
THE DECLARATION OF INDEPENDENCE AND CONTEMPORARY CONSTITUTIONAL PEDAGOGY

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The judicial opinions in *Dred Scott v. Sandford* debated whether the Declaration of Independence expressed an American aspiration to some form of racial equality. Chief Justice Taney insisted that the simultaneous American commitments in 1776 to the principles of the Declaration and to maintaining African Americans in human bondage demonstrated that the persons responsible for the Constitution of the United States did not regard persons of color as having any natural rights that “the white man was bound to respect.”¹ “[I]f the language” of the Declaration, “as understood in that day, would embrace [persons of color],” Taney stated, “the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.”² Justice Benjamin Curtis disagreed. His dissent insisted that the Declaration in 1776 articulated an American commitment to recognizing that persons of color had fundamental human rights. Curtis maintained,

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1. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

2. *Id.* at 410. *See also id.* at 502 (Campbell, J., concurring) (maintaining that the Declaration established thirteen independent sovereignties as part of an argument that each state had a joint interest in all American territories).

a calm comparison of these assertions of universal abstract truths, and of their own individual opinions and acts, would not leave these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them, nor true in itself, to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts.³

Few constitutional law classes teach the debate in *Dred Scott* between Taney and Curtis, or the contemporaneous debates among American abolitionists or between abolitionists and slaveholders,⁴ over how the Declaration should influence constitutional interpretation. Constitutional law textbooks focus almost exclusively on judicial decisions that are presently good constitutional law.⁵ *Dred Scott* was once good constitutional law, but that decision was reversed by the Thirteenth and Fourteenth Amendments. The Declaration was never constitutional law. *Dred Scott* is typically consigned to a class on constitutional history, although some constitutional law casebooks excerpt that decision.⁶ The Declaration makes appearances only in classes on American political thought, a class rarely if ever taught in American law schools.⁷ Constitutional law in the contemporary legal academy—as well as in most undergraduate programs⁸—is about the judicial rules for waste disposal handed down in such cases as *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*.⁹ Such classes neither cover nor expose potential

3. *Id.* at 574–75 (Curtis, J., dissenting).

4. See generally ALEXANDER TESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE (2012) (describing various abolitionist arguments around the time the Declaration was written).

5. But see *Lochner v. New York*, 198 U.S. 45 (1905) (the main exception to this practice).

6. See, e.g., PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 268–93 (6th ed. 2014).

7. None of the leading constitutional law casebooks include or excerpt the Declaration. The leading constitutional text in political science is similarly devoted entirely to judicial decisions. But see 1 Howard Gillman, Mark A. Graber & Keith E. Whittington, AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT 45–47 (2013) [hereinafter STRUCTURES OF GOVERNMENT]; 2 Howard Gillman, Mark A. Graber & Keith E. Whittington, AMERICAN CONSTITUTIONALISM: RIGHTS AND LIBERTIES 104–05 (2013) [hereinafter RIGHTS AND LIBERTIES] (including excerpts of the Declaration).

8. See Mark A. Graber, *Constitutionalism and Political Science: Imaginative Scholarship, Unimaginative Teaching*, 3 PERSP. ON POL. 135, 136 (2005), http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1312&context=fac_pubs.

9. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

lawyers to past debates over slavery and the fundamental regime principles underlying the American constitutional order articulated outside the courts in such documents as the Declaration.

This Article seeks to revive pedagogical attention to the Declaration as central to the basic constitutional law class and to legal education. The Declaration too often suffers from concerns with teaching to the bar examination and the tendency for constitutional law courses to focus on constitutional practice in courts. Both pedagogical practices are unfortunate. Practicing lawyers must interpret canonical legal texts as well as engage in straightforward application of black letter law. They must make constitutional arguments to elected officials, civil servants, and their fellow citizens, as well as to state and federal justices. The Declaration, while not a direct source of legal rules, plays vital roles both in the process of constitutional interpretation in the courts and the process of constitutional argument outside of courts. A law student who does not understand how such canonical texts function in American constitutionalism is not prepared for legal practice.

What practicing lawyers must know about the Declaration differs from what they must know about the standard materials taught in the traditional law and constitutional law classes. The conventional pedagogical canon consists of judicial decisions.¹⁰ Students must memorize the legal rules those judicial opinions established, be aware that members of the legal profession dispute whether some of those decisions are correctly decided, and develop the capacity to argue that those decisions should be reaffirmed or rejected, extended, or narrowed. They must know that *Roe v. Wade*¹¹ interpreted the due process clause as protecting abortion rights, but may dispute whether that interpretation was correct and whether the principles underlying *Roe* should be broadened to support a constitutional right to a state-funded abortion or narrowed to permit extensive state regulation of abortion clinics. By comparison, students must learn that while a general consensus exists that the Declaration states the fundamental principles underlying the American constitutional regime, lawyers dispute the best interpretation and application of those principles.¹² Rather than debate

10. See generally J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998) (describing the canons of constitutional law as studied in law schools and arguing that the current canonical tradition is narrowly focused on Supreme Court opinions).

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

12. American lawyers similarly agree that *Dred Scott* is a perversion of the principles underlying the American constitutional order, but disagree over why this is so. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 17 (2006) (“This agreement that *Dred Scott* was a ‘national calamity’ masks a deeper disagreement over exactly what was wrong with the Supreme

whether the principles underlying the Declaration should be reaffirmed or rejected, expanded, or narrowed, Americans struggle over the direction in which those principles of the Declaration should move constitutional politics. Whether *Roe* was correctly decided, a competent attorney must understand, depends to a fair degree on the precise regime principles underlying the Declaration. A political coalition that gains control over the dominant interpretation of such canonical texts as the Declaration will determine the life span of such cases as *Roe v. Wade*.

The Declaration also occupies a central role in the political constitution, which differs from the legal constitution studied in most constitutional law classes. Constitutional law classes typically require students to master only the legal constitution, the constitution that is a source of rules and rights one can argue for in a court of law. *Roe v. Wade* is taught in law classes because *Roe* is the crucial precedent underlying the constitutional right to an abortion. The Declaration is not the source of any important legal right.¹³ Instead, the Declaration is the central text of the political constitution, the major source of constitutional rules and rights when constitutional claims are made outside of the courtroom. Given how much legal practice takes place outside the courtroom and the substantial extent to which the political constitution bleeds into the legal constitution, practicing lawyers can neither serve clients nor public interests unless they are aware of the differences between the political constitution—in which the Declaration is the main source of constitutional rights—and the legal constitution—in which the Declaration is a vital means for interpreting other legal texts that are the sources of constitutional rights.

The following pages present the reasons for reintroducing the Declaration back into constitutional law and the legal curriculum. Part I details the frequent judicial practice of citing the Declaration in state and federal court opinions, and explores the different ways in which the Declaration is cited. This frequency of citation standing alone might constitute a good enough reason for teaching the Declaration, given that students ought to be familiar with the texts justices cite and the ways in which justices cite those texts. Part II discusses what law students (and their teachers) might learn from how the Declaration is cited in judicial opinions. Some lessons fall under the heading of strategic tips (like citing the Declaration when possible). The first of the more substantial lessons is

Court's decision in that case.").

13. *But see infra* Part I.C. (noting the Declaration provides some foundation for some legal claims).

that an important difference exists between legal texts that are direct sources of constitutional law and legal texts that are vital for interpreting the legal texts which are direct sources of constitutional law. The Declaration is the latter kind of text, and when cited in a legal context, should almost always be cited as an aid to legal interpretation rather than as a source of legal rights. The second more substantial lesson is that an important difference exists between how constitutional law is practiced in federal courts and how constitutional debates take place outside the courts.¹⁴ Arguments based on the Declaration that are routinely dismissed as failing to state a cause of action by federal judges have considerable cache outside of the courtroom, as Robert Bork and others have learned to their sorrow.¹⁵ The populist constitutional law centered on the Declaration that Mark Tushnet calls for¹⁶ has been quite vibrant outside the courts throughout much American history, though not always in ways that legal populists might wish.

Pedagogical approaches to constitutional law—often criticized as not really being about law—are crucial to what has been deemed the “practice ready lawyer.” Constitutional law is not a list of rules that one simply memorizes. Nor for that matter are torts, contracts, tax, trusts and estates, and all other subjects on the legal curriculum. Students must be taught the rhetorical techniques that enable the law to move in certain directions. High on the list of those techniques is the manipulation of such canonical texts as the Declaration. Law students should be aware that constitutionalism is practiced differently in federal and in state courts, as well as in judicial and non-judicial settings. Given that most lawyers will practice in more than one forum, law students should learn early in their careers that legal texts have different variances depending on the setting.

I. THE DECLARATION IN CONTEMPORARY AMERICAN CONSTITUTIONALISM

Contemporary federal and state opinions demonstrate the various roles the Declaration plays in contemporary American constitutionalism.¹⁷ More than two hundred federal court opinions and more than one hundred state court opinions penned during the second decade of the twenty-first century mention the Declaration.¹⁸ The Declaration is mentioned in more than one

14. State court practice occupies a middle ground.

15. See *infra* notes 49–51 and accompanying text.

16. See MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 6–7 (1999).

17. The information in this paragraph is based on Westlaw searches done in the summer of 2015.

18. My decision to begin with 2010 was based solely on making the survey contemporary and

thousand briefs submitted to courts from 2010 to the present. This compares favorably to the judicial decisions that are routinely studied in basic constitutional law classes. Federal and state judges are three times as likely to mention the Declaration as *Brown v. Board of Education*,¹⁹ and nearly twice as likely to mention the Declaration as *McCulloch v. Maryland*²⁰ or *Gibbons v. Ogden*.²¹ Federal and state briefs mention the Declaration almost as often as they mention *Buckley v. Valeo*,²² more than twice as frequently as they mention *Texas v. Johnson*²³ or *Regents of the University of California v. Bakke*²⁴ and ten times more often than they mention *Engel v. Vitale*.²⁵

Judges mention the Declaration in five contexts. Many citations assert that the Declaration does not provide the basis for a cause of action—federal causes of action in particular.²⁶ Judges and protestors sometimes refer to the Declaration when they have reason to mention a text that they are confident their audience will be familiar with and think of as valuable or important. Some opinions mention the Declaration when discussing the legal significance of the American separation from Great Britain. Others use the Declaration as an intensifier when emphasizing the importance of a particular right, practice, person, or state. The Declaration in some federal and many state court cases is cited as the source of regime principles, or basic American commitments that influence how the writer interprets the federal or state constitution.²⁷

Whether citations to the Declaration in legal opinions are window dressing that play no role in the actual judicial decision is unclear and may be pedagogically beside the point. Some political scientists claim that all the precedents routinely taught in constitutional law classes are window

manageable. None of the substantive information noted below would have changed significantly had the survey begun in 2008 or 2012.

19. *Brown v. Bd. Of Educ. of Topeka*, 347 U.S. 483 (1954).

20. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

21. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In general, cases taught in Constitutional Law II on civil rights tend to be cited far more often than cases taught in Constitutional Law I on powers and structures.

22. *Buckley v. Valeo*, 424 U.S. 1 (1976).

23. *Texas v. Johnson*, 491 U.S. 397 (1989).

24. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

25. *Engel v. Vitale*, 370 U.S. 421 (1962).

26. *See, e.g., Michael v. Letchinger*, No. 10C3897, 2011 U.S. Dist. LEXIS 86685, at *35 (N.D. Ill. Aug. 5, 2011) (holding that “the pursuit of happiness” is not an enforceable right); *Brodzki v. Wisconsin*, No. 11-CV-248-sic, 2011 U.S. Dist. LEXIS 45459, at *2 (W.D. Wis. Apr. 26, 2011) (recognizing that the Declaration is not binding law).

27. *See infra* Part I.A.

dressings that play no role in the actual judicial decision.²⁸ Citations to the Declaration, from this extreme legal-realist perspective, have no more or less persuasive impact than citations to case law or constitutional provisions. Law students interested in persuading justices, from this perspective, are better off learning some combination of what judicial decisionmakers have for breakfast, their favorite color, their ideological predilections, and their partisan affiliations. Still, to the extent the legal curriculum is designed to teach students to understand and manipulate the materials that typically appear in legal briefs and judicial opinions, the sheer number of citations to the Declaration seems a sufficient reason to teach students about the various roles the Declaration plays in legal opinions. Moreover, given the general consensus that values play some role in judicial decisionmaking, constitutional law classes devoted to teaching students how to persuade justices should focus on teaching students to manipulate such texts as the Declaration, which are sources of basic regime values, rather than focus obsessively on manipulating black letter law.

A. THE DECLARATION AS NOT-LAW

The Declaration is most commonly mentioned in federal and state court opinions as a text that is not a valid source of constitutional rights. Many judicial opinions mention the Declaration only when noting in passing that a plaintiff who based claims on the Declaration failed to state a legal cause of action. Quite frequently, those opinions indicate or clearly imply that the defendant was pro se or mentally ill. Many opinions explicitly state that the Declaration is not a valid source of constitutional law. For instance, *Michael v. Letchinger* maintained, “Although the Declaration of Independence provides that ‘the pursuit of Happiness’ is among the inalienable rights endowed all individuals, it is not an enforceable constitutional right.”²⁹ “The rights to pursue liberty and happiness are not contained in the Constitution,” a federal district court sternly reminded the plaintiff in *Hopkins v. Canton City Board of*

28. See HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 287 (2001); SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT 1946–1992, at 110 (1995). For criticisms of this view, see Howard Gillman, *What’s Law Got to Do With It? Judicial Behavioralists Test the “Legal Model” of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465, 466–68 (2001); Keith E. Whittington, *Once More Unto the Breach: Postbehavioralist Approaches to Judicial Politics*, 25 L. & SOC. INQUIRY 601, 628–32 (2000).

29. *Letchinger*, 2011 U.S. Dist. LEXIS 86685, at *35. See also *Brodzki*, 2011 U.S. Dist. LEXIS 45459, at *2 (“[T]he Declaration of Independence identifies the pursuit of happiness as an ‘inalienable right,’ but the Declaration of Independence is not binding law and cannot be enforced in the context of a § 1983 action.”).

Education, “but appear in the second section of the Declaration of Independence.”³⁰ A few judges admit that the plaintiffs may have stated a powerful, political claim for justice before denying their legal cause of action.³¹ A federal district court in Florida cited the Declaration as supporting the proposition that “[f]reedom to earn a living in the field of one’s choice is a significant liberty enjoyed in this nation.”³² Nevertheless, that liberty had no legal status: “[w]hile such decisions are fundamental in life,” the court concluded, “it is not a fundamental right guaranteed by the Constitution.”³³

That the Declaration is not a source of federal constitutional rights is hardly a reason to avoid teaching that document, even when the generically labeled “constitutional law” class is, in fact, limited to decisions interpreting the Constitution of the United States. Lawyers as well as pro se litigants are citing the Declaration as a source of federal law.³⁴ Students must therefore learn that federal courts do not regard as a legitimate cause of action claims based on such texts as the Declaration or, for that matter, the Preamble to the Constitution. Federal constitutional law as practiced in the United States concerns the interpretation and implementation of such specific constitutional provisions as the equal protection clause of the Fourteenth Amendment and not such uber-texts as the Declaration or the Gettysburg Address.

Pro se and other defendants who cite the Declaration in the courtroom are best conceptualized as confusing the political and legal constitution than failing to make constitutional arguments. Elite judges and lawyers know that the Declaration is not the legal foundation of any right, but the Declaration plays that foundational role in constitutionalism outside the courts. Much legal practice consists of making constitutional arguments to elected officials and the general public, yet these arguments have historically been rooted in the Declaration. Practicing lawyers ignore them at their peril.

A substantial gap between the legal and political constitution has existed throughout American history. Americans from all walks of life make constitutional claims on government officials not knowing,

30. *Hopkins v. Canton City Bd. of Educ.*, No. 5:08CV2288, 2011 U.S. Dist. LEXIS 63183, at *9 n.2 (N.D. Ohio June 23, 2010) (italics omitted).

31. *See, e.g., Avera v. United Air Lines*, 686 F. Supp. 2d 1262, 1274–75 (N.D. Fla. 2010).

32. *Id.* at 1274.

33. *Id.* at 1275.

34. *See, e.g., Little v. Martin-Morris*, No. C11-91-GK, 2011 U.S. Dist. LEXIS 57583, at *2 (W.D. Wash. May 25, 2011).

indifferent to, or in defiance of existing legal practices. George Lovell details how “ordinary people have the capacity to use rights and other legal discourses expansively to frame demands for entitlements that go well beyond what legal authorities establish as official law.”³⁵ Abolitionists invoked the Declaration when condemning slavery, fully aware that claims based on Thomas Jefferson’s declaration “all men are created equal” would not stand up in federal court.³⁶ Lovell details the numerous letters the Civil Rights Division of the Justice Department received during the late 1930s that made claims similar or identical to those contemporary litigants make when citing the Declaration.

These broad-based claims based on the Declaration often have substantial cache in popular constitutional culture. Federal lawyers could foreclose legal consideration of these rights claims rooted in the Declaration made during the New Deal by tersely responding “This is Not Civil Rights” to petitions for help,³⁷ just as contemporary judges foreclose such claims by declaring that the petitioner has not stated a cause of action. Nevertheless, political movements have gained control of the political constitution by waving banners inscribed with quotations from the Declaration. Lincoln and members of the Republican Party, during their successful campaign to control the national government, repeatedly invoked the Declaration when asserting a constitutional commitment to the abolition of slavery.³⁸ Members of the contemporary Tea Party are gaining political traction by “pledg[ing] to each other . . . our Lives, our Fortunes, and our sacred Honor”³⁹ when interpreting the Declaration as providing the foundation for their constitutional vision.⁴⁰

The success of popular, political movements that derive their constitutional claims from the Declaration demonstrate the power of what Mark Tushnet calls “the thin Constitution.”⁴¹ Tushnet’s claim that legal elites should interpret the Constitution as only requiring that Americans

35. GEORGE I. LOVELL, THIS IS NOT CIVIL RIGHTS: DISCOVERING RIGHTS TALK IN 1939 AMERICA 10 (2012).

36. TSESIS, *supra* note 4, at 61–62.

37. LOVELL, *supra* note 35, at 2.

38. See Abraham Lincoln, *Speech in Independence Hall, Philadelphia, Pennsylvania*, in 4 COLLECTED WORKS OF ABRAHAM LINCOLN, 241 (Roy P. Basler ed.) (1953) (“I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence.”).

39. THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776).

40. See TEA PARTY, www.teaparty.org/about-us/ (last visited Feb. 18, 2016).

41. TUSHNET, *supra* note 16, at 9–11.

remain faithful to the Declaration⁴² is a fair description of popular constitutional practice at present and throughout much of the American constitutional experience. Given the pervasiveness of such rhetoric in the American political system, an exclusive focus on legalities rather than popular understandings may be fatal to the practicing lawyer. Practicing lawyers should be aware that appeals to the Declaration when defending a right to abortion at a town meeting or the right to bear arms at a legislative hearing are often persuasive, and certainly far more persuasive than detailing a long list of legal precedents.

Robert Bork's failed nomination to the Supreme Court of the United States is a textbook example of consequences that result when legal experts confuse the political and legal constitution. Then-Senator Joseph Biden began the Bork hearings by stating his commitment to the principles underlying the Declaration. He spoke of the promise made when Americans declared "all men are created equal" and he maintained, "I believe all Americans are born with certain inalienable rights."⁴³ Bork responded with a technical theory of constitutional interpretation. He told the Senate and the viewing audience, "The only legitimate way" that a judge could make decisions was "by attempting to discern what those who made the law intended."⁴⁴ That may have been the better constitutional law examination answer, but Biden easily triumphed in the court of public opinion. By responding to questions with legal jargon rather than political symbols such as the Declaration, "Bork looked, and talked, like a man who would throw the book at you—maybe a man who would throw the book at the whole country."⁴⁵

B. CELEBRITY CITATIONS

Many justices mention the Declaration when making celebrity citations. Just as celebrities are famous for being famous, so a celebrity citation is chosen primarily because the text or person is well-known to the audience. When justices want to cite a case well known to their audience, they usually choose *Brown v. Board of Education*.⁴⁶ When justices want to cite a text well known to their audience, they often choose the Declaration,

42. *See id.* at 12.

43. STRUCTURES OF GOVERNMENT, *supra* note 7, at 578–79 (reprinting excerpt from Senate Judiciary Hearings on the Nomination of Robert Bork).

44. *Id.* at 579.

45. L.A. Powe, Jr., *From Bork to Souter*, 27 WILLAMETTE L. REV. 781, 794 (1991).

46. *See generally* Mark A. Graber, *The Price of Fame: Brown as Celebrity*, 69 Ohio St. L.J. 939 (2008) (discussing how courts have cited to *Brown* since it was decided).

confident that their audience understands the reference.⁴⁷ A judge in Delaware made an analogy to a person who thinks he or she has found an old copy of the Declaration in the attic.⁴⁸ A Minnesota judge pointed to the Declaration when elaborating the different meanings of “pursuit.”⁴⁹ When judges complain about the length of a brief, they note that Jefferson accomplished his goals in less than 1,500 words.⁵⁰

Celebrity citations are more important to the practicing attorney than may at first appear. A central problem when making analogies (or writing law school examinations) is finding subjects that are well known to the relevant audience and unlikely to cause offense. The standard problem with sports analogies is that some members of the intended audience do not know the name of the local sports hero, and even if they have heard of, say, Michael Jordan, they may feel offended by a gendered reference to a sports figure or may have a visceral dislike of that person. Citing such canonical constitutional texts as the Declaration avoids these difficulties. People who read judicial opinions are likely to be sufficiently familiar with the Declaration to make the analogy work. Readers are likely to approve of the Declaration, thus preventing the point of the analogy from becoming rhetorically lost in a way that might have occurred had the judge or lawyer, needing to cite a random text, chose *Mein Kampf*. *Anderson v. City of Hermosa Beach*⁵¹ provides a good example of the effective use of the Declaration as a celebrity citation. When discussing constitutional protections for tattoos, the court noted:

[T]he entire purpose of tattooing is to produce the tattoo, and the tattoo cannot be created without the tattooing process any more than the Declaration of Independence could have been created without a goose quill, foolscap, and ink. Thus, as with writing or painting, the tattooing process is inextricably intertwined with the purely expressive product (the tattoo), and is itself entitled to full First Amendment protection.⁵²

In theory, any document produced with a goose quill (or any written

47. See, e.g., *JL Powell Clothing LLC v. Powell*, No. 2:13-CV-00160-NT, 2014 U.S. Dist. LEXIS 11482, at *49 n. 20 (D. Me. 2014) (noting John Hancock’s signature on the Declaration as a particularly distinctive trademark).

48. *Lake Treasure Holdings, Ltd. v. Foundry Hill GP LLC*, No. 6546-VCL, 2014 Del. Ch. LEXIS 205, at *48 n.1 (Oct. 10, 2014).

49. *State v. Schmid*, 840 N.W. 2d 843, 846 (Minn. Ct. App. 2013).

50. *United States v. Norris*, 753 F. Supp. 2d 492, 500 n.1 (E.D. Pa. 2010) (noting that “the Declaration of Independence required only 1,321 words to establish for the world a new concept of freedom” when criticizing a defense memorandum “containing 105 substantive pages totaling roughly 35,000 words”).

51. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010).

52. *Id.* at 1062.

document) would have served the analogy's purpose. The Declaration makes the analogy far more compelling. An American audience is aware of the Declaration, knows it was written, and regards it as epitomizing a text that merits constitutional protection.

The Declaration as a celebrity appears in judicial opinions when judges describe the use of that text during protests against restrictions on speech or other democratic freedoms. In *Kanelos v. County of Mohave*, a district court in Arizona pointed out that the petitioner had been sanctioned for handing out copies of the Declaration near the entrance of a government building in violation of an ordinance against speech at that facility.⁵³ In theory, Jim Kanelos (the petitioner) could have handed out any constitutionally permitted text outside the Mohave County Administrative Building. He no doubt chose the Declaration because that text is the paradigmatic document that Americans should be able to share with each other. By framing the issue as the right to hand out the Declaration rather than the right to speak more generally, Kanelos could guarantee that side issues about whether the particular text he distributed was appropriate would not distract the litigation and would appeal to the popular support for the Declaration.⁵⁴

C. THE DECLARATION AS LAW

Legal elites who claim the Declaration is not generally a valid source of constitutional rights recognize the legal significance of the Declaration as the text that declared the United States legally separate from Great Britain.⁵⁵ That decision had legal consequences. After the Declaration was issued, legal authority in the United States moved from the King and Parliament to the states and the Continental Congress. Several opinions handed down in the second decade of the twenty-first century cite the Declaration for the proposition that states gained sovereign powers after the

53. *Kanelos v. Cty. of Mohave*, 893 F. Supp. 2d 1001, 1006 (D. Ariz. 2012).

54. *See Occupy Nashville v. Haslam*, 949 F. Supp. 2d 777, 789 (M.D. Tenn. 2013) (noting that protestors recited the Declaration). Reading from the Declaration hardly guarantees that free speech rights will be protected, as members of the International Workers of the World ("Wobblies") understood at the turn of the twentieth century. Still, Wobblies understood that because of the significance of the Declaration in American culture, being arrested for reading the Declaration in a public space created far more favorable publicity than being arrested for reading Marx in a public space. *See* Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917–1927*, 85 OR. L. REV. 649, 683–84 (2006).

55. One might nevertheless note that several states declared independence before July 4, 1776. *See, e.g.*, 4 *American Archives, Ser. No. 4*, at 1030 (Peter Force ed., M. St. Clair Clark & Peter Force 1843); *Charters and Legislative Documents Illustrative of Rhode-Island History* (Knowles & Vose 1844).

Declaration was promulgated that they have not fully relinquished. The Seventh Circuit declared, “From the time of the Declaration of Independence until the Constitution of 1787 took effect, the states were fully sovereign in the international sense of the term; they were States, just as modern-day France, Japan, or India are States today.”⁵⁶ The Delaware Court of Chancery quoted the Declaration when explaining why that state had residual state sovereignty. When “the Second Continental Congress unanimously adopted the Declaration of Independence,” the court stated, “Delaware became a ‘Free and Independent State . . . [empowered] to do all . . . Acts and Things which Independent States may by right do.’”⁵⁷ Other state courts have invoked the Declaration when justifying the independent significance of the state bill of rights⁵⁸ or when claiming title over riverbeds located within the state.⁵⁹

The Declaration is cited as a marker for when English legal precedent is and is not a source of American law. This shift in the legal status of English precedent forms the basis of two aspects of American law. English practice before July 4, 1776 is legally relevant when determining the meaning of constitutional provisions. Thus, the Supreme Court in *Citizens United v. FEC* cited numerous cases detailing how the English experience during the seventeenth century with licensing laws is relevant to interpreting the First Amendment, but ignored Fox’s Libel Law.⁶⁰ *Collazo v. Warden* emphasized that “the general rule . . . that if there is any one count to support the verdicts, it shall stand good” was sound constitutional law in the United States, even though rooted in English precedent, because that principle was announced by “Lord Mansfield before the Declaration of Independence.”⁶¹ Contemporary judicial opinions regularly point to English common law at the time of the American Revolution as a valid source for determining constitutional, criminal, and civil procedure. “Reception of British law before and at the time of the Declaration of Independence,” *United States v. Polouizzi* notes, “makes contemporary English practice particularly important in construing the Sixth

56. *Bd. of Regents of the Univ. of Wis. Sys. v. Phx. Int’l Software, Inc.*, 653 F.3d 448, 471 (7th Cir. 2011).

57. *Town Council of Ocean View v. Brown*, No. CA 4969-VCL, 2010 Del. Ch. LEXIS 122, at *2 (May 27, 2010). *See also* *Treasurer of N.J. v. U.S. Dep’t of Treasury*, 684 F.3d 382, 405 (3d Cir. 2012) (“[T]he States assert that ‘Treasury’s refusal to comply with state laws governing unclaimed property usurps sovereign power exercised by the states since the Declaration of Independence’”).

58. *State v. Baldon*, 829 N.W. 2d 785, 804 (Iowa 2013) (Appell, J., concurring).

59. *North Carolina ex rel. N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc.*, 989 F. Supp. 2d 479, 481 (E.D.N.C. 2013).

60. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 335 (2010).

61. *See Collazo*, 2013 Conn. Super. LEXIS 1108, at *19.

Amendment.”⁶² *Satterwhite v. Commonwealth* relied on a Texas court’s statement that “the Virginia court adheres to the rule announced in all the other States, that if the testimony was admissible in England at the date of the Declaration of Independence, the testimony is admissible and is not violative of the Constitution.”⁶³

What states did in the immediate wake of the Declaration similarly plays a crucial role in constitutional analysis. If states adopted some constitutional practice immediately before or after 1776, then that is considered evidence of the original meaning of federal and state constitutional provisions. The Supreme Court of Utah observed, “By the time of the Declaration of Independence, the American colonies also recognized either an oath or an affirmation as a valid procedure for certifying witnesses.”⁶⁴ The Supreme Court of Georgia quoted a previous decision of the Supreme Court of the United States when declaring, “After the Declaration of Independence, the right of self-representation, along with the other rights basic to the making of a defense, entered the new state constitutions in wholesale fashion.”⁶⁵

D. THE DECLARATION AS AN INTENSIFIER

Judges cite the Declaration when highlighting the significance of a legal rule, political principle, person, or place. The legal analysis in many of the opinions cited in this subsection begin with the observation that Thomas Jefferson accused King George III of violating the same right at issue in the proceeding before the court. In *Brundage v. Cumberland County*,⁶⁶ the court mentioned that an early draft of the Declaration spoke of property when asserting the historical importance of property rights.⁶⁷ The opinion does not interpret the relevant constitutional right or principle in light of how Jefferson or the Continental Congress understood that right. Instead, the judge invokes the Declaration when stressing the centrality of

62. *United States v. Polouizzi*, 687 F. Supp. 2d 133, 168 (E.D.N.Y. 2010). *See also* *Commonwealth v. Ricker*, No. 1693 MDA 2014, 2015 Pa. Super. LEXIS 410, at *20 (July 17, 2015) (discussing the purpose of early English preliminary hearings in the context of interpreting the Pennsylvania Constitution’s equivalent of the Confrontation Clause).

63. *Satterwhite v. Commonwealth*, 695 S.E.2d 555, 559 (Va. Ct. App. 2011). *See also* *State v. Berry*, 707 S.E.2d 831, 838 (W. Va. 2011) (“It was settled law in England before the Declaration of Independence, and in this country long afterwards, that a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds—even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury’s action.”).

64. *State v. Gutierrez-Perez*, 337 P.3d 205, 209–10 (Utah 2014).

65. *Smith v. Baptiste*, 694 S.E.2d 83, 91 (Ga. 2010).

66. *Brundage v. Cumberland Cty.*, 357 S.W.3d 361 (Tenn. 2011)

67. *Id.* at 365.

that right or principle to the American constitutional regime. Some judicial opinions similarly point out that a particular person signed the Declaration as a means to emphasize their importance. The Supreme Court of Oklahoma noted that the Declaration makes no reference to the Decalogue when discounting the role of the Ten Commandments in the American constitutional order.⁶⁸

The survey of recent federal and state opinions suggests that contemporary judges may think British interference with the judiciary was the primary cause of the American Revolution.⁶⁹ Of the nineteen federal court opinions that mention a specific grievance cited in the Declaration, fourteen concern the judiciary and nine concern judicial independence or judicial salaries. Of the seventeen state court opinions that mention a specific grievance, thirteen concern the judiciary and eleven concern trial by jury. The only grievances mentioned in more than one opinion that do not concern the judiciary concern the right to petition and the royal “swarms” of bureaucrats that entered the colonies.⁷⁰ Judges often respond less favorably when litigants base claims on different grievances unrelated to the judiciary enumerated in the Declaration. *United States v. Ross* spoke of the “hackneyed tax protester refrain” when petitioners claimed they were being taxed without their consent in violation of principles stated in the Declaration.⁷¹

Jefferson’s complaint that King George III made “[j]udges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries,” is the passage in the Declaration most often cited by federal judicial opinions written during the second decade of the twenty-first century. Chief Justice John Roberts quoted that passage in *Stern v. Marshall* when explaining why Article III judges had life tenure and why “the other branches of the Federal Government could [not] confer the Government’s ‘judicial power’ on entities outside Article III.”⁷² Federal

68. *Prescott v. Okla. Capitol Pres. Comm’n*, No. 113, 332, 2015 Okla. LEXIS 72, at *29–30 (June 30, 2015) (Taylor & Gurich, JJ., concurring).

69. These searches were conducted in the summer of 2015 using Westlaw.

70. See, e.g., *Commonwealth v. Gary*, 91 A.3d 102, 144 (Pa. 2014); *Tucker v. Comm’r of Internal Revenue*, 135 T.C. 114, 120 (2010).

71. *United States v. Ross*, No. 3:11-CR-032, 2012 U.S. Dist. LEXIS 128903, at *2 (E.D. Tenn. Filed Sept. 11, 2012).

72. *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011). For other federal court opinions citing the relevant passage of the Declaration when discussing the powers of non-Article III judges, see *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1950–51 (2015) (Roberts, J., dissenting); *In re Arceo Capital Mgmt., LLP*, 479 B.R. 254, 261 (S.D.N.Y. 2012); *In re Sutton*, 470 B.R. 462, 467 (Bankr. W.D. Mich. 2012). See also *In re Renewable Energy Dev. Corp.*, 792 F.3d 1274, 1276 (10th Cir. 2015); *In re Teleservices Grp.*, 456 B.R. 318, 326 (Bankr. W.D. Mich. 2011).

and state judges are particularly enthusiastic about the Declaration when Congress tinkers with their compensation package. The Federal Circuit cited the Declaration in an opinion declaring unconstitutional a congressional effort to change the automatic cost of living adjustments for judges.⁷³ When New Jersey attempted to change the way in which state judges paid for their health care, the Supreme Court of that state declared that measure unconstitutional, citing the above passage in the Declaration on judicial compensation as demonstrating the importance of keeping judicial salaries free from political interference.⁷⁴ Other courts have quoted Jefferson's concern with "making Judges dependent upon his Will" when sustaining laws limiting judicial speech during political campaigns⁷⁵ and when refusing to recuse themselves.⁷⁶

Federal and state judges are also fond of quoting the passage in the Declaration in which Jefferson accuses George III of "depriving us in many cases, of the benefits of trial by jury."⁷⁷ A court in Illinois noted, "The right of trial by jury is recognized in the Magna Charta, our Declaration of Independence."⁷⁸ A Florida judge wrote,

Waiver of the right to a jury is a matter of great consequence. The jury trial reflects the ideals of democracy, local decision making, and civic virtue upon which our form of government is built. It is no coincidence that trial by jury is expressly mentioned in the Declaration of Independence⁷⁹

The Supreme Court of Mississippi cited Jefferson's grievance about the denial of jury trials when insisting that a judge must instruct a jury on all elements of a crime.⁸⁰ A lower federal court invoked Jefferson when holding that the Due Process Clause of the Fourteenth Amendment incorporated the Jury Clause of the Seventh Amendment.⁸¹ One state judge was quite explicit that the Declaration helped sway his opinion on the importance of a jury trial. He wrote,

73. *Beer v. United States*, 696 F.3d 1174, 1183 (Fed. Cir. 2012).

74. *DePascale v. State*, 47 A.3d 690, 696 (N.J. 2012).

75. *See, e.g., Wersal v. Sexton*, 674 F.3d 1010, 1034 (8th Cir. 2012).

76. *See, e.g., State v. Wright*, No. 91004136D1, 2014 Del. Super. LEXIS 654, at *68–69 (Dec. 16, 2014).

77. The Declaration of Independence para. 3 (U.S. 1776).

78. *Ney v. Yellow Cab Co.*, 117 N.E.2d 74, 84 (Ill. App. Ct. 1954).

79. *Mendez v. Hampton Ct. Nursing Ctr., LLC*, 140 So. 3d 671, 676 (Fla. Dist. Ct. App. 2014).

80. *Harrell v. State*, 134 So. 3d 266, 270–71 (Miss. 2014).

81. *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.*, 27 F. Supp. 3d 265, 273–74 (D.P.R. 2014).

I do find when I look back on this on deep thought and after I heard the argument at the end of May, I initially thought it was harmless error, the more I thought about it and it just took me a few hours after more thought to think I couldn't let that decision stand. And I'll tell you why. It is clear to me that in the Declaration of Independence from about seven generations we had to suffer under England not letting us have jury trials and then for about the last 235 years on earth that'd be about maybe nine generations, we've had the right to a jury trial. And then the Sixth Amendment permits counsel and a public trial and a jury trial. And I simply couldn't stand to see that Defendant in this case at bar be deprived the right of a jury trial with the right to counsel, right to present witnesses and right to go forward and have his witnesses come forward.⁸²

Judges enhance the status of various persons mentioned in their opinions by observing that those persons signed the Declaration. Most often, judges do so when making arguments about the original meaning of the Constitution. In an opinion holding that the death penalty did not violate the state constitution, the Maryland Court of Appeals pointed out that three members of the committee that drafted the Maryland Declaration of Rights, which made reference to the constitutional use of capital punishment, also signed the Declaration.⁸³ A Connecticut court noted that more than half the persons who signed the Declaration were lawyers when concluding that legislative lobbying can be considered the practice of law.⁸⁴ In other cases, being a signer of the Declaration may be invoked simply as a way of informing readers that an apparently obscure figure was someone of importance during the late eighteenth century. The Supreme Court of Pennsylvania made special note that Thomas McKean had signed the Declaration when commenting that McKean had thanked Steven Girard for public services.⁸⁵ Places as well as persons may benefit from their association with the Declaration. An Iowa opinion sought to enhance the importance of Pennsylvania practice by noting that Pennsylvania was the state where the Declaration was signed.⁸⁶

82. *People v. Mitchell*, No. 311147, 2014 Mich. App. LEXIS 2139, at *5–6 (Nov. 14, 2014) (per curiam) (citing circuit court judge).

83. *Miles v. State*, 80 A.3d 242, 260, 261 & n.17 (Md. 2013).

84. *Bysiewicz v. Dinardo*, No. HHDCV1060081945, 2010 Conn. Super. LEXIS 1149, at *145 (May 5, 2010). *See also Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement*, 998 F. Supp. 2d 957, 964 (D. Or. 2014) (noting that a number of signers of the Declaration were physicians required to sign an oath swearing to preserve patient confidentiality).

85. *City of Philadelphia v. Cumberland Cty. Bd. of Assessment Appeals*, 81 A.3d 24, 27 (Penn. 2013).

86. *U.S. v. Young*, 960 F. Supp. 2d 881, 902 (N.D. Iowa 2013).

E. THE DECLARATION AS REGIME PRINCIPLE

Federal and state judges cite the Declaration when elaborating the basic regime principles they use for interpreting the Constitution. Justice Ruth Bader Ginsburg engaged in this citation practice when quoting from the Declaration in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.⁸⁷ The issue in that case was whether the word “legislature” in the elections clause of Article I, Section 3 should be interpreted as encompassing the people of a state acting as a whole through a referendum. Justice Ginsburg began from the premise that all government powers in the United States are derived from the people.⁸⁸ The Declaration of Independence was the source of this regime principle. “Our Declaration of Independence,” she wrote, states that “Governments are instituted among Men, deriving their just powers from the consent of the governed.”⁸⁹ This master principle of government by consent supported the power of the people of Arizona to act as a legislature through a referendum that created an independent commission to redistrict state legislative districts. “In this light,” Ginsburg concluded,

[I]t would be perverse to interpret the term ‘Legislature’ in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators’ ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be ‘chosen . . . by the People of the several States.’⁹⁰

The Declaration played a prominent role in many judicial opinions discussing the constitutionality of same-sex marriage. Justice Clarence Thomas and the late Justice Antonin Scalia invoked the Declaration when detailing the regime principles underlying what they believed should have been the correct decision in *Obergefell v. Hodges*.⁹¹ Justice Scalia cited the Declaration as standing for the principle of government by consent of the governed. From this regime principle, he concluded that the Supreme Court should have allowed the people of each state through the electoral process to determine whether same-sex couples have a right to marry. The Supreme Court’s decision in *Obergefell*, he claims, “robs the people of the most important liberty they asserted in the Declaration of Independence and won

87. *Ariz. St. Leg. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2675 (2015).

88. *Id.* at 2668.

89. *Id.* at 2665 (citations omitted).

90. *Id.* at 2675.

91. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627, 2631 (2015) (Scalia & Thomas, JJ., dissenting).

in the Revolution of 1776: the freedom to govern themselves.”⁹² Justice Thomas cited the Declaration as standing for the principles “that human dignity is innate”⁹³ and that constitutional liberty is freedom from government restriction. He declared, “Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One’s liberty, not to mention one’s dignity, was something to be shielded from—not provided by—the State.”⁹⁴ From this master principle, he reached the conclusion that denying same-sex couples the right to marry could not deny them of human dignity or liberty because human laws are incapable of taking away fundamental human dignity and because government does not deprive persons of liberty by refusing to authorize or recognize their marriages. Although the majority opinion in *Obergefell* did not cite the Declaration, the Declaration was cited as providing the regime principle underlying support for same-sex marriage by several lower federal court opinions. A federal district judge, when ruling that the Wisconsin ban on same-sex marriage was unconstitutional, declared, “we view marriage as essential to the pursuit of happiness, one of the inalienable rights in our Declaration of Independence.”⁹⁵ A federal judge in Virginia, when ruling the state’s ban on same-sex marriage was unconstitutional, began her opinion by declaring, “Our Declaration of Independence recognizes that ‘all men’ are created equal. Surely this means all of us.”⁹⁶

Jefferson’s assertion that persons have inalienable rights is a particularly popular principle for interpreting rights provisions in the federal and state constitutions. The Supreme Court of Mississippi insisted on hearing a claim that constitutional rights were denied during the sentencing process because of “the deprivation of liberty—that inalienable, natural right inherent in all persons since time immemorial.”⁹⁷ The Supreme Court of Texas twice invoked the Declaration’s promise of liberty when finding that plaintiffs had a constitutional right to practice cosmetology without a state license.⁹⁸ Jefferson’s words were first cited for the proposition that the American constitutional regime was committed to individual freedom rather than majority rule:

92. *Id.* at 2627 (Scalia, J., dissenting).

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

94. *Id.* at 2639–40 (Thomas, J., dissenting).

95. *Wolf v. Walker*, 986 F. Supp. 2d 982, 987 (W.D. Wisc. 2014).

96. *Bostic v. Rainey*, 970 F. Supp. 2d 456, 460 (E.D. Va. 2014).

97. *Rowland v. State*, 98 So. 3d 1032, 1036 (Miss. 2012).

98. *Patel v. Texas Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 92–96 (Tex. 2015) (Willett, J., concurring).

[O]ur federal and state charters are not, contrary to popular belief, about “democracy”—a word that appears in neither document, nor in the Declaration of Independence. . . . Government exists . . . to secure pre-existing rights, as the Declaration makes clear in its first two sentences.⁹⁹

The court then cited the Declaration for the proposition that occupational freedom was a fundamental right. After repeating the Declaration’s assertion that “Governments are ‘instituted among Men’ to ‘secure’ preexisting, ‘unalienable Rights,’” the opinion in *Patel v. Texas Department of Licensing & Regulation* continued, “Occupational freedom, the right to earn a living as one chooses, is a nontrivial constitutional right entitled to nontrivial judicial protection. People are owed liberty by virtue of their very humanity—‘endowed by their Creator,’ as the Declaration affirms.”¹⁰⁰ The Supreme Court of Washington paid homage to the Declaration when reversing a conviction for obstructing the police. The opinion first quoted the Declaration and then asserted,

This second sentence of our Declaration of Independence encapsulates the moral ideal to which we must strive if we are to be true to our best heritage. Abraham Lincoln believed the Declaration represented principles through which the United States Constitution should be interpreted. . . . I agree.¹⁰¹

Judges frequently cite the Declaration as stating principles bearing on the federal and state constitutional rules governing voting and elections. Many judicial decisions quote Justice William O. Douglas’s assertion in *Gray v. Sanders* that “[t]he 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.”¹⁰² Several courts cited the Declaration as supporting claims that governing officials must ensure that special elections to fill open legislative seats take place with some dispatch. The Supreme Court of Appeals of West Virginia made reference to the Declaration when justifying a decision to issue a writ a mandamus that ordered the state to fix a time for a special gubernatorial election:

99. *Id.* at 92–96.

100. *Id.* at 122–23.

101. *State v. E.J.J.*, 183 Wash. 2d 497, 526 (2015) (Gonzalez, J., concurring).

102. *Gray v. Sanders*, 372 U.S. 368, 381 (1963). *See also* *Harris v. Indep. Redistricting Comm’n*, 993 F. Supp. 2d 1042, 1104 (D. Ariz. 2014); *NAACP-Greensboro v. Guilford Cty. Bd. of Elections*, 858 F. Supp. 2d 516, 523 n.11 (M.D.N.C. 2012); *Bd. of Educ. v. Memphis City Bd. of Educ.*, No. 11-2101, 2011 U.S. Dist. LEXIS 87803, at *40 (W.D. Tenn. Aug. 8, 2011); *Guillory v. Avoyelles Parish Sch. Bd.*, No. 1:10-cv-1724, 2011 U.S. Dist. LEXIS 16141, at *19 (W.D. La. Feb. 7, 2011); *Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 711, 739 (Pa. 2012); *Rock v. Lankford*, 301 P.3d 1075, 1083 n.3 (Wyo. 2013); *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 399 n.1 (W. Va. 2012).

The American constitutional system, under which West Virginia's government is organized . . . changed substantially the operative theory of sovereignty and identified the sovereign, whose will legitimizes authority, as the people. Virginia Declaration of Rights, c. 1, § 2 (May 6, 1776); the Declaration of Independence (July 4, 1776); U.S. Const. Preamble; W. Va. Const. art. 2, § 2.¹⁰³

A dissent to an opinion refusing to authorize a recall election maintained, “The power of recall has deep historical roots, blossoming from fundamental notions of popular sovereignty, that is, that all power resides with the people and that it is only by their consent that the people may be governed. That doctrine finds its most familiar expression in the Declaration of Independence.”¹⁰⁴

Religion is another matter on which the Declaration makes frequent appearances. Justice Elena Kagan in 2014, quoting from an earlier opinion penned by Justice Scalia, maintained, “[O]ur constitutional tradition, from the Declaration of Independence . . . down to the present day, has . . . ruled out of order government-sponsored endorsement of religion.”¹⁰⁵ Many state and federal cases determine whether government displays may include the Ten Commandments if the Declaration is also included. Local officials maintain, almost always unsuccessfully, that both the Declaration and Ten Commandments are statements of the fundamental principles underlying the American constitutional regime.¹⁰⁶ In *ACLU of Ohio Foundation, Inc. v. DeWeese*,¹⁰⁷ a judge was required to take down a poster in his courtroom reading, “The Declaration of Independence acknowledges God as Creator.”¹⁰⁸ Persons seeking public recognition of religion in other contexts have more successfully invoked the Declaration. The Supreme Judicial Court of Massachusetts refused to declare recitations of the Pledge of

103. *State ex rel. W. Va. Citizen Action Grp. v. Tomblin*, 715 S.E.2d 36, 44 (W. Va. 2011) (quoting *State ex rel. Skinner v. Dostert*, 278 S.E.2d 624, 629 (W. Va. 1981)). *See also* *Rossito-Canty v. Uomo*, No. 15-CV-0568, 2015 U.S. Dist. LEXIS 18796 (E.D.N.Y. Feb. 16, 2015).

104. *Comm. to Recall Robert Menendez from the Office of U.S. Sen. v. Wells*, 7 A.3d 720, 763 (N.J. 2010) (Rivera-Soto & Hoens, JJ., dissenting).

105. *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1843 (2014).

106. *See generally* *Felix v. City of Bloomfield*, 36 F. Supp. 3d 1233 (D.N.M. 2014); *Am. Humanist Ass'n v. City of Lake Elsinore*, No. 5:13-cv-00989-SVW-OPx, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014). *See also* *Freedom from Religion Found., Inc. v. Saccone*, 894 F. Supp. 2d 573, 576 (M.D. Pa. 2012) (discussing failed legislative effort to justify a resolution declaring the year of the Bible in part because “biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States”).

107. *ACLU of Ohio Found. v. DeWeese*, 633 F.3d 424 (6th Cir. 2011).

108. *Id.* at 428. *See also* *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 974 (9th Cir. 2011) (requiring teacher to take down banner acknowledging God as the creator, even though the banner included religious references in the Declaration).

Allegiance unconstitutional in part because the congressional report in 1954, which added the phrase “under God” to the pledge, “identifie[d] a number of historical statements and documents of the founding fathers and subsequent national leaders that refer expressly to ‘God,’ ‘Nature’s God,’ the ‘Creator,’ and like terms, . . . including the Mayflower Compact, the Declaration of Independence, and the Gettysburg Address.”¹⁰⁹ A lower state court in Louisiana quoted the same language in the Declaration when recognizing the right of a priest to keep confessions confidential.¹¹⁰

State court judges are more inclined than federal court judges to cite the Declaration as a source of regime principles partly because, in sharp contrast to the federal constitution, the Declaration is embedded in most state constitutions. Numerous state constitutions or state bills of right have provisions that paraphrase the first sentences in the Declaration’s second paragraph.¹¹¹ Article I of the Maryland Declaration of Rights states, “That all Government of right originates from the People, is founded in compact only, and is instituted solely for the good of the whole; and they have, at all times, the inalienable right to alter, reform or abolish their Form of Government in such manner as they may deem expedient.”¹¹² Article I, Section 2 of the Constitution of the State of Hawaii states, “All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property.”¹¹³ Federal law during the nineteenth century required some state constitutions to incorporate the Declaration. When authorizing many state constitutions during the late nineteenth century, Congress declared that the fundamental law of the state must be consistent with the Declaration’s principles. A federal district court in Utah cited the enabling Act of 1894 as requiring that state’s constitution to be interpreted as respecting the principles of the Declaration of Independence.¹¹⁴

109. *Doe v. Acton-Boxborough Reg’l Sch. Dist.*, 8 N.E.3d 737, 743 (Mass. 2014). *See also* *Freedom from Religion Found. v. Hickenlooper*, No. 10CA2559, 2012 Colo. App. LEXIS 741, at *46 (May 10, 2012) (holding day of prayer partly justified by Declaration).

110. *Parents of Minor Child v. Charlet*, 135 So. 3d 724, 744 (La. Ct. App. 2013).

111. The preamble to the 1777 Constitution of New York included the entire Declaration. N.Y. CONST. of 1777, pmbl. That preamble was revised and considerably shortened. The most recent Constitution of New York does not explicitly mention the Declaration. N.Y. CONST.

112. MD. CONST., Decl. of Rights art. 1.

113. HAW. CONST. art. I, § 2.

114. *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1228 (D. Utah 2013). *See also* *Kirk v. Carpeneti*, 623 F.3d 889, 892 (9th Cir. 2010) (“The Alaska Constitution was ratified by Alaska’s voters and approved by Congress, which found it to be ‘republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence.’”).

State court justices interpret clauses that paraphrase Jefferson's second paragraph as incorporating the Declaration into the fundamental laws of the state. The Supreme Court of Kentucky in *Blue Movies Inc. v. Louisville/Jefferson County Metro Government* observed that "the preamble to the [state] bill of rights," which declares, "all, men are by nature, free and equal, and have certain inherent and inalienable rights,"¹¹⁵ "is taken from the Declaration of Independence."¹¹⁶ State court judges who acknowledge that the Declaration is the source of the language in state constitutional provisions insist that the Declaration is the proper source for interpreting that language. In an opinion declaring state restrictions on abortion unconstitutional, the Supreme Court of North Dakota wrote,

This section [of the North Dakota Constitution] embodies the essence of the statement of the "self-evident truths" set forth in the Declaration of Independence, and the words and terms used, whether in the Declaration of Independence, the Constitution of the United States, or the Constitutions of the several states, convey a commonly accepted meaning Within the meaning of the term "liberty" is also included . . . in general, the opportunity to do those things which are ordinarily done by free men.¹¹⁷

Justices in Alabama during the second decade of the twenty-first century were particularly prone to invoke the Declaration when interpreting the inalienable rights clause in the state constitution as a source of rights and regime principles. The Supreme Court of Alabama has issued more opinions than any other state court citing the Declaration and more opinions that discuss the contemporary legal implications of the Declaration at length. *Hicks v. State* is a typical instance of that tribunal's practice.¹¹⁸ The issue in that case was whether Alabama could punish a woman for endangering her unborn children by taking controlled substances.¹¹⁹ The majority opinion quoted the second paragraph of the Declaration when claiming, "A plain reading of the Equal Protection Clause . . . indicates that states have an affirmative constitutional duty to protect unborn persons within their jurisdiction to the same degree as born

115. KY CONST. § 1.

116. *Blue Movies, Inc. v. Louisville/Jefferson Cty. Metro Gov't*, 317 S.W.3d 23, 41, 42 (Ky. 2010).

117. *MKB Mgmt. Corp. v. Burdick*, 855 N.W.2d 31, 61–62 (N.D. 2014) (alterations in original). See also *In re Mental Commitment of Mary F. R.*, 839 N.W.2d 581, 587 n.15 (Wis. 2013) ("Art. I Sec. I, of the Wisconsin Constitution is framed in language of a Declaration of Rights and reminiscent of the Declaration of Independence, and many times has been held to be substantially equivalent of the due-process and the equal-protection clauses of the 14th Amendment to the U.S. Constitution.").

118. *Hicks v. State*, 153 So. 3d 53 (Ala. 2014).

119. *Id.* at 54.

persons.”¹²⁰ Judge Parker’s concurrence agreed that

“[t]he public policy of the State of Alabama is to protect life, born, and unborn.” This inalienable right is a proper subject of protection by our laws at all times and in every respect. The Declaration of Independence, one of our nation’s organic laws, recognized that governments are ‘instituted among men’ to protect this sacred right.¹²¹

Chief Justice Moore’s concurring opinion similarly stated,

[T]he Declaration of Rights in the Alabama Constitution . . . states that ‘all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.’ These words, borrowed from the Declaration of Independence . . . affirm that each person has a God-given right to life.¹²²

In other cases, justices on the Supreme Court of Alabama have invoked Jefferson’s claims in the Declaration when affirming parental rights to deny grandparental visits¹²³ and when protesting the termination of parental rights.¹²⁴

II. TEACHING THE DECLARATION

This survey of recent federal and state court citations to the Declaration demonstrates the importance of teaching students the distinctive role the Declaration plays in constitutional law, constitutional interpretation, and the political constitution. The Declaration is not constitutional law per se. Law professors should make students aware that lawyers make a pleading mistake when they base legal claims on the Declaration, except when discussing the legal consequences of the American separation from Great Britain. The Declaration is nevertheless vital for interpreting black letter law. Jefferson’s text is the canonical source for the regime principles necessary for elaborating general constitutional clauses. Federal court judges invoke the Declaration when determining the meaning of provisions as diverse as the Elections Clause in Article I, Section 4, and the due process clause of the Fourteenth Amendment. State court justices invoke the Declaration’s principles when interpreting state constitutional provisions that repeat or paraphrase

120. *Id.* at 71.

121. *Id.* at 73 (Parker, J., concurring) (citation omitted).

122. *Id.* at 70 (Moore, C.J., concurring) (alterations in original) (citations omitted). *See also Ex parte Ankrom*, 152 So. 3d 397, 492 (Ala. 2013).

123. *Ex parte E.R.G.*, 73 So. 3d 634, 651 (Ala. 2011). *See also E.H.G. v. E.R.G.*, 73 So. 3d 614, 621 (Ala. Civ. App. 2010).

124. *Ex parte T.M.*, 160 So. 3d 10, 15 (Ala. 2014) (Moore, C.J., dissenting).

Jefferson's language. The Declaration is also the core text of the political constitution. Before being certified as practice ready, potential lawyers must be aware that a populist constitutionalism exists outside of the courts that is rooted in the common belief that the Constitution of the United States is derived from the "consent of the governed," committed to the proposition that "all men are created equal" and protects the "inalienable rights" of all people.

A. TEACHING LEGAL RULES AND LEGAL INTERPRETATION

Much legal education is devoted to teaching students legal rules in ways that exclude serious reflection on the Declaration. Bar examinations are limited to black letter law. Testing potential lawyers on the contemporary constitutional status of same-sex marriage is fair because no dispute exists among liberals and conservatives that the Supreme Court has declared that same-sex couples have the constitutional right to be married. No similarly objective answer exists to questions about whether the Declaration supports judicial decisions interpreting the Constitution as protecting the constitutional right of same-sex couples to marry. Lawyers frequently advise people how to structure various transitions under the legal rules. A lawyer advising a local planning commission must know that property owners must be compensated when regulations deprive them of the entire value of their land, unless the regulation is abating a common law nuisance.¹²⁵ Whether proposed planning commission regulations that are contrary to plain black letter law are also inconsistent with the Declaration does not seem a matter on which legal advice is necessary or even useful.

Legal education encompasses mastering interpretation as well as memorizing existing rules, but even on these matters, professors tend to ignore the Declaration and related texts. Law professors teach students how to make arguments that existing precedents should be reaffirmed or overruled, expanded, or contracted. When considering whether *Obergefell v. Hodges*¹²⁶ was correctly decided, students are taught to consider the best interpretation of such past precedents as *Lawrence v. Texas*¹²⁷ and *United States v. Windsor*.¹²⁸ Students are taught to look for passages in *Obergefell v. Hodges* that can be used to support or strike down a state law forbidding first cousins to marry. Students who think *Obergefell* was a good decision are taught the doctrinal techniques they may use to have that decision

125. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1046–47 (1992).

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

127. *Lawrence v. Texas*, 539 U.S. 558 (2003).

128. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

reaffirmed or expanded. Students who think *Obergefell* was a bad decision are taught the doctrinal techniques they may use to have that decision narrowed or overruled. The Declaration plays no role in this conversation because, as is the case for the other basic texts in the constitutional canon, no dispute exists over whether Americans should remain committed to the Declaration (and related texts) or whether those texts should be interpreted broadly or narrowly.

Legal practitioners do not dispute the basic merits of the core texts in what might be called the constitutional interpretation canon.¹²⁹ General agreement exists that Americans are committed to the basic principles of the Declaration, that *Marbury v. Madison* was correctly decided, and that *Dred Scott v. Sandford* was wrongly decided.¹³⁰ This general agreement may not extend beyond the practicing constitutional law community. Law professors and those outside the legal profession question the American practice of judicial review. A young political scientist who claimed that “*Marbury* established judicial review” might be justifiably laughed out of the profession. Nevertheless, law students need to know that the practicing, constitutional law community believes that *Marbury* established judicial review, that the decision was correctly decided, and that no court in the United States is going to reverse or narrow the holding of *Marbury* under any conditions. For similar reasons, while lawyers may agree that constitutional claims may not be based on the Declaration of Independence, no court in the country is going to deny that the Declaration of Independence is one source of the basic regime principles underlying American constitutionalism or claim that the principles of the Declaration should be construed narrowly.

This broad consensus means that texts in the constitutional interpretation canon are available for participants on all sides in contemporary constitutional disputes. The Declaration and *Brown v. Board of Education* belong to every American. Constitutional debate is over how one fully realizes the principles of the Declaration and *Brown*, and not over whether those principles should be expanded or overruled.¹³¹ *Roe v. Wade*, by comparison, is the text of choice only for pro-choice advocates. The constitutional debate over abortion is whether that decision should be expanded or narrowed, and not over how that decision is best expanded.

The constitutional interpretation canon is available to all Americans

129. See Balkin & Levinson, *supra* note 10, at 970.

130. See TUSHNET, *supra* note 16, at 173; GRABER, *supra* note 12.

131. See Graber, *supra* note 46, at 995.

because that canon is concerned with shared regime principles rather than contentious decisions. Regime principles are the central commitments of a constitutional order. A constitutional text, person, or event becomes canonical when people agree that the text, person, or event stands for a basic regime principle. *Marbury* became canonical when people agreed that courts ought to have substantial power to declare laws unconstitutional. *Brown* became canonical when persons agreed on racial equality. The interpretation of constitutional canons is nevertheless controversial because persons disagree on the best understanding of particular regime principles and employ canonical texts when justifying divergent principles. Americans do not claim that *Brown* stands for the principle of racial equality and then fight over whether racial equality is desirable. Rather, they insist that *Brown* stands for the principle of racial equality, agree that racial equality is desirable, and fight over what racial equality means and the policies that will best promote racial equality in the United States. The same is true of debate over the Declaration. As the frequent citation to the principles of the Declaration by persons on all sides of the debate over same-sex marriage demonstrates, Americans agree that the Declaration provides the foundational principles of their constitutional regime, but fight over the meaning of those principles and what policies best promote the Declaration's values.

Law students must understand that whoever controls the meaning of the canons of constitutional interpretation controls constitutional law. Lawyers who convince a court that *Brown v. Board of Education* supports their position have won their case. Similarly, *Lochner* is the old maid of constitutional law.¹³² A lawyer who successfully sticks their rival with *Lochner* has won the case. In theory, we could imagine a case in which general agreement exists that one side is supported by *Marbury*, George Washington, the Declaration, and *Lochner*, while the other side is supported by *Brown*, Abraham Lincoln, the Gettysburg Address, and *Dred Scott*. In practice, such alignments do not occur. In constitutional interpretation, the canonical cases line-up correctly. That is to say, all general theories of constitutional interpretation claim to justify all the good canonical texts while repudiating all the bad ones. Just as students must learn how to persuade a court that *Brown* supports their understanding of racial equality, also must students be taught how to persuade courts that the Declaration supports their interpretation of the foundational principles underlying the American constitutional regime. A lawyer who is not able to

132. *Lochner v. New York*, 198 U.S. 45 (1905).

manipulate the Declaration and other core texts in the constitutional interpretation canon so they line up correctly is not a very good lawyer.

B. TEACHING THE POLITICAL CONSTITUTION

The Declaration is the core text of the political constitution. Americans believe that the Constitution protects all the “inalienable rights” to “life, liberty and the pursuit of happiness” that Jefferson maintained were “endowed by their Creator,” even those Americans who do not believe in a Creator. When Americans experience a wrong, they identify that wrong as a violation of principles expressed by the Declaration. If walking a dog at night is essential to the pursuit of happiness, then that right must be protected by the Constitution.

The exalted status of the Declaration in the political constitution differs from the status of that text in the legal constitution or in other constitutional canons. Lawyers debate whether clauses in state constitutions based on the declaration are justiciable. Historians debate whether the Constitution of 1787 repudiated the Declaration of 1776. Philosophers and lawyers debate whether the natural law Jefferson spoke of has any content. Such debates do not permeate popular constitutional consciousness. Abraham Lincoln spoke for the popular constitutional mind when he declared,

Without the *Constitution* and the *Union*, we could not have attained the result; but even these, are not the primary cause of our great prosperity. There is something back of these, entwining itself more closely about the human heart. That something, is the principle of “Liberty to all”

The *expression* of that principle, in our Declaration of Independence, was most happy, and fortunate. *Without* this, as well as *with* it, we could have declared our independence of Great Britain; but *without* it, we could not, I think, have secured our free government, and consequent prosperity

The assertion of that *principle*, at *that time*, was *the word*, “*fitly spoken*” which has proved an “apple of gold” to us. The *Union*, and the *Constitution*, are the *picture* of *silver*, subsequently framed around it. The picture was made, not to *conceal*, or *destroy* the apple; but to *adorn*, and *preserve* it. The *picture* was made *for* the apple—*not* the apple for the picture.¹³³

The Declaration in popular constitutionalism provides the foundational principles for the Constitution of the United States and those principles

133. Abraham Lincoln, Fragment on the Constitution and Union, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 168–69 (Roy P. Basler et al. eds., 1953).

have rich political content.

Recent scholarship is witnessing a renewed interest in the political constitution, often referred to as the constitution outside of the courts. Many scholars note that substantial constitutional decisionmaking takes place outside of the court. Others observe that constitutional argument outside the court often differs from constitutional argument inside the court. J.M. Balkin and Sanford Levinson point out how the constitutional canon that the black letter lawyer must master differs from the constitutional canon the constitutionally literate citizen must master.¹³⁴ George Lovell details how popular constitutional rights discourse differs from legal rights discourse.¹³⁵ Keith Whittington suggests that while judges should interpret the constitution, other political actors are free to construe the constitution.¹³⁶

Popular constitutionalists are aware that lawyers must engage with a political constitution that rests on the principles of the Declaration, whether they are practicing outside of or inside the courtroom. Tushnet believes a Supreme Court committed to a thin constitution would abjure judicial review, leaving elected officials and the general public to determine what combination of policies and rights best instantiate the values of the Declaration.¹³⁷ Tsesis calls on courts to protect a variety of liberties in light of the ways in which the Declaration has been used in popular constitutionalism.¹³⁸

The political Constitution that is premised on the principles underlying the Declaration bleeds into the legal Constitution. The bleeding is most obvious in the case of the numerous state constitutions that have provisions which incorporate Jefferson's language. Just as important, judicial citation patterns demonstrate the significance of the political valiance of the Declaration in legal settings. The exalted status of the Declaration explains why judicial analogies often rely on the Declaration, free speech protestors frequently recite the Declaration, and the Ten Commandments is most often paired with the Declaration in public displays. Celebrity citations to the Declaration work because the audience knows what the Declaration is and has positive feelings about that text. In theory, persons protesting bans on free speech in some public place have the same legal case whether they

134. Balkin & Levinson, *supra* note 10, at 970.

135. LOVELL, *supra* note 35, at 1–34.

136. Keith E. Whittington, *Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 612 (2000).

137. See TUSHNET, *supra* note 16, at 165–74.

138. TSESIS, *supra* note 4, at 316–18.

hand out copies of the Declaration, the University of Southern California Law Review, Mad Magazine, or any other constitutionally protected text. The Declaration is the text of choice because no political official in our constitutional culture wants to be accused of banning Jefferson's handiwork. The Declaration similarly adds legal weight to rights, persons, and places. That James Wilson signed the Declaration adds constitutional force to his interpretation of federalism. That Jefferson protested English decisions to try Americans in Great Britain is a reason why persons accused of crime in southern California should not be tried in northern California. Practicing lawyers who do not know how the political constitution influences the legal constitution are likely to be poor lawyers.

Making constitutional arguments outside of the courtroom is a J.D. preferred or advantaged profession. Being an attorney in the Office of Legal Counsel, or a lawyer for a House committee are J.D. required jobs, even though the job responsibilities consist largely of making constitutional arguments outside the courtroom. A very high percentage of elected officials in the United States, including Presidents Bill Clinton and Barack Obama, are lawyers, as are more members of Congress and state legislatures than any other profession. Lawyers regularly pitch their cases before congressional committees and state legislatures, as well as before ordinary citizens. A lawyer who does not know the different constitutional status of the Declaration in a courtroom and in a hearing before a local Board of Education is, again, likely to be a poor lawyer.

CONCLUSION

Law schools in recent years have been put under increased pressure to produce what are being called "practice-ready" lawyers. A good deal of this pressure is a backlash against the increased penetration of the legal academy by PhDs, many of whom, even if they have a J.D., have not practiced law to any significant extent. Part of the mantra of the practice-ready literature is that students need more preparation for being transactional lawyers than for being litigators. Another part of the mantra is that students need more training in black letter law than in more theoretical endeavors.

This survey suggests that practice fetishism in the contemporary academy will no more prepare lawyers for practice than the PhD fetishism of the past decade. Lawyers seeking to move constitutional law and politics in favorable directions must command such texts as the Declaration as well as master black letter law. Within the courtroom, fights over the meaning of the Declaration determine the path of constitutional doctrine. A

Declaration that declares that marriage is an inalienable right compels a different decision in same-sex marriage cases than a Declaration that declares that same-sex marriage is one of those matters that ought to be determined by the “consent of the governed.” Outside the courtroom, the Declaration is commonly regarded as the foundational source of American rights. When clients come to lawyers complaining of a wrong, they are likely to see that injustice as a violation of principles underlying the Declaration. Often, the claimed injury is more likely to be remedied in legislative or electoral settings dominated by persons more likely to be swayed by Jefferson’s inspiring words than by appeals to dry precedents. The job of the lawyer expected to practice in all settings where appeals are made to basic regime principles is often to give voice to the common understanding of our political Constitution and not to tell fellow Americans that, had they gone to law school, they would have known that the Declaration is not the source for any constitutional right.

