continental Congress acted as a de facto national government. It conducted almost the entire War of Independence against one of the most powerful nations on earth. It requisitioned supplies, supported, trained, and governed the Continental Army, organized a navy, negotiated treaties with foreign nations, sent American ambassadors throughout Europe, heard appeals from state courts in admiralty suits, and issued currency. In short, the Congress acted as if it were the representative of one American nation.


267. For an account of the ratification debates over the Articles of Confederation, see Eric M. Freedman, Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation, 60 TENN. L. REV. 783 (1994).

Jack Rakove observes:

Nothing in the general reception the Articles received suggests that Americans were deeply interested in discussing the nature of the union they were forming. No pamphlets were written about them, and when the Articles were printed in American newspapers they appeared only as another scrap of news, probably less important than reports of victory at Saratoga and almost certainly less controversial than a growing number of essays proposing remedies for inflation. RAKOVE, supra note 102, at 185.

268. It is also worth noting that the Articles did not look like typical treaties entered into between sovereign nations. They were drafted by the Continental Congress and sent to the states for ratification. Thus, no state created any separate agreements with any of the other states. The process was centrally directed and states had the option of approval or disapproval, but they could not adjust the Articles' terms.

269. See generally RAKOVE, supra note 102.

270. See, e.g., id. at 184–85 ("[T]he idea that the confederation was essentially only a league of sovereign states was ultimately a fiction[;] Congress was in fact a national government, burdened with legislative and administrative responsibilities unprecedented in the colonial past.").

The only substantive difference that ratification of the Articles brought to Congress was that its directives were now styled "ordinances," rather than "resolves" or "recommendations." See Richard P. McCormick, Ambiguous Authority: The Ordinances of the Confederation Congress, 1781–1789, 41 AM. J. LEGAL HIST. 411, 411 (1997).
These powers are best seen as powers vested in the Congress by the American people at the time of the Declaration. By creating the new state constitutions, the people of each state vested control of state and local affairs in the state governments. In no state did the people explicitly confer any power over foreign affairs to their state government. It was understood that these powers rested with the Congress. Thus, the Articles of Confederation did not operate on a clean slate. Under the Articles each state retained “every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.” Strictly speaking, this does not mean that Congress had only those powers delegated to it by the states; it means that states retained the powers which they had not delegated to the Congress. And states could not retain that which was not theirs to begin with.

Likewise, although each state “retains its sovereignty, freedom, and independence,” this clause reveals nothing about the scope of what was retained. In light of the extensive powers Congress exercised at the time of the ratification in 1781, the best reading of this clause is simply that the states retained their sovereignty over their internal affairs, their freedom to govern themselves as they saw fit, and their independence from Britain, and were not absorbed into one American super-state.

This is not to say that a state might not gain the powers of external sovereignty for itself. If the people of the state agreed to withdraw affirmatively from the union, at least prior to the Constitution, such secession would probably have transferred those powers to the state. Just as the powers of external sovereignty fell to the United States when it withdrew from the British empire, so would those powers fall to a state that withdrew from the American Union. But this would be a result of the people’s ultimate power to distribute sovereignty among organs of

271. See, e.g., RAKOVE, supra note 102, at 150 (“Only in Connecticut—whose existing charter, widely regarded as a model for republican government, required no revision—was a serious question raised about the status of Congress when a Litchfield County convention proposed that members of Congress be elected by the people.”).

272. Cf. id. at 170–71 (suggesting that the clause was “ambiguous” and that the Congress viewed it as “less significant” than its sponsor believed it to be).

Supporters of a thirteen nations argument might also point to the Articles’ assertion that it formed a “firm League of Friendship.” ARTICLES OF CONFEDERATION art. III. Yet the Articles also describe themselves as “Articles of Confederation and Perpetual Union.” ARTICLES OF CONFEDERATION pmbl. Perpetual union is a quite different matter than a “firm League of Friendship.”
government; it would not be a function of a state’s simply reclaiming a power it had granted away under the Articles. 273

Finally, it is worth noting that contemporaries were familiar with the argument that the Articles implied the existence of thirteen separate nations. This argument was nonetheless decisively rejected by many people who thought carefully about these issues, among them such distinguished figures as James Wilson, William Paterson, and Joseph Story. None of these people saw the Articles as contradicting the idea that the Declaration was the act of one people creating an American nation. Neither should we.

7. The Historical Evidence: A Summary

Sections A and B argued the Declaration is best interpreted as the act of one American people creating an American nation. The evidence outlined in this section confirms the merits of such a reading. Such an interpretation was endorsed by such leading figures as James Madison, James Wilson, Alexander Hamilton, John Jay, John Marshall, and John Quincy Adams. It was endorsed in the Constitutional Convention; it was endorsed in the courts of law; and it was endorsed by ordinary Americans on Independence Day. In all these ways, Americans reaffirmed their understanding of the origins of the American nation and of the underlying sovereignty of the American people.

III. THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL FORMALISM

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—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to

273. See also RAKOVE, supra note 102, at 173–74 n.*:

A reconstruction of the precedents, events, and atmosphere of 1774–76 does not validate a states’-rightist interpretation of the origins of the union. In addition to congressional prerogatives over war and diplomacy, the procedures used to authorize the creation of new governments in 1775–76 clearly demonstrate that sovereign powers were vested in Congress from the start and that the emerging provincial regimes were regarded as subordinate bodies.
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...alter or abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

This eloquent passage is the most celebrated in the Declaration of Independence and among the most celebrated of all political writings in American history. It is a powerful statement of American principles and beliefs. Our understanding of this passage, however, has often been obscured by simplistic readings that strip it of much of its subtlety. At its worst, the passage simply becomes a convenient tool for courts wishing to strike down any legislation that strikes them as violating some sort of "natural right." This specter of rampant Lochner-ism is a powerful force in legal academics' traditional aversion to the Declaration. Standing in isolation, this passage has an ungrounded quality and an ethereal feel that makes lawyers doubtful of its analytical power. What constitutes a violation of these "unalienable rights," and what sort of rights are they? Lacking specificity, the passage could be used to support almost anything.

These concerns can be substantially eliminated by reading the passage in the context of the entire Declaration. About one half of the Declaration is devoted to the specific charges laid against George III. Although these charges are almost entirely ignored today, for the Continental Congress they were the most important part of the Declaration. As Pauline Maier has put it, "Independence was justified only if the charges against the King were convincing and of sufficient gravity to warrant the dissolution of his authority over the American people." The most careful British response to the Declaration, John


275. See supra notes 32–41 and accompanying text.

276. MAIER, supra note 3, at 105. Maier notes, "[The charges] were therefore essential to the Declaration's central purpose, not subordinate to an assumed premise, as Carl Becker argued in one of the more tortured passages in his book on the Declaration." Id. (citation omitted).
Lind's *An Answer to the Declaration of the American Congress*, spent only four of its 129 pages discussing the preamble.277 As Lind noted, "Of the preamble I have taken little or no notice. The truth is, little or none does it deserve."278 For Lind, the issue was whether the charges were accurate, a challenge subsequent American defenders of the Declaration would take up.279 This task was more daunting then it appeared. Pauline Maier has observed, "Today most Americans, including professional historians, would be hard put to identify exactly what prompted many of the accusations Jefferson hurled against the King, which is not surprising since even some well-informed persons of the eighteenth century were perplexed."280 However, to understand the philosophy of the Declaration, the historical accuracy of the charges is of little consequence. What is important is that the delegates thought that the actions charged had occurred, and that these charges were sufficient to justify independence.

The charges against the King constitute the principal focus of this Part. It is important to note that the charges do not simply recount instances in which the King had deprived individuals of life, liberty, or the pursuit of happiness. They were addressed to the far more serious concern of a "Design to reduce [the Americans] under absolute Despotism." It was this fear that justified revolution: "The History of the present King of Great-Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid World." The charges seek to establish that George III is a tyrant, which is not necessarily the same thing as saying that he has violated the rights of life, liberty, and pursuit of happiness. Rather, the presumption is that a despotism is so unlikely to safeguard these rights that the people are justified in overthrowing it. Thus the Declaration asserts, "A Prince, whose Character is thus marked by every act which may define a Tyrant, is unfit to be the Ruler of a free People." The problem is not that George III is a prince, but that he has become a tyrant.

277. See WILLS, supra note 93, at 65.
280. MAIER, supra note 3, at 106.
281. The Declaration refers to a "Design." By 1776, Americans had become convinced that there was a conspiracy in Britain to deprive them of their liberties. See BAILYN, supra note 20, at 144–59.
This emphasis on despotism is linked to the Declaration’s deep concern with what it terms “form.” The Declaration legitimizes revolution “whenever any Form of Government becomes destructive of these Ends.” Notice the prominence of the term “form.” It is not strictly necessary here, as the phrase could easily have read “whenever any government becomes destructive of these ends.” In quick succession, the term appears twice more: The people are to organize new government “in such Form, as to them shall seem most likely to effect their Safety and Happiness.” Then, “Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed.” Later, the Declaration charges the King with “altering fundamentally the Forms of our Governments.” Form had a slightly more definite meaning in the eighteenth century than it does today; it implied a clear structure—something with definite shape. This concern with form, of course, is a hallmark of constitutionalism. By analyzing the appropriate forms of government, the Declaration speaks in constitutional language.

The charges against the King, therefore, are not so much rooted in particular violations of natural rights, as they are in what I term “constitutional formalism.” Although the Declaration suggests that “any form of government” might become destructive of the rights of the people, the Declaration is far from neutral as to form. It categorically rules out “Despotism,” “arbitrary Government,” and “absolute Rule,” for example, as acceptable forms of government. More importantly, the Declaration’s charges display a close attention to the proper and distinct spheres of legislative, executive, and judicial power and to the paramount importance of the rule of law. The rights that George III allegedly violated were not so much individual rights, but the collective rights of the American people to self-government.

282. (emphasis added).
283. (emphasis added).
284. (emphasis added).
285. (emphasis added).
287. The Declaration’s grounding in self-government is clearly expressed in a letter written by John Adams on June 23, 1776. Adams felt that with a declaration of independence, it would be easier for the states to “ascertain the criminality of toryism” and to prevent the presses from producing “seditious or traitorous speculations.” Letter from John Adams to John Winthrop, June 23, 1776, reprinted in SPIRIT OF SEVENTY-SIX, supra note 168, at 307. It would lessen “[s]landers upon public men,” and provide the civil governments with a “vigor hitherto unknown.” Id. at 307–
This Part explores these themes through a close reading of the charges against the King. Section A analyzes the Declaration’s commitment to the rule of law. Sections B, C, and D respectively address the legislative, executive, and judicial powers. Section E summarizes the main points of this Part.

A. The Rule of Law

One of the most prominent themes in the Declaration’s charges against the King is the importance of law in a well-governed society. Indeed, the term “laws” serves as a sort of a pervasive refrain throughout the body of the charges:

He has refused his Assent to Laws .

He has forbidden his Governors to pass Laws .

He has refused to pass other Laws .

He has . . . obstruct[ed] the Laws for Naturalization of Foreigners .

He has . . . refus[ed] his Assent to Laws for establishing Judiciary Powers .

He has . . . subject[ed] us to a Jurisdiction . . . unacknowledged by our Laws .

For abolishing the free System of English Laws in a neighbouring Province .

For . . . abolishing our most valuable Laws. 288

Two important principles emerge from this collection of charges. First, laws are not necessary evils, but positive and necessary goods. Second, the law must be defended and obeyed, even by kings.

08. Whatever Adams perceived a declaration to mean, it had little to with the rights of minorities to utter expressions of loyalty to Great Britain. Cf. United States ex rel. Guar. Trust Co. of N.Y. v. Gehr, 116 F. 520, 522 (N.D.W.Va. 1902) (“[T]here is not a word in the Declaration of Independence about [freedom of speech].”).

288. (emphasis added).
1. The Importance of Law

The first charge that the Declaration levels against the King is a ringing affirmation of the importance of law: "He has refused his Assent to Laws; the most wholesome and necessary for the public Good."289 What would it mean for a law to be "necessary?" Garry Wills has argued that the term "necessary" is firmly rooted in the mechanistic world-view of the Enlightenment: "It was the proudest boast of the world opened by Newton's Principia that men could discern necessity at work, invariable, in the flow of apparent chance."290 This sense of necessity is pervasive in the Declaration, which begins, "WHEN in the Course of human Events, it becomes necessary...."291 Later it refers to the "Necessity which constrains [the colonies] to alter their former Systems of Government."292 At the end, it simply resigns itself to the inevitable: "We must, therefore, acquiesce in the Necessity, which denounces our Separation."293 Just as separation from England was required by the course of events leading up to the Declaration, so are certain laws required if a society is to function properly.294

The term "wholesome" also plays an important role here. A "wholesome" law is one that performs some sort of improving function. The word derives from Middle English terms for "health" and it came to imply a promotion of well-being.295 As Shakespeare's Marcellus noted of Christmas Eve: "And then, they say, no spirit can walk abroad; / The nights are wholesome; then no planets strike, / No fairy takes, nor witch hath power to charm."296 A law that is "wholesome" for the "public good," then, is a sort of medicine for the body politic—something that improves the people and their lives and banishes the evils that would otherwise beset them.

289. (emphasis added).
290. WILLS, supra note 93, at 94.
291. (emphasis added).
292. (emphasis added).
293. (emphasis added).
294. The Constitution reiterates the necessity of some laws. Article One, Section Eight of the Constitution authorizes Congress to make all laws "necessary and proper" for carrying out its enumerated powers. Likewise, Article Two, Section Three requires the President to recommend to Congress "such Measures as he shall judge necessary and expedient."
296. WILLIAM SHAKESPEARE, HAMLET act 1, sc. 1 (emphasis added).
The image of law is of an active, positive force in the lives of the people. The claim is not that George III has permitted bad laws, but that he has prevented the passage of good ones, a theme taken up in subsequent charges: The King has “forbidden his Governors to pass Laws of immediate and pressing Importance.” He has “refused to pass other Laws for the Accommodation of Large Districts of People.” He has “endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws for the Naturalization of Foreigners.” He has “obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.” It is striking that the charges thus begin, not with a complaint that the King has violated natural rights, nor with a complaint that he has approved bad law, but that there was not enough good law. The lack of good law can evidently be as despotic as the overwhelming presence of bad law. The Declaration has plenty to say about bad law, but for the moment it is important to note how far the Declaration is from an endorsement of the minimalist state.

2. Obedience to Law

An equally compelling principle is that kings are not above the law. In this principle, we can see the deeply legalistic nature of the Declaration. In an intriguing passage, the Declaration asserts, “He has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation.” The “others” in this charge are members of Parliament, a body the Declaration never mentions by name. Carl Becker has suggested that for the Continental Congress it was a “point of principle not on any account to pronounce the word Parliament,” the source of so many of the colonists’ disputes with Britain. What is most striking, however, is the contention that the King and Parliament had together violated “our Constitution” and “our Laws.” It is a bit of a mystery precisely what sort of “Constitution” is being referred to. In an

297. (emphasis added).
298. (emphasis added).
299. The Declaration iterates nine instances of bad laws (“pretended legislation,” as the Declaration puts it) passed by Parliament and approved by the King.
300. At a later point, the Declaration asserts, “We have warned [our British Brethren] from Time to Time of Attempts by their Legislature to extend an unwarrantable Jurisdiction over us” (emphasis added).
earlier draft, the phrase read "our constitutions," but Congress changed this to the singular form.\textsuperscript{302} In the plural, the phrase would almost undoubtedly have referred to the constitutions and charters of the individual colonies. But the singular rules this out. There must be a constitution common to all Americans. It is hard to imagine what this might be other than the British Constitution, which was the subject of much discussion in the revolutionary period.\textsuperscript{303} The British Constitution, of course, was not a written constitution, but an accumulation of unwritten practices that resulted in a balance of power between the king, the lords and the commons. Americans perceived this constitution as binding even the king himself.\textsuperscript{304} Accordingly, any \textit{ultra vires} action by the king would be null and void. The parliamentary legislation he approved was thus "pretended Legislation." Likewise, the Declaration's accusation that the King had committed "repeated Injuries and Usurpations" is itself a denunciation of illegal action. The term "injury" in its technical sense refers specifically to a violation of law; this is the essence of the Latin \textit{injuria}, that is, an act contrary to right.\textsuperscript{305} Similarly, the term "usurpation" is meaningless outside of a normative framework for evaluating the legality of exercises of power. The Declaration repeats these terms in its conclusion, asserting, "Our repeated Petitions have been answered only by repeated Injury," and that the Americans had asked the British people to "disavow these Usurpations."

The Declaration's charge that the King and Parliament had asserted a jurisdiction "unacknowledged by our Laws," closely echoes the charge of "foreign to our Constitution." This passage suggests the two different senses in which the Declaration employs the word "law." On the one hand, there are the statutes and common law decisions, ordinary law which the king is obligated to uphold and defend. In that sense, the Declaration denounces the King and Parliament for "abolishing our most valuable Laws" and for "abolishing the free System of English Laws in a neighbouring Province." On the other hand, there is "law" in a larger sense, the constitutional structures that limit and channel the authority of the king. The king's obligations to preserve and protect the more

\textsuperscript{302} See id. at 178.
\textsuperscript{303} See, e.g., \textsc{Bailyn, supra} note 20, at 67 ("The word 'constitution' and the concept behind it was of central importance to the colonists' political thought; their entire understanding of the crisis in Anglo-American relations rested upon it.").
\textsuperscript{304} See, e.g., \textsc{Thomas Jefferson, A Summary View of the Rights of British America} (1774), \textit{quoted in Ellis, supra} note 274, at 35–36.
\textsuperscript{305} See \textsc{7 The Oxford English Dictionary} 981 (1989).
ordinary law follow directly from his duties under law in its larger sense. When the king and Parliament abolished ordinary law, their actions were thus illegal, not because they violated the laws that were abolished, but because they violated the “Constitution” and the “Laws.” Likewise, their attempts to legislate for the colonies were an extension of “an unwarrantable Jurisdiction.” In other words, the king and Parliament cannot legitimately act outside of the scope of the “Constitution” and the “Laws.”

But who is to judge whether the king and Parliament have violated the laws? The Declaration makes abundantly clear that this power rests in the people themselves: “when a long Train of Abuses and Usurpations...evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government.” The final judge of the law is in a sense an immense national jury, composed of the people deliberating about whether to throw off their government. The ultimate interpretation of the “Constitution” and “Laws” is therefore not in the hands of a mandarin class, but in the hands of the people. This is not an invitation to lawless violence, but a serious charge to the people as a whole. Revolution is justified only when the people are convinced that their government has persistently and consistently violated the law.

B. The Legislative Power

The Declaration places great value in representative legislatures as protectors of the rights of the people. Many of the charges against the King address obstructions of the legislative process. These obstructions do not directly abridge any individual’s life, liberty, or the pursuit of happiness, but they do interfere dramatically with the people’s right to self-government.

The term “right” appears only twice in the charges, and in both instances it relates to the functioning of representative legislatures. The Declaration asserts that the King “has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyrants only.” In Britain, many districts were not entitled to send representatives to Parliament; this was justified under the theory that they were “virtually” represented by

306. (emphasis added).
representatives from other districts. The Declaration forcefully rejects this notion of virtual representation. Representation is not simply a convenient way to organize a government—it is a fundamental right to which all people are entitled. Accordingly, the charge pointedly links a lack of representation with tyranny.

Why does representation matter? Because the legislature is the primary guarantor of the rights of the people. The second instance of the term “right” in the charges states, “He has dissolved Representative Houses repeatedly, for opposing with manly Firmness his Invasions on the Rights of the People.” Here the Declaration again emphasizes the representative function of legislative bodies by referring to them as “Representative Houses,” rather than as “legislative houses.” The legislature is to protect the people’s rights with “manly Firmness,” a phrase that suggests a certain stern republican virtue. This resonates nicely with an image in the second paragraph: The people are entitled to “provide new Guards for their future Security.” Representative houses filled the role of “guard” perfectly, which was why George III felt compelled to dissolve them. Representative bodies will protect the rights of the people precisely because they are representative of the people.

The importance of representation animates certain other charges the Declaration lays against the King. With Parliament, he is accused of “imposing Taxes on us without our Consent,” and with “suspending our own Legislatures.” In one of the most maligned charges in the Declaration, he is accused of “call[ing] together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records, for the sole Purpose of fatiguing them into Compliance with his Measures.” This charge apparently referred to the moving of the Massachusetts legislature from Boston to Cambridge by the royal governor in 1768. British critics of the Declaration could scarcely contain their derision of this clause. Thomas Hutchinson doubted that Harvard College, four miles from Boston, was unusual, uncomfortable, or distant from the public records, and could not fathom how this “unimportant dispute between an American Governor and his Assembly” could possibly be a “ground to justify Rebellion.” John Lind described

307. See generally BAILYN, supra note 20, at 161–75.
308. Cf. Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.") (citation omitted).
309. See MAIER, supra note 3, at 110.
310. Quoted in id. at 111.
the charge as "truly ridiculous," and wondered whether it was "inserted by an enemy...to throw an air of ridicule on the declaration in general." The Congress wisely chose not to dwell on the details of this incident, but instead cast it in more general terms. Against the backdrop of representation, the charge takes on more meaning. If a king could "fatigue" legislative bodies into compliance with his own will, then the entire purposes of representation would be destroyed. If the legislature was forced to meet at places distant from the public records, it would be impossible to legislate intelligently about public issues and the people's right to adequate representation would thereby be diluted.

The Declaration contends that representative bodies are the most appropriate organs to exercise the legislative power. In an interesting charge, the Declaration reveals its understanding of this power:

He has refused for a long Time, after such Dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the Dangers of Invasion from without, and Convulsions within.

This charge makes clear that the legislative powers originate with the people, to whom those powers return on the dissolution of legislative assemblies. But this is obviously an extremely undesirable outcome. The people at large should not be exercising the legislative power. Only a representative legislature can wield these powers effectively and protect the state from invasions and convulsions. By dissolving legislative houses, the king reduces the colonies to a tumultuous ekklesia at best, and to complete anarchy at worst.

In sum, the Declaration views representative legislatures as the primary protector of the rights of the people. It is critically important that these assemblies be truly representative, that they are protected from interference and dissolution by the executive, and that their powers not return to the people at large. Once again, the deeply formalist nature of the Declaration is apparent. By placing such stress on the importance of representative legislatures, the Declaration suggests that they are not simply one possible form of government among many plausible alternatives. Rather, representation in the legislature is essential to self-government, the most important right the Declaration intends to protect.

311. Quoted in id. at 111.
C. The Executive Power

In one sense, the entire Declaration is an essay on the misuse of executive power, because each of the charges laid against the King describes an abuse of his authority.\textsuperscript{312} This Section attempts to bring more precision to the subject of the Declaration’s perspective on executive power. A good place to start is with the conclusion to the charges, where the Declaration asserts, “A Prince, whose Character is thus marked by every act which may define a Tyrant, is unfit to be the Ruler of a free People.” This sentence demonstrates that the relationship between monarchy and tyranny is not as direct as is often made out. Indeed, the sentence implies that a “Prince” who did not engage in tyrannous acts would be perfectly fit to be the “Ruler of a free People.” To modern ears, it seems strange that anyone might be the “Ruler” of a free people; after all, the people should be ruling themselves. But in this context, “Ruler” is simply a synonym for the executive authority. “Head of a free People” might have captured the meaning slightly better, but with less elegance; “Ruler” served just as well. A people might thus be under a “Prince” yet still be “free.” The key issue is whether that “Prince” conducts himself as a constitutional monarch governed by the rule of law, or acts as a lawless tyrant.\textsuperscript{313} Notice how this becomes a question of personal character: “whose Character is thus marked by every act which may define a Tyrant.”\textsuperscript{314} It is not simply that George III has done tyrannous things, but that he has a tyrannous character. The distinction is subtle, but important. One who has done tyrannous things might be restrained or reformed; one with a tyrannous character must be overthrown, because he poses the greater threat to the people’s liberties. This is a reflection of the revolutionary generation’s deep concern about

\textsuperscript{312} Cf. Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 273 (1991) (“The abuses by the monarch recounted in the Declaration of Independence provide dramatic evidence of the threat to liberty posed by a too powerful executive.”); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (“The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.”).

\textsuperscript{313} Cf. Lucas, Justifying America, supra note 104, at 110 (“[Independence] was not likely to be won without support from European monarchies such as France and Spain, neither of which would be favorably impressed with a Declaration that inveighed against kingship.”).

\textsuperscript{314} (emphasis added).
public virtue, and about the essential character attributes of those who would govern. 315

Of course, it will not always be easy for the people to determine whether or not their leader displays a tyrannous disposition. This was particularly true in the eighteenth-century, where few people ever met their leader face-to-face (only a handful of Americans had actually met George III). Accordingly, government must be structured to control the potential tyrannous tendencies of those in power. The Declaration thus provides an implicit framework for control of the executive. The main features of this framework are limited veto powers, positive duties of protection, civilian control of the military, and limits to the creation of executive offices.

1. The Veto

Some of the Declaration’s most bitter complaints concern the King’s use of his veto power to prevent the passage of laws favored by the colonial assemblies. 316 At least five of the Declaration’s charges relate to this abuse of the veto power. The inescapable conclusion seems to be that the vesting of an absolute veto power in one individual creates a dangerous likelihood of tyranny. This is especially true when the veto power is wielded against representative legislatures, the very bodies the Declaration contemplates as the prime protectors of the people’s liberties. A representative legislature whose enactments can be readily discarded by an executive ceases to be a legislature at all, but becomes merely a forum for the expression of discontent. As Gordon Wood has explained, in 1776 “it seemed abominable that a single person should have a negative over the voice of the whole society.” 317

2. Positive Duties of Protection

The principle that the king has duties to his people dates back at least to the medieval coronation oaths and is echoed in the oath that Article Two of the Constitution provides for the President of the United States: “I do solemnly swear (or affirm) that I will faithfully execute the Office
of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.\footnote{318} That George III owed positive legal duties to his people is made clear in the Declaration: He has "utterly neglected to attend" to the passage of important laws, and has "abdicated Government here, by declaring us out of his Protection and waging War against us." This lack of action by the King constitutes a violation of his affirmative duties as an executive. Accordingly, he can be seen to have "abdicated" the office of king, in essence leaving that office vacant for the people to fill as they deem fit.

These charges suggest that some sort of covenant or contract exists between an executive and the people. The people entrust the executive with the executive power; in exchange, the executive must exercise those powers for the benefit of the people. As Thomas Jefferson put it in his 1774 pamphlet, \textit{A Summary View of the Rights of British America}, the king is "the chief officer of the people, appointed by the laws, and circumscribed with definite powers, to assist in working the great machine of government erected for their use, and consequently subject to their superintendence."\footnote{319} It is not merely that the people have the power to select an executive when that office is indisputably vacant. They have the far more important power of determining for themselves the conditions under which executive misfeasance or nonfeasance will constitute an abdication of that office. Thus, in the Declaration it is the "good People of these Colonies" who determine that George III has "abdicated Government here."

3. \textit{Civilian Control of the Military}

Since the threat of an overpowering military was never far from the minds of the revolutionary generation,\footnote{320} the Declaration also has much to say about the relationship between the military and the executive authority. The Declaration condemns the King for "affect[ing] to render the Military independent of and superior to the Civil Power." In similar fashion, the Declaration asserts that the King "has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures," and that the King and Parliament have "quarter[ed] large Bodies of Armed Troops among us." Indeed, these charges suggest that

\footnotesize
\begin{itemize}
  \item \textit{Declaration of Independence}\textit{.}
  \item \footnote{318}{U.S. Const. art II, § 1, cl. 8.}
  \item \footnote{319}{See supra note 304, at 35-36.}
  \item \footnote{320}{See, \textit{e.g.}, AKHIL REED AMAR, THE BILL OF RIGHTS 46–63 (1998).}
\end{itemize}
it was not merely a despotism that George III was supposedly trying to impose on the American states; it was the worst sort of despotism—a *military* despotism. The fundamental problem was making the military both “independent” of and “superior” to the civilian authorities. Military *independence* freed the military of civilian control; military *superiority* in turn subjected the civilian authority to military control. To the revolutionary generation, a standing army represented one of the greatest threats to republican virtue and liberty. The Declaration takes pains to point out that the Hessian troops hired by George III were not just mercenaries, but an *Army*: “He is, at this time, transporting large Armies of foreign Mercenaries to compleat the Works of Death, Desolation, and Tyranny, already begun with circumstances of Cruelty and Perfidy, scarcely paralleled in the most barbarous Ages, and totally unworthy the Head of a civilized Nation.” It is this image that the Declaration contemplates as the inevitable result of an uncontrolled military. Military dominance is a trait of tyrannous and “barbarous” nations; by contrast, “civilized” nations can rigorously control the use of their military power.

What is the fundamental problem with military control? After all, in some circumstances, military control might be preferable to ineffective civilian government. The fundamental problem, in the Declaration’s view, is that military rule is fundamentally inconsistent with representative government. Military government is wrong, not so much because it is likely to infringe on the people’s individual liberties, which it almost assuredly will, but because it infringes on the people’s “*Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyrants only.*” Although the people might be represented in the local *militia*, they cannot be represented in *armies*, which are rigidly hierarchical and governed by their own distinct rules

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321. See *id.* at 53.
322. Consider, for example, an address given by General John Cadwalader, a leading figure in the American Revolution, to the Pennsylvania Council of Safety in 1777:

> We wish to see the civil authority regulate and direct all our public measures and should greatly lament the necessity, which may compel the military power to take the direction in their hands, in order to save this country from absolute ruin—but you may depend that the military will exert its authority whenever the weakness, languor, or timidity of your councils shall render it their duty so to do, and all the world will justify them in it.

General John Cadwalader, Address to the Pennsylvania Council of Safety (Jan. 15, 1777) (on file with the Cadwalader Collection, Historical Society of Pennsylvania).
323. (emphasis added).
and practices. It is the legislatures, not armies, who speak for the people; consequently the slightest intrusions on representative legislatures should be fervently resisted.

4. The Proliferation of Offices

Another abuse of executive authority is the creation of numerous and unnecessary offices. The Declaration expresses this in colorful terms: "He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harrass our People, and eat out their Substance." There is more than a touch of the hyperbolic here, but the charge is nonetheless interesting. New offices will of course be filled by new officers, and the Declaration's use of the term "Swarms" readily equates these officers with a biblical plague of locusts.324 Part of the problem, no doubt, is that these officers would not be Americans, but faceless bureaucrats "sent hither" from Britain. Again, the issue is a lack of accountability in government and a disconnect between the people and their rulers.

5. The Executive Power: A Summary

In all of these ways, then, the Declaration suggests how the power of the executive can be controlled. The Declaration does not necessarily reject Alexander Hamilton's contention in The Federalist that "[e]nergy in the executive is a leading character in the definition of good government,"325 but it does emphasize the importance of channeling that energy within narrow bounds. The Declaration is much more disturbed by executive encroachment on the rights of the representative colonial assemblies than it is about potential legislative encroachments on the prerogatives of the Crown. As a means of preventing tyranny, this makes perfect sense. In the minds of the drafters of the Declaration, executive tyranny was a far more serious threat than legislative tyranny. To be sure, the Declaration minces no words in denouncing the actions of Parliament. The problem, though, was not that Parliament had encroached on the prerogatives of the King; indeed, the Declaration heartily denounces Parliament for having "combined," that is, "conspired," with the King to form an absolute tyranny over the American colonies. The problem was that Parliament was simply not the

324. See MAIER, supra note 3, at 110.
relevant legislature. The legislatures that mattered were the colonial assemblies, and it was their rights that the King and Parliament were infringing.

Once again, the Declaration is speaking not so much about individual rights, but about structure. Properly constructed and faithfully executed, the executive power can play an important role in preserving the fundamental rights of self-government. Poorly structured and imperfectly controlled, the executive power can quickly degenerate into tyranny.

D. The Judiciary Power

The Declaration’s discussion of the judiciary power is also grounded in the preservation of self-government. The first charge to deal with the judiciary asserts that the king had “obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.” The Declaration here specifically links the judiciary powers to the administration of justice. But it is only a particular kind of judiciary that is likely to administer anything resembling justice. The Declaration thus carefully lays out its understanding of the proper role of judges and of juries.

1. Judges

The Declaration addresses one charge to the role of judges. It contends that the King “has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.” American judges have often cited this charge in support of judicial independence, and, indeed, the charge does suggest the importance of an independent judiciary. Note the striking contrast, for example, between this charge and the military charge. The King is denounced for making the military “independent,” but he is equally denounced for making judges “dependent.” One might read the Declaration of Independence, then, as a declaration of dependence for the American military, but as a declaration of independence for the American judiciary.

326. See supra note 82 and accompanying text.

327. Indeed, one of the earliest and most forceful assertions of judicial independence in the revolutionary era was directed not against the civilian government, but against the Continental
There is much to be said for such a reading, but it is not quite accurate. The issue was not so much that judges were dependent, but that they were dependent on the wrong entity. Judges were supposed to be accountable to the colonial assemblies, not to the king.\footnote{328} A judge appointed and paid by the king simply became one more petty executive official, one more locust in the great “Swarm of Officers,” to use the phrase that immediately follows this charge. Such a person would have no sense of the local community and no duties to the people at large. Far better that judges be appointed by representative colonial assemblies or by the people. Only if judges are accountable in this fashion, can self-government be preserved. This does not necessarily mean that life tenure or salary protection for judges would be inconsistent with self-government, but it does mean that representative legislatures must have a role in their selection and that there be some mechanism for removal in cases of criminality or mental incapacity.

2. \textit{Juries}

Although the Declaration discusses judges in only one charge, it addresses juries in no fewer than three charges. This imbalance suggests the vital role that the drafters of the Declaration envisioned for the jury. Quite simply, the jury was the democratic branch of the judicial department.\footnote{329} Through juries, the people themselves would determine when to impose the coercive power of the state on an individual.

The Declaration asserts that the King and Parliament had “depriv[ed] us, in many Cases, of the Benefits of Trial by Jury.” The use of the term

\footnote{Army. In April 1778, Pennsylvania Chief Justice Thomas McKean, a signer of the Declaration of Independence, ordered Robert Hooper, a colonel in the Continental Army, to appear before him to answer for a violent assault Hooper had committed on Jonathan Dickinson Sergeant, the Pennsylvania Attorney General, at the Reading Court of Quarter Sessions. Letter from Thomas McKean to Nathaniel Greene (June 9, 1778), quoted in \textit{John M. Coleman, Thomas McKean: Forgotten Leader of the Revolution} 225 (1975). Hooper's commanding officer, General Nathaniel Greene, wrote to McKean, claiming that he could not “without great Necessity consent” to Hooper's absence. McKean replied:

\begin{quote}
I shall not ask \textit{your consent} nor that of any other person in or out of the army, whether my Precept shall be obeyed or not in Pennsylvania.... I should be very sorry to find, that the execution of criminal laws should impede the operation of the army in any instance, but should be more so to find the latter impede the former.
\end{quote}

\textit{Id.}}

\footnote{328. \textit{See, e.g., Maier, supra note 3, at 111.}
\footnote{329. The best exposition of this idea is in \textit{Amar, supra} note 320, at 81–118.}
"Benefits" nicely captures the importance of the jury. Jury trial was not simply a "right" of the accused; it had "benefits" for the entire community.330 Tocqueville, one of the most astute observers of the American jury, would later observe, "The institution of the jury... places the real direction of society in the hands of the governed... and not in that of the government."331 It was this element of popular participation that drove the revolutionary generation's concern for the preservation of the jury. Popular participation on juries lies beneath two other charges that the Declaration lays against the King and Parliament. Immediately after the jury charge, the Declaration denounces "transporting us beyond Seas to be tried for pretended Offences." This charge echoes the Declaration's early dismissal of Parliamentary acts as "pretended Legislation." At issue was the application of a statute from the reign of Henry VIII allowing the trial in England of treasons committed outside the realm.332 The fundamental problem with this, of course, was that it destroyed the privilege of trial by a local jury. Not only would the individual be deprived of jurors drawn from his community, but the local community would also be deprived of its right to decide whether to apply the treason statute in a given case.333 In similar fashion, the Declaration denounces the protection of British troops by "a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States." A "mock trial" is one in which local civilian juries do not have a meaningful voice.

E. The Constitutional Formalism of the Declaration

This Part has argued that the Declaration displays a pervasive concern with the structure of government and with the rule of law. In this manner, the Declaration is deeply formalistic and speaks in constitutional language. This is powerful evidence that the "rights"
about which the Declaration's famous second paragraph is most concerned are not so much the natural rights of individuals against the state or against the majority, but the rights of the American people to self-government. The most important phrase in the second paragraph is not so much "Life, Liberty, and the Pursuit of Happiness," but rather "the Consent of the Governed." Charge after charge reiterates the ways in which the King and Parliament have interfered with American self-government. To be sure, the Declaration describes some direct assaults on life, liberty, and the pursuit of happiness. The charge, "He has plundered our Seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our People," is a good example of this. But even this refers to an assault on the American people as a whole; it describes violent acts that directly interfere with the rights of self-government.

This deep concern for the preservation of self-government is reflected in the Declaration's concern with the structure and the form of government. Far from being neutral as to form, the Declaration specifies the forms that are most likely to preserve self-government and, by extension, the inalienable rights of life, liberty, and the pursuit of happiness. The Declaration imagines a government structured along these lines as most conducive to securing the people's "Safety and Happiness": the government must be founded in the rule of law and must value the preservation of law as a valuable end in its own right. It must recognize that no official is above the law and must provide mechanisms for dealing with official lawlessness. It must have representative legislatures responsive to the people, but it must not allow the legislative powers to return to the people at large. It must limit the executive's power of the veto, specify the executive's legal duties, and limit the proliferation of executive offices. It must ensure that the military power remains subordinate to the civilian authorities. It must protect judges from interference by the executive power, and it must preserve inviolate the role of juries in the courts. This basic outline of government is not inconsistent with the state constitutions that were drafted after the Declaration nor is it inconsistent with the Constitution framed by the Convention of 1787. Although they differ in some details, all are broadly concerned with protecting the people's right to self-government and with protecting the people from self-interested government.

In his 1998 book, The Bill of Rights, Akhil Amar argues that the Bill of Rights was not primarily about vesting "individuals and

334. AMAR, supra note 320.
minorities with substantive rights against popular majorities”; rather, it was about “structural ideas” intended “not to impede popular majorities but to empower them.” This Part has offered a similar analysis of the Declaration of Independence. For too long, the Declaration has been seen as a rather vacuous endorsement of indefinable and ghostly natural rights. When we strip away the interpretive overlay of the *Lochner* era, we can see the Declaration that its drafters saw: a Declaration with very specific notions about the structure of government, and a Declaration that, above all else, is committed to the right of the American people to govern themselves. On this, Jefferson’s last letter serves well as the last word: “May [the Declaration of Independence] 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.”

IV. CONCLUSION

On July 3, 1776, John Adams wrote to his wife Abigail:

The second day of July, 1776, will be the most memorable epocha in the history of America. I am apt to believe that it will be celebrated by succeeding generations as the great anniversary festival. It ought to be commemorated as the day of deliverance, by solemn acts of devotion to God Almighty. It ought to be solemnized with pomp and parade, with shows, games, sports, guns, bells, bonfires and illuminations, from one end of this continent to the other, from this time forward, forevermore.

You will think me transported with enthusiasm, but I am not. I am well aware of the toil, and blood, and treasure, that it will cost us to maintain this declaration, and support and defend these States. Yet, through all the gloom, I can see the rays of ravishing light and glory. I can see that the end is more than worth all the means, and

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335. *Id.* at xii.
that posterity will triumph in that day’s transaction, even although we should rue it, which I trust in God we shall not.\textsuperscript{337}

Adams’s predictions were remarkably prescient. He only got one thing wrong—the date. Americans do not (and never did) celebrate the day that Congress voted to approve Richard Henry Lee’s motion on independence. We celebrate the day that Congress approved the Declaration of Independence. Why? Because even more important than independence itself was how that independence was declared and justified. We celebrate the Declaration because it marks the birth of an American nation, because it dedicates America to the principle of self-government, and because it confirms the inherent sovereignty of the American people. The vote on July 2 did not do this, but the vote on July 4 did.\textsuperscript{338}

For too long, these important features of the Declaration have been obscured in the legal community by a misguided focus on individual natural rights. As a result, it has been easy to consign the Declaration to irrelevance and oblivion. This Article has argued that the deepest principles of the Declaration are not about an individual’s natural rights against the state, but about the right of the American people to self-government and about the formal structures that allow self-government to flourish. When we understand the Declaration in this fashion, we can better appreciate the Declaration’s place in American law.

\textsuperscript{337} Letter from John Adams to Abigail Adams, July 3, 1776, \textit{reprinted in} \textit{SPIRIT OF SEVENTY-SIX, supra} note 168, at 321. Late in life, Adams, envious of Thomas Jefferson’s fame as the principal draftsman of the Declaration and fearful that his own contributions were being eclipsed, dismissed the Declaration as a “theatrical side show,” and complained that “Jefferson ran away with the stage effect . . . and all the glory of it.” \textit{Quoted in} \textit{ELLIS, supra} note 274, at 292.

\textsuperscript{338} Even as a purely legal matter, the Declaration, and not the July 2 vote, created American independence. The voicing of the Declaration suggests that it is doing something in the present moment. Thus, it states, “we declare,” not we “have declared” or we “have resolved.” “Declaring,” of course, had a distinctly legal connotation. A declaratory judgment, familiar from equity, declared the rights of individual parties in the same way that the Declaration declared the rights of the American people. \textit{Cf.} \textit{PETER CHARLES HOFFER, THE LAW’S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 72–77} (1990) (tying the Declaration to forms of equitable pleading). A declaration of war altered the legal status between two countries in the same way that the Declaration altered the relationship between the colonies and Great Britain. (The Constitution grants Congress the power to “declare War.” \textit{U.S. Const.} art I, § 8 (emphasis added).) The resolution of July 2 might easily have been the subject of a motion to reconsider; once independence was “declared,” such a motion could not have succeeded. Finally, all legal decisions, from the eighteenth century forward, have treated the Declaration, not the July 2 vote, as the legal act of independence.
First, reading the Declaration as the act of one American people creating an American nation makes sense of a number of judicial decisions that cannot be justified if the Declaration created thirteen independent nations. These include cases dating United States citizenship to the Declaration of Independence,339 cases justifying United States control over the shoreline,340 and cases concerning the foreign affairs powers of the federal government.341

Second, the nationalist understanding of the Declaration is relevant to one of the most divisive issues in modern constitutional law, the so-called “sovereign immunity” of the states. A paramount principle of the Declaration is that the people, not governments, are sovereign.342 Any “sovereignty” the state governments possess is theirs because the sovereign American people gave it to them. Quite simply, the states have never been completely sovereign and independent nations. Invoking their “sovereignty” to avoid suit in federal court for violations of federal law fundamentally misunderstands the nature of the federal union. A Declaration that denounces “mock trials,” celebrates the role of juries and the rule of law, attacks judicial subservience to the executive, and condemns a “swarm of officers” for “harrass[ing] our people” offers little support for a doctrine that keeps citizens out of court when government lawlessness infringes on their rights.343

Third, recognizing the grounding of the Declaration in popular sovereignty rescues it from the Lochner-esque reasoning with which it is

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339. See cases cited supra note 64.

340. See, e.g., United States v. Maine, 420 U.S. 515, 520 (1975) (“[D]omination over the marginal sea was first accomplished by the National Government rather than by the Colonies or by the States.”); United States v. California, 332 U.S. 19, 31 (1947) (“[W]e cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it.”).


342. The classic statement of popular sovereignty as a rejection of governmental sovereignty is Amar, supra note 101.

343. Some judges have recognized that the Declaration may be relevant to sovereign immunity. See, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 95 (1996) (Stevens, J., dissenting) (“[T]he recitation in the Declaration of Independence of the wrongs committed by George III made [the proposition that the king could do no wrong] unacceptable on this side of the Atlantic.”); Nevada v. Hall, 440 U.S. 410, 415 (1979) (“[The fiction that the king could do no wrong] was rejected by the colonists when they declared their independence from the Crown.”); City and County of Denver v. Madison, 351 P.2d 826, 831 (Colo. 1960) (Frantz, J., dissenting) (arguing that the Declaration repudiates governmental immunity from tort suits); Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632, 641 (N.D. 1994) (Sandstrom, J., concurring) (noting inconsistency between the Declaration and sovereign immunity); Fowler v. City of Cleveland, 126 N.E. 72, 78 (Ohio 1919) (Wanamaker, J., concurring) (“The Declaration of Independence makes no exception in favor of governmental sovereignty.”).
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often associated. Anyone who argues that a particular law violates the Declaration of Independence because it infringes on some perceived individual natural right misunderstands the Declaration. There is not one line in the Declaration about the empowerment of minorities against popular majorities.\textsuperscript{344} The core principle of the Declaration is the people's right of self-government; it is this principle that pervades all of the charges against the King. The mistake of the \textit{Lochner} era was to read into the Declaration's second paragraph a vision of economic laissez-faire that is unsupported by anything else in the Declaration's text. Courts attentive to the entire text of the Declaration would have recognized that individual rights are not the only rights at stake when a law is challenged. Equally at stake is the people's right to self-government through representative legislatures, a right 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.

Fourth, a reconsideration of the Declaration helps define with more precision when it is appropriate for courts to cite the Declaration. This is particularly relevant in those states that appear to have adopted the "principles of the Declaration of Independence" as part of their positive law.\textsuperscript{345} As should now be clear, it will rarely be sufficient to cite the Declaration in opposition to some law that supposedly violates individual rights, because there will almost always be an opposing interest of self-government.\textsuperscript{346} It is in cases involving the structural principles of government that the Declaration can play a more valuable role. The most suggestive cases along these lines are those that employ the Declaration as a "negative constitution."\textsuperscript{347} These cases have intuitively understood that the Declaration can speak to structure, but none of them quite realized the degree to which structural concerns animate the entire Declaration. This Article has attempted to move the analysis forward by demonstrating how the charges form a coherent structural vision—a vision that may be persuasive in resolving structural

\textsuperscript{344} By this, I do not mean to suggest that the protection of minorities is not a critical thread in the fabric of American law. It is. But this is much more a result of the Reconstruction Amendments than of the political ideas that animate the Declaration of Independence. \textit{See generally AMAR, supra note 320.}

\textsuperscript{345} \textit{See supra} notes 73–74 and accompanying text.

\textsuperscript{346} It is possible that some laws might be so oppressive that they create a \textit{prima facie} case that the process of representation has utterly broken down. In such a case, violation of individual rights may be indicative of the violation of the collective right of the American people to self-government.

\textsuperscript{347} \textit{See supra} notes 76–90 and accompanying text.
questions in the interpretation of the state constitutions and the Constitution of the United States.

Fifth, focusing on the Declaration of Independence brings to light the fascinating pre-constitutional history of the United States. In the legal community, it often seems as if nothing of any significance happened before 1787. This Article has demonstrated the fallacy of that belief. By carefully studying the period between 1776 and 1787, we can gain a much better understanding of the origins of our country and of the principles upon which it was founded.

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The parchment copy of the Declaration of the Independence now rests in a massive bulletproof container in the National Archives Building in Washington, D.C., where it is viewed by thousands of visitors every year. Immediately below the Declaration, one can view two pages of the parchment copy of the Constitution and the parchment copy of the twelve amendments to the Constitution proposed by the First Congress, ten of which became our Bill of Rights. The writing on the Constitution and the Bill of Rights is still bright and crisp, but the Declaration has worn badly. Years of exposure to the sun and a poorly executed attempt to create a facsimile in 1823 have rendered it almost entirely illegible. The placement of the documents in the Archives accentuates the elusiveness of the Declaration. Whereas the Constitution and Bill of Rights are conveniently placed at eye level, the Declaration is higher and further back; the visitor to the Archives must strain mightily to lean over the Constitution to make out any words in the Declaration.

This physical arrangement of our nation's founding documents is perfectly symbolic. The familiar words of the Constitution and the Bill of Rights have been parsed and re-parsed by lawyers in thousands of cases over the past two centuries. But the Declaration is always just beyond the horizon, in the nether twilight where familiarity blends into shadows. It is the vague ethereal presence that somehow looms so deeply behind the Constitution that even legally-trained Presidents of the United States can easily confuse the two documents.

This Article has attempted to bring the Declaration into sharper focus, bringing clarity to those lines that are so elusive in the National Archives, and, perhaps, bridging the gap between the Declaration and

348. See MAIER, supra note 3, at xi.
349. See supra note 23 and accompanying text.
the documents that lie beneath it. Both Abraham Lincoln and Roger Brooks Taney would have understood why the Declaration holds such a pride of place in the Archives. These men recognized, in their own way, the important role the Declaration plays in American law. For Lincoln, the Declaration was the founding document of the American nation, a document committed to "government of the people, by the people, for the people." For Taney, the Declaration was a source of deep structural principles of government. This Article has argued that on these points, both men were right. Right not only because of their understanding of the Declaration, but because they bothered to consider it at all. For both men correctly understood the Declaration not as a curiosity of interest only to antiquarians, but as a living source of principles of government—principles that 225 years later continue to define and shape this great experiment in self-government that we call the United States of America.

350. Lincoln, supra note 183, at 104.
Appendix: The Dunlap Broadside, the First Printing of the Declaration of Independence

IN CONGRESS, JULY 4, 1776.

A DECLARATION
BY THE REPRESENTATIVES OF THE UNITED STATES OF AMERICA, IN GENERAL CONGRESS ASSEMBLED.

WHEN in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.

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—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes, and all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed. But when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security. Such has been the patient Sufferance of these Colonies; and such is now the Necessity which constrains them to alter their former Systems of Government. The History of the present
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King of Great-Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid World.

HE has refused his Assent to Laws, the most wholesome and necessary for the public Good.

HE has forbidden his Governors to pass Laws of immediate and pressing Importance, unless suspended in their Operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

HE has refused to pass other Laws for the Accommodation of large Districts of People, unless those People would relinquish the Right of Representation in the Legislature, a Right inestimable to them, and formidable to Tyrants only.

HE has called together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records, for the sole Purpose of fatiguing them into Compliance with his Measures.

HE has dissolved Representative Houses repeatedly, for opposing with manly firmness his Invasions on the Rights of the People.

HE has refused for a long Time, after such Dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the Dangers of Invasion from without, and Convulsions within.

HE has endeavoured to prevent the Population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands.

HE has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

HE has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.

HE has erected a Multitude of new Offices, and sent hither Swarms of Officers to harrass our People, and eat out their Substance.

HE has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures.

HE has affected to render the Military independent of and superior to the Civil Power.
HE has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation.

FOR quartering large Bodies of Armed Troops among us:

FOR protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

FOR cutting off our Trade with all Parts of the World:

FOR imposing Taxes on us without our Consent:

FOR depriving us, in many Cases, of the Benefits of Trial by Jury:

FOR transporting us beyond Seas to be tried for pretended Offences:

FOR abolishing the free System of English Laws in a neighbouring Province, establishing therein an arbitrary Government, and enlarging its Boundaries, so as to render it at once an Example and fit Instrument for introducing the same absolute Rule into these Colonies:

FOR taking away our Charters, abolishing our most valuable Laws and altering fundamentally the Forms of our Governments:

FOR suspending our own Legislatures, and declaring themselves invested with Power to legislate for us in all Cases whatsoever.

HE has abdicated Government here, by declaring us out of his Protection and waging War against us.

HE has plundered our Seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our People.

HE is, at this Time, transporting large Armies of foreign Mercenaries to compleat the Works of Death, Desolation, and Tyranny, already begun with circumstances of Cruelty and Perfidy, scarcely paralleled in the most barbarous Ages, and totally unworthy the Head of a civilized Nation.

HE has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the Executioners of their Friends and Brethren, or to fall themselves by their Hands.

HE has excited domestic Insurrections amongst us, and has endeavoured to bring on the Inhabitants of our Frontiers, the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes and Conditions.

In every state of these Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury. A Prince, whose Character is thus marked by every act which may define a Tyrant, is unfit to be the Ruler of a free People.
NOR have we been wanting in Attentions to our British Brethren. We have warned them from Time to Time of Attempts by their Legislature to extend an unwarrantable Jurisdiction over us. We have reminded them of the Circumstances of our Emigration and Settlement here. We have appealed to their native Justice and Magnanimity, and we have conjured them by the Ties of our common Kindred to disavow these Usurpations, which, would inevitably interrupt our Connections and Correspondence. They too have been deaf to the Voice of Justice and of Consanguinity. We must, therefore, acquiesce in the Necessity, which denounces our Separation, and hold them, as we hold the rest of Mankind, Enemies in War, in Peace, Friends.

We, therefore, the Representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS, Assembled, appealing to the Supreme Judge of the World for the Rectitude of our Intentions, do, in the Name, and by the Authority of the good People of these Colonies, solemnly Publish and Declare, That these United Colonies are, and of right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all Allegiance to the British Crown, and that all political Connection between them and the State of Great-Britain, is and ought to be totally dissolved; and that as FREE AND INDEPENDENT STATES, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which INDEPENDENT STATES may of right do. And for the support of this Declaration, with a firm Reliance on the Protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

Signed by ORDER and in BEHALF of the CONGRESS,

JOHN HANCOCK, PRESIDENT.

ATTEST. CHARLES THOMSON, SECRETARY.

PHILADELPHIA: PRINTED BY JOHN DUNLAP.