
THE GHOST OF THE DECLARATION PRESENT

THE LEGAL FORCE OF THE DECLARATION OF INDEPENDENCE REGARDING ACTS OF CONGRESS

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ABSTRACT

I distinguish three ways by which references to the Declaration of Independence might enter into American legal argument. In primary-legal mode, the Declaration ranks as supreme law beside or above the Constitution, setting mandates as the Constitution does for other purported exercises of legal authority, from Acts of Congress on down. In interpretive-contextual mode, the Declaration provides informative historical context for determinations of the meanings of the Constitution and other laws. In creedal mode, the Declaration serves as a canonical marker for axiomatic principles of good or right government. Creedal uses of the Declaration are common and benign. Interpretive-contextual uses invite debates like those attending other uses of history in legal interpretation. A supreme-law status for the Declaration finds little support in our legal history, nor is there good reason to press in that direction.

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INTRODUCTION

The arc of the Declaration is long. Like the Christmas spirits in Dickens, the Declaration—or say our imaginations and constructions of it, because those have been variable over times and parties—can speak to us of a past recollected, a future projected, and a present fraught with choice. My focus here will be on the view from now. I propose to join Professor Schauer in thinking through some questions about the Declaration’s present bearing on the work of lawyers, judges, and the law of this country.¹

As a prop for that effort, I put before you the case of *King v. Burwell*, recently decided by the Supreme Court of the United States.² The case is about an Act of Congress, the Patient Protection and Affordable Care Act of 2010 (“ACA”).³ *King* presents a question about the precise legal meaning of a linked pair of phrases in the statute,⁴ where each of two different readings has respectable arguments going for it.⁵ Under one reading, proposed by the plaintiffs, an immediate result would be this: a given American family’s qualification to receive federal government financial assistance for their health insurance costs would depend on that family’s state of residence.⁶ Contingent on choices made by the respective state governments, needy families in some states would be eligible for these federal subventions, while equally needy families in other states would be left to manage without.⁷ That is under one possible reading, which I will call the “non-uniform” reading. Many lawyers, though, have thought better of a reading of the statute defended by the Government—which I will call the “uniform” reading—that avoids that odd-seeming result.⁸ At the time the case stood pending, it looked to lawyers like a close call, and expectation was widespread that the Court would divide—as of course it did—over which way to go.⁹

1. See Frederick Schauer, *Why the Declaration of Independence Is Not Law—And Why It Could Be*, 89 S. CAL. L. REV. 619, 626–27 (2016).

2. See *King v. Burwell*, 135 S. Ct. 2480 (2015).

3. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

4. The key phrases are: “an Exchange established by the State under [42 U.S.C. § 18031]” and “such Exchange within the State [§ 18041(c)(1)].” See *King*, 135 S. Ct. at 2495–96 (citing Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18031, 18041(c)(1) (first alteration in original)).

5. The details giving rise to the ambiguity do not matter for my presentation here. See *King*, 135 S. Ct. at 2491–92 for an explanation of these details.

6. See *id.* at 2482.

7. See *id.*

8. See *id.* at 2484.

9. Compare *id.* at 2480 (upholding the uniform reading), with *id.* at 2496 (Scalia, J., dissenting, joined by Thomas & Alito, JJ.) (adopting the non-uniform reading).

No party treated this as a case of first-order constitutional dimension. Precisely before the Court was a question of the legal validity of certain regulations adopted by the Internal Revenue Service,¹⁰ and all sides agreed that the answer would depend on the meanings assigned to key clauses in a particular Act of Congress, the ACA.¹¹ Yet the legal answer *could* still have depended, in a secondary way, on how we read the Constitution, as suggested by the following lightly embroidered snippet from the oral argument:

JUSTICE ALITO: If we adopt Petitioners' interpretation of this Act [that is, the non-uniform reading], is [the Act then] unconstitutionally coercive [upon states that have thus far declined to establish exchanges to do so]?

GENERAL VERRILLI: . . . I think that it would . . . be a novel question, and if the Court believes it's a serious question—

JUSTICE KENNEDY: . . . [D]oes novel mean difficult? * * * Because it does seem to me that if Petitioners' argument is correct, this is just not a rational choice for the States to make [i.e., the choice to abandon their refusals hitherto to set up state exchanges] and that they're being coerced . . . [a]nd that you then have to invoke the standard of constitutional avoidance.¹²

That exchange did not go unnoticed by pundits. It prompted speculation that “constitutional avoidance” might prove to be the unexpected key to unlock a crucial vote from Justice Kennedy against the non-uniform reading.¹³

This episode reminds us of the sundry ways in which the legal answers to cases involving the application of statutes can sometimes turn out to depend on how we read the Constitution. But what I mainly want to ask right now is something different and probably less expected. My question is about whether or how the legal answer to cases involving the application of statutes might also sometimes depend on how we read the Declaration of Independence.

The Declaration has not memorably, to my knowledge, been invoked

10. See Treas. Reg. § 1.36B-2(a)(1) (2015) (making tax credits available for insurance purchases on “an Exchange”); 45 C.F.R. § 155.20 (2015) (defining “exchange” as an entity meeting certain specifications “regardless of whether the exchange is established and operated by the State . . . or by [the U.S. Department of Health and Human Services]”).

11. The Court rejected any fallback to deference to the statutory reading favored by the responsible administrative agency, in this case the Internal Revenue Service. See *King*, 135 S. Ct. at 1248–49.

12. Transcript of Oral Argument at 48–49, *King*, 135 S. Ct. 2480 (No. 14-114).

13. See, e.g., Noah Feldman, *Obamacare Is on Roberts's Shoulders, Again*, BLOOMBERG VIEW (March 4, 2015, 1:54 PM), <http://www.bloombergview.com/articles/2015-03-04/obamacare-is-on-roberts-s-shoulders-in-king-v-burwell>.

on the point of defense of the American states against bullying from Washington.¹⁴ Let us try out something more historically resonant. In what is by far the most widely recalled and frequently cited portion of its text, the Declaration posits the equal natal endowment of everyone with rights to life, liberty, and the pursuit of happiness.¹⁵ The text furthermore conditions the legitimacy of any incumbent government on that government's due regard for those rights,¹⁶ and then makes that posited condition of legitimacy a major premise for its ensuing deduction, "therefore," of the rightfulness of the act of political secession it ends by announcing.¹⁷ Logically and syntactically, it is this most widely remembered passage in the Declaration—this credo on basic terms and conditions of the justification of political rule—that would most aptly figure for future generations of Americans as a directive for the conduct of our politics.¹⁸ And of course it has in fact been precisely this passage in the Declaration's text to which contenders in American political argument have over the years directed their appeals to the Declaration for support.¹⁹

At sundry stages in our history, masses and movements of Americans have read this passage to convey a determination that no entrant to American society should be blocked by accident of birth or family, or by vicissitude of market, from access to the preconditions for a dignified and

14. I find no mention of the Declaration in any of the Supreme Court's three decisions most likely to be cited by lawyers on the matter of a state-coercion-based limit on the congressional spending power. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); *South Dakota v. Dole*, 483 U.S. 203 (1987); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

15. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold . . . that all Men are created equal, that they are endowed by their Creator with . . . unalienable Rights . . . [to] Life, Liberty, and the pursuit of Happiness.").

16. *See id.* ("We hold . . . That to secure these rights, Governments are instituted among Men . . . [and that] whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it . . .").

17. *See id.* para. 32 ("We, therefore . . . do . . . solemnly . . . declare . . . that all political Connection between [these Colonies] and the State of Great-Britain, is and ought to be totally dissolved . . ."). The syllogism's minor premise is comprised of the Declaration's recital of sundry "Injuries and Usurpations" committed by King George and connived in by Parliament. *See id.* para. 2.

18. *See* MICHAEL P. ZUCKERT, THE NATURAL RIGHTS REPUBLIC: STUDIES IN THE FOUNDATIONS OF THE AMERICAN POLITICAL TRADITION 49 (1996) (remarking on how the Declaration's posited truths would apparently represent "bedrock or first principles of all political reasoning" for any political community affirming them as self-evident).

19. It is, for example, by far the dominant portion of the Declaration's text that figures in Professor Tsesis's recent extensive study of "the . . . ways in which [American] social groups [have] relied on the Declaration . . . as a popular constitution." ALEXANDER TSEISIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE 5 (2012) [hereinafter TSEISIS, LIBERTY AND EQUALITY]. *See* Alexander Tsesis, *The Declaration of Independence and Constitutional Interpretation*, 89 S. CAL. L. REV. 369 (2016) (same) [hereinafter Tsesis, *Constitutional Interpretation*].

productive life.²⁰ If so—basic healthcare plainly being one of those preconditions—the Declaration can quite plausibly be said to stand for and propound a principle committing American governments to the steadfast pursuit of an equality of access by citizens, regardless of private wealth or the lack of it, to basic essential healthcare services. On that reading of the Declaration, an Act of Congress contrived to allow access by some needy families to such services while excluding others equally needy would seem to be quite arguably—so to speak—undeclarational.

True, far from everyone will agree right off that the Declaration can or should be read to contain or imply any such “social rights” proposition as the one I have just put into play. The Declaration’s message on inalienable rights has at least as often been read as an expression of a classical-liberal, natural rights philosophy that it seems would not be especially friendly to the idea of a higher-law claim of needy individuals to material support from taxpayers.²¹ The fact remains, though, that progressive-redistributive readings of the Declaration are also indelibly a part of our political-discursive heritage.

But so what, you might respond; what, after all, have debates about the theory or philosophy of the Declaration of Independence to do with the *laws* that apply to one or another course of government conduct in the here

20. See, e.g., Katie R. Eyer, *The Declaration of Independence as Bellwether*, 89 S. CAL. L. REV. 427, 431 (2016) (“The basic promise of American life, that all men are created equal, must mean . . . that all Americans are assured an equal opportunity to make the most of their individual abilities.” (quoting Opinion, *Opening the Door to Employment*, WASH. POST, TIMES HERALD, Dec. 26, 1969, at A18)); Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1115 (1986) (“In a constitutional universe admitting serious attention to the Declaration of Independence, a malnourished child is not enjoying a ‘right to the pursuit of happiness.’”); Joseph Fishkin & William E. Forbath, *Wealth, Commonwealth & the Constitution of Opportunity*, NOMOS (forthcoming), <http://ssrn.com/abstract=2620920> (describing American adherents to a “democracy of opportunity tradition” who “offered [constitutional readings and] arguments . . . based on commitments embodied in the Declaration of Independence . . .”).

21. See, e.g., ZUCKERT, *supra* note 18, at 5 (describing a commitment of the American founding generation to a “natural rights or social contract” theory of politics); *id.* at 6–7 (calling the theory “one of “natural rights liberalism”); *id.* at 18–21 (rejecting suggestions that the Declaration’s phrase “created equal” could refer to equality of “life chances” or “condition”); *id.* at 26–27 (noticing the congeniality of natural-rights theory to “limited government,” “privatism,” and the freedom of individuals to pursue “their own happiness”); *id.* at 31 (construing the Declaration’s “theory of justice” to afford to each person “security of his or her own rights” and accordingly to bar government from measures that would “sacrifice some to the others”); *id.* at 79–81 (offering reasons why a Jeffersonian natural right to life would certainly encompass a right to retain and enjoy the fruits of one’s labor—a right to liberty and to property—and therefore could not encompass any claim of right to be supplied by others with “the means of life” in case one’s own efforts fail). See also RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 550–51 (2014) (affirming and explaining an antipathy of classical-liberal constitutional theory toward “forced redistribution” or “massive forms of wealth transfer”).

and now? And that, then, is the question I mean to raise. What is or should be the legal force of a duly certified attribution, to the distinct historical event we identify as the Declaration of Independence, of some proposition about rights and wrongs of government conduct? How, if at all, does it matter *legally* that the proposition shows up *there*, in the Declaration—as compared with its showing up in (say) a President’s State of the Union speech,²² a prominent lawyer’s treatise,²³ a political party platform, or a bar association report? Does or could that fact of showing up, specifically, in *the Declaration* give to a court of law a potentially decisive reason—on the order of Justice Kennedy’s “standard of constitutional avoidance”—to prefer the uniform over the non-uniform reading of the ACA?²⁴

I. THE QUESTION SHARPENED: USING THE DECLARATION-TEXT AS LAW, AS CREED, OR AS INTERPRETIVE CONTEXT

A. DEFINING THE TEXT AS “LAW”

For reasons already mentioned, our focus will be on one selected passage from the Declaration of Independence:

We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these Rights, Governments are instituted among Men²⁵

Suppose we could separate those words from all association with specific historical events. For most Americans today, they still would doubtless represent a set of values and principles ideally to be realized by American law. But now let us add back a specific historical association with American events of the summer of 1776. It is the words *in that historical association*—what I will henceforth call “the Declaration-text”—whose bearing on our legal practice I want to examine. Let us say roughly, for starters, that the Declaration-text figures as law in this country just insofar as we take it to supply a potentially decisive reason—one that might

22. See Franklin D. Roosevelt, Message to Congress on the State of the Union (Jan. 11, 1944), in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 41 (Samuel I. Rosenman ed., 1950) (“We have accepted, so to speak, a second Bill of Rights”); CASS R. SUNSTEIN, THE SECOND AMERICAN REVOLUTION: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 62 (2004) (suggesting the contents of FDR’s “second bill” have acquired a status of a “constitutive commitment” in American political practice).

23. See *District of Columbia v. Heller*, 554 U.S. 570, 594–95, 597, 607 (2008) (citing treatises by St. George Tucker, William Rawle, Joseph Story, and others in support of a contested interpretation of the Second Amendment).

24. See *supra* note 12 and accompanying text.

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

otherwise be missing from the overall legal picture—to decide one way or another a pending legal dispute. I make that stipulation not out of allegiance to any grand jurisprudential theory,²⁶ but solely because it helps us to draw some apt and useful lines, while describing and assessing the Declaration’s current bearing on American legal affairs.

B. THREE MODALITIES OF USE

We can differentiate three imaginable modes of use for the Declaration-text in American legal argument, to which I will give the names of “primary law,” “national creed,” and “interpretive context.” First, the historical issuance of the Declaration-text could figure for us, much as adoption of the Constitution figures, as a very high ranking legislative event in the annals of American law, to whose demands any purported exercise of lower ranking legislative authority must yield or else be set aside as not-law because undeclarational. The Declaration-text would thus stand side-by-side with the Constitution, or maybe ahead of it, as a body of supreme law within our system.²⁷ (A party argues, against any enforcement of a non-uniform reading of the ACA, that such a reading makes the statute *pro tanto* undeclarational and to that extent not cognizable as law.)²⁸

26. Cf. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

27. See U.S. CONST. art. VI (“This Constitution . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts If the former part of the alternative be true, then a legislative act contrary to the constitution is not law”).

28. As a moderately “softer” form of primary law, the Declaration-text could work as a legally mandatory guide to the interpretation—although never as a test of the validity—of all other legal enactments in the system. When, but only when, the wording of a statute is arguably open to two or more conflicting interpretations, any of those found to run against the grain of the Declaration-text would have to be discarded; but statutes found irredeemably non-compatible with the Declaration-text would remain nevertheless in full force as law. (A party argues that the ACA must be given the uniform reading because that reading is reasonably available and an opposite, non-uniform reading would be non-compatible with the Declaration-text.) We would then be treating the Declaration-text as what the legal tradition of the mother country of the Declaration’s authors called by the very name of constitutional law: a set of norms subsisting in the legal background, to be used by judges as guides to the interpretation and application of statutes of Parliament when those statutes do not clearly and explicitly dictate to the contrary. See ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 33 (Peter Birks ed., 1998) (“The [United Kingdom] constitution is therefore very largely a written one. The point is that it is uncodified. It is a jumble of diffuse statutes and court rulings, supplemented by extra-legal conventions and practices.”). An example would be the norms of fair trial for those accused of crimes. A judge who failed to insist on those norms right up to the point where an Act of Parliament would explicitly contradict them would be said to act unconstitutionally. See *id.* at 17–18 (“[D]ecisions of the lower courts themselves, on a point of statutory or other law, for example, common law, may be

Second, we could treat the Declaration-text as a pledge that we inherit from a founding generation, about what American law from the Constitution on down is sooner or later to become. (A party argues that fidelity to the Declaration-pledge would favor a reading of the Fifth Amendment due process clause that makes a non-uniform reading of the ACA constitutionally impermissible.) Third, we can treat the Declaration-text as potentially informative historical context for determinations of the meanings and proper applications of clauses in the Constitution, where those remain as yet unsettled or are deemed open to reconsideration. (A party points to the alleged salience of the Declaration-text in the thought of constitutional framers and ratifiers as a persuasive reason to give a like reading to the due process clause of the Fifth Amendment.) The second and third, “creedal” and “contextual” possibilities, may strike you at first as closely similar. They hold, however, significantly different implications, as I explain below.²⁹

1. As Primary Law: The Drive for Fixation of Legal Meanings

Suppose the Declaration-text does stand side-by-side with the Constitution as American supreme law. Even then it could never be the text in itself that would be serving as the potentially decisive factor for a pending legal dispute. As with all other textual inputs to legal argument, the potentially decisive factor could only be some meaning assigned to the text by a decisionmaker engaged in an act of interpretation. American judges deciding cases inevitably have the task of assigning legal meanings to constitutional clauses, to statutes, to executive orders and agency regulations, and to canonical doctrines of the common law whenever any of those meanings remains open to doubt and the decision of a case depends on its resolution. But judicial authority in the United States does not end there. As our legal and related social practices now stand, they incline strongly to treat judicial resolutions of legal meanings, including those reached by the Supreme Court in constitutional cases, as drawn to cover entire classes of cases to which by their terms and context they would seem to apply. This feature of our practice reflects a widespread sense of a strong need for uniformity and fixity in the institutionalized applications of laws from case to case and from time to time, flowing both from perceived requirements of effective social ordering by law and from commitment to the idea of an equal rule of law, the same for everyone.³⁰

reviewed if they fail to take account of relevant constitutional principles, in particular those guaranteeing the fundamental rights of individuals.”).

29. See *infra* notes 83–91 and accompanying text.

30. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*,

For as long as that feature of our practice is to continue, whatever we treat as primary law here must fall under the sway of this drive for fixation of meanings by the progress of adjudicative precedent. By so treating the Declaration-text we would put it into the lap of the Supreme Court, by its acts of legal interpretation, to settle for the country as a whole, now and for some indefinite time to come, such questions such as whether the Declaration-text does or does not propound a principle of universal basic healthcare entitlement.³¹

2. As National Creed

Let us now consider a different kind of American political-argumentative practice involving the Declaration-text, which does not carry the same consequence and indeed would largely lose its value to us if it did. Americans have regularly launched appeals to the Declaration-text that treat it as a commitment, binding on Americans from generation to generation, regarding what American law from the Constitution on down is sooner or later to become—as opposed, that is, to treating the text as a container of what American law is now.

Examples will come soon. As they will show, American political actors making such a creedal use of the Declaration-text have not uniformly agreed on the contents of the creed. They have rather treated the text as a kind of icon for a package of incompletely specified ideals, which all can claim as normative bedrock here, but which different actors can and do quite differently construe while still retaining some sense of all addressing a common heritage. And that, then, is the point: in contrast to primary-legal deployments of the Declaration-text, these creedal deployments carry with them no sense of a pressing need for a publicly binding fixation of meaning.

We do not have to settle what *the creed* directs in regard, say, to a universal healthcare entitlement, as long as *the law* on the point is

110 HARV. L. REV. 1359, 1376–78 & n.80 (1997) (explaining how social needs for stability, coordination, and a bounded range for “viable disagreement” are served by recognition of a “single authoritative interpreter [of laws] to which others must defer,” and how this “settlement function” of law extends fully to constitutional law); Jeremy Waldron, *Kant’s Legal Positivism*, 109 HARV. L. REV. 1535, 1539–40 (1996) (explaining similarly the value to a society of a legal corpus, the validity and the specifications of the meanings of which are subject to determination “without reproducing the disagreements about rights and justice that it is the law’s function to supersede,” and, hence, by socially identified institutional authorities set up for that purpose).

31. *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992) (plurality opinion) (speaking of the dimension of the Court’s responsibility that comes into play “whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution”).

sufficiently settled for now. Rather to the contrary, we may think it a special blessing to Americans that history has served us with an iconic representation of national ideals that are *not* primary law to which the drive for fixation applies, but which rather can figure for us as a mutually cognizable common ground on which to criticize, to challenge, and to contest, with an eye to possible future alteration, the legal meanings currently borne by our laws in force. The Declaration-text can serve as primary law here, *or* it can serve as a platform from which to launch complaints of grave faults in our laws. It cannot serve as both at once. A question thus inevitably comes about how far, if at all, we should wish the uses of the Declaration-text in American political struggles to be hampered and muzzled by the latest interpretations of it announced by the Supreme Court. Some kind and degree of submission to the Court's interpretive authority may be a necessary consequence of treating *the Constitution* as law in a working positive legal order.³² The question, though, is one of extending that consequence to the Declaration.

When suffragists invoked the Declaration-text in support of full inclusion of women as citizens,³³ or when abolitionists claimed the text as law “superior[] to ordinary law, even to the Constitution itself,”³⁴ they no doubt sometimes spoke as if demanding performance in regular course of legal obligations currently in force.³⁵ Is that, though, the most plausible and convincing construction to place upon their words? Or should we rather see them as engaged in acts of moral prophecy and political persuasion—as calling on a moral law and a civic creed as necessitating reasons to correct the civic law?³⁶ On which understanding do we find and feel the greater credibility and thrill and transformative potential in their words and deeds?

If you answered those questions as I would, you would not be saying

32. See *supra* note 30 and accompanying text.

33. See TESIS, LIBERTY AND EQUALITY, *supra* note 19, at 213–26 (recounting such invocations).

34. DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 76 (1987).

35. See Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation*, 111 PENN. ST. L. REV. 413, 417 (2006) (reporting views of some abolitionists that “the Declaration had abolished slavery or at least rendered it unconstitutional for the federal government to support slavery”). Strang further documents invocations of the Declaration as “an independent source of [legally] binding constitutional principles” by nineteenth-century suffragists. See *id.* at 422–23. He discusses this in the context of twentieth-century right-to-life advocates as well. See *id.* at 427, 430–31.

36. See CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY ON THE HISTORY OF POLITICAL IDEAS 242 (1922) (describing abolitionists as invoking the Declaration in their defense “not [of] the legal rights of American citizens, but the sacred and inalienable rights of all men”—an appeal beyond the Constitution to a “higher law” of “conscience”).

that lawyers have no proper cause ever to mention the Declaration in the course of their professional work. For one thing, lawyers and judges can sometimes rightly point to the Declaration-text as context for interpretation of the Constitution.³⁷ For another, we can allow both lawyers and judges some space within those roles to act with a citizen's eye on the longer term.³⁸ We could well imagine, say, that parties supporting the government's side in *King v. Burwell* might have engaged a team of law professors and historians to prepare an amicus brief on the Declaration's bearing on the matter at hand, without at all meaning to promote a recognition of the Declaration-text as primary law in the United States.³⁹ Social mobilizations in pursuit of implantations of new or revised legal meanings into our constitutional and other laws are an honored part of our history.⁴⁰ Movements dating at least from Jacksonian times have appealed to the Declaration-text in support of efforts of that kind.⁴¹ The text as an icon of American values and commitments could very possibly figure now in a mobilization in pursuit of an eventual implantation into American constitutional law of a principle of equal basic healthcare.⁴² The brief the parties think of commissioning could be meant to help move such a project along. That seems to me a perfectly benign sort of use of the Declaration-text in American political debate, from which goings-on in courtrooms need not and ought not be insulated.

3. As Interpretive Context

Suppose we find that members of the 38th and 39th Congresses drafting the Thirteenth and Fourteenth Amendments, and also members of state legislatures voting on ratification, generally shared an aim of enacting

37. See *infra* Section II.B.3.

38. See William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430–31 (1987) (affirming the value of “prophetic” judicial dissents that “seek to sow the seeds for future harvest,” and citing as an example the opinion of Justice Harlan in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting)).

39. Perhaps Professor Tsesis could have served as a principal author, drawing from his work cited above. See *supra* note 19.

40. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1349 (2006) (“Since the Civil War, the understandings and practices of American constitutional culture have constrained conflict sufficiently and with sufficient creativity that long-running constitutional disagreement has created new understandings that officials can enforce and the public will recognize as the Constitution.”)

41. See generally TSESIS, LIBERTY & EQUALITY, *supra* note 19.

42. See Eyer, *supra* note 20, at 430 (“By providing an entry point for social movements . . . to engage with constitutional values, contestation over the Declaration’s meaning may lead in turn to shifts in constitutional understandings.” (citing JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 18–23 (2011))).

into law certain normative ideals.⁴³ For anyone accepting at all a reference to “history”⁴⁴ or “framers’ intent”⁴⁵ in the work of constitutional interpretation—even if only as one among other relevant considerations—a recollection of those ideals could properly enter into the work of courts and others so engaged. Any association by the drafters of those recollected ideals with the specific historical event known as the Declaration of Independence could be relevant insofar as it might shed some further light on the drafters’ more specific understandings of content of the motivating ideals. To make such an interpretive-contextual use of the Declaration-text is most certainly not to treat it as primary law—any more than we would consider to be primary law here the treatises and dictionaries that a judge or lawyer might cite in support of a contested interpretation, say, of the Second Amendment.⁴⁶ On the other hand, neither is a contextual use of the Declaration-text the same as the credal use we reviewed above. The credal use involves a claim of constant obligation on both lawmakers and interpreters to strive toward an eventual conformation of all of our laws to a canonical statement of principles. The contextual use involves a claim to interpreters that certain past acts of lawmaking *were in fact* thus prompted and that their meanings, where otherwise uncertain, should be determined in that light.

II. IF THE DECLARATION-TEXT IS AMERICAN PRIMARY LAW, WHEN AND HOW DID IT BECOME SO?

We say that the Declaration-text figures as primary law just insofar as its application as a controlling norm—additionally to norms found in other standardly recognized texts of American law and not just as an aid to construing those other texts—is found to make a decisive difference in a pending adjudicative outcome. But by what means could anything contained in the Declaration of Independence acquire such a status in our legal system? A constitutional amendment could no doubt make it so, as could (within limits set by the Constitution) an Act of Congress so

43. See Tsesis, *Constitutional Interpretation*, *supra* note 19, at 373–74 (providing evidence to this effect).

44. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 24 (1991) (breaking down constitutional argument into several “modalities” including that of “the historical,” which relies on the intentions of the framers and ratifiers of the Constitution).

45. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189 (1987) (“[M]ost judges, lawyers, and commentators recognize the relevance of [several] kinds of constitutional argument [including] . . . arguments about the intent of the framers . . .”).

46. See *District of Columbia v. Heller*, 554 U.S. 570, 606–09 (2008) (citing treatises and dictionaries in support of a conclusion that the Second Amendment confers individual rights of gun possession).

declaring; as could also a slower emergence over time of a “social fact” of widespread acceptance from the American public—but more especially from the American legal community—of the Declaration-text not just as a part of this country’s history and traditions but as primary law for this country.⁴⁷

In sum: if or insofar as the Declaration-text indeed is primary law here, there must have been some historical occasion or process by which it acquired that character. What might have been that occasion or that process? I take up below three occasions that will come easily to mind for consideration: the issuance of the Declaration itself in 1776, the drafting and ratification of the original Constitution from or between 1787–1789, and the drafting and ratification of the Fourteenth Amendment from or between 1866–1868.

A. ISSUANCE OF THE DECLARATION

It is one thing to utter to the world, as the Declaration’s endorsers plainly did, a statement of principles to which you claim any legitimate system of political rule must conform and by which you accordingly justify an act of political secession to your own political constituents or to others.⁴⁸ It is a second and different thing to utter words and phrases, as the endorsers also plainly did, with the intended effect of altering, by the very act of utterance, a pre-existing state of political relationships.⁴⁹ It would be

47. See Schauer, *supra* note 1, at 622, 629.

48. As would have been required by motivating factors of diplomacy, the Declaration’s justificatory claims were largely directed toward “what was called at the time ‘the law of nature and of nations’ and what was just coming to be called ‘international law.’” David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 39, 42 (2002). See also *id.* at 46–49 (describing concerns about foreign state responses to pending British-American hostilities that prompted the issuance of the Declaration). That the Declaration was everywhere contemporaneously understood as an attempt at international-legal justification does not mean it was everywhere accepted as successful in that regard. See *id.* at 52–54 (describing negative or skeptical or receptions in some quarters).

49. THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776) (“We . . . do . . . solemnly . . . declare, [t]hat these United Colonies are . . . Free and Independent States . . .”); Armitage, *supra* note 48, at 46 (describing the Declaration as “a speech act that not only *communicated* the fact of the independence of the United States to the world but by so doing also *performed* the independence it declared”); J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 4–7 (2d ed. 1975) (explaining the idea of the “performative” character of certain verbal utterances). We need not settle here whether secession was in fact thus accomplished at Philadelphia in 1776 or only later and by other or additional means, say by battlefield success in 1881 at Yorktown or by treaty in 1883 at Paris. See Armitage, *supra* note 48, at 58–60 (describing international uncertainty and debates, but concluding that the Declaration’s pronouncement of the nation-state status of the United States had at all events achieved general recognition “as part of the modern positive law of nations” by “soon after . . . the Treaty of Paris”).

a third and still different thing by that act of utterance to have effected—as luminaries like Story, Webster, and Lincoln reportedly have understood the Declaration to have done—a combination of the peoples of the erstwhile thirteen colonies into a single people under a general government.⁵⁰ With none of those effects have we here anything to do.

It would be a fourth and again a very different thing to utter these words with a view to affecting the content, going forward, of the internal laws of any jurisdiction in the world. Of such an intention or effect, the histories contain no sign at all. There is no evidence I know of to suggest that either the endorsers or their readers at the time considered the Declaration to be meant, much less to succeed, as an act of internal legislation for any of the newborn states or for any union of them.⁵¹ What evidence there is on the point would appear to be to the contrary. We are told that in the run-up to the Declaration, every colony instructed its congressional delegation against any tampering with its own internal laws by whatever action Congress might take on the question of independence.⁵²

B. ADOPTION OF THE CONSTITUTION AND RECONSTRUCTION AMENDMENTS

We can distinguish two different ways by which occasions of constitutional drafting and ratification might be said to have established (or contributed toward establishing) the character of the Declaration-text as primary law in the United States. First, it might be claimed that parties to these occasions acted under what they believed to be an already subsisting legal mandate from the Declaration-text. Such a fact of a belief by some number of the parties could serve as evidence pointing toward a conclusion that the text indeed had become law by virtue of some prior social process. Second, it might be claimed that one, the other, or both of the constitutional-legal enactments of 1787–1789 and 1865–1868 itself encompassed an enactment of the Declaration-text as a distinct component

50. See GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 131–32 (1992) (describing views of Story, Webster, and Lincoln to this effect).

51. See RODGERS, *supra* note 34, at 67–68 (1998) (describing the Declaration as “a legally impotent document: a declaration of rights and grievances, a document of explanation”); Armitage, *supra* note 48, at 39 (“[The Declaration] was originally irrelevant to domestic law, however often its ideals may have since been invoked.” (footnote omitted)); PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 192 (1998) (“[T]he Declaration’s original function was to end the previous regime, not to lay down principles to guide and limit its successor.”); GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* 333 (1978) (observing that the Declaration “was not a legislative instrument”).

52. See WILLS, *supra* note 51, at 331–32.

of American law.⁵³ It would be as if the texts of the original Constitution or the Fourteenth Amendment had said, in so many words: “The Declaration-text is hereby enacted as supreme law in the United States, of equal rank with any other provision in this Constitution.”

1. Beliefs of the Parties

Historians of the period have overall not been kind to suggestions that the drafters and ratifiers of 1787–1789 might have understood themselves to be acting under a legal obligation imposed by the Declaration to track its claims into the Constitution.⁵⁴ The case can be somewhat more strongly made in regard to the Thirteenth and Fourteenth Amendments, so let us turn to them.

In the 38th and 39th Congresses, numerous members made reference to the Declaration-text as a guide to the work of preparing constitutional amendments for submission to the states. Members might go so far as to say or imply that the amendments were designed to fulfill a pledge or carry out a project of justice set going by the Declaration.⁵⁵ The fact of the occurrence of such statements no doubt composes a part of the interpretive context for legal applications of the amendments. It is a different question, though, whether such statements testify to a recognition of the Declaration-text as an extant norm in the American legal firmament, to which anyone exercising powers of office (such as voting out an amendment for submission to the states under Article V) would owe allegiance as to a law. We do not have to read any drafter that way, much less the drafters as a group, nor have we evidence that Americans over the succeeding years have preponderantly found cause to do so. For reasons I have already started to suggest⁵⁶ and to which I will return,⁵⁷ I see no pressing reason to start doing so now.

53. See Tsesis, *Constitutional Interpretation*, *supra* note 19, at 391 (“The ratification of the Reconstruction Amendments incorporated the second paragraph of the Declaration into the Constitution.”)

54. See MAIER, *supra* note 51, at 169 (reporting that participants in drafting and ratification debates “mentioned the Declaration . . . very infrequently and then generally cited its assertion of the people’s right to ‘abolish or alter their governments’ and to found new ones”). *Accord* Strang, *supra* note 35, at 439–45 (noting that participants sometimes used the Declaration to bolster an argument for or against the Constitution or a particular provision thereof while reporting no suggestion of acting under a legal mandate). *But see* Tsesis, *Constitutional Interpretation*, *supra* note 19, at 390–97 (taking an opposite view).

55. See Tsesis, *Constitutional Interpretation*, *supra* note 19, at 392–97 (collecting instances); Daniel Farber, *Historical Versus Iconic Meaning: The Declaration, the Constitution, and the Interpreter’s Dilemma*, 89 S. CAL. L. REV. 457, 467 n.45 (2016) (same).

56. See *supra* Part I.B.2.

57. See *infra* notes 83–91 and accompanying text.

2. Enactment into Primary Law

What exactly might hang on whether we do or do not say the Fourteenth Amendment enacts not only its own text but also, in addition, the Declaration-text, into American primary law? Does the Declaration-text arguably cover any possible space of rights-claiming not reachable through the Thirteenth Amendment, the four clauses of section 1 of the Fourteenth,⁵⁸ and sundry clauses of the first eight amendments, of course including the due process clause of the Fifth?⁵⁹ Had it not been for the advent of so-called “modern substantive due process”⁶⁰ and the recognition of an equal protection equivalent in the Fifth Amendment,⁶¹ the answer might have been “yes.”⁶² Those two developments, though, have in fact occurred, and so the question now comes: Are there special aspects of the words, the history, or the context of the Declaration-text that would point toward constructions of it that the roughly corresponding clauses of the Fifth and Fourteenth Amendments could not bear? If, but only if, we answer “yes” to that question could there possibly be any loss to legal-argumentative possibility from a denial that the Declaration-text has been enacted into law (so to speak) in its own right. Keeping in mind the offset to any such possible loss from the undoubted availability of the Declaration-text to serve as interpretive context for the Fifth and Fourteenth amendments, it seems the final net loss could not be much.

III. SOME FURTHER EXAMPLES

A. “APPLE OF GOLD”

By way of illustration of points and distinctions introduced above, I take up three noteworthy examples of appeals to the Declaration-text as a guide or key to American constitutional law. Two are opinions from the

58. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States . . . are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”)

59. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

60. See, e.g., GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 831–942 (6th ed. 2009) (section on “Modern Substantive Due Process”).

61. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

62. Especially is that so, given the strict construction of Fourteenth Amendment “privileges or immunities” adopted by the Supreme Court in 1873 and persisting to this day. See *Slaughter-House Cases*, 83 U.S. 36, 78–80 (1873) (restricting protected “privileges or immunities of citizens of the United States” to a few sorts of claims attaching specifically to national citizenship, such as the right to stand for election to national office).

2015 term of the Supreme Court. The third, with which I begin, is perhaps the single most famous—and also (not surprisingly) the most poetic and elusive—such appeal in our history, coming as it does from the hand of Abraham Lincoln.

On November 19, 1863, Lincoln spoke of the dedication of the American nation, at birth, to a “proposition,” as he called it, of the created-equal condition of all men. The President quite pointedly marked the date of that dedication. He marked it not as the year of the Constitution but as the year of the Declaration of Independence.⁶³ Three years prior to Gettysburg, Lincoln had written of the Constitution as a “picture of silver” made to frame the “apple of gold” consisting of the Declaration, and in particular, its principle of “Liberty to all.”⁶⁴ In Old Testament sonorities, in words oft-quoted since but apparently not known ever to have been publicly spoken, Lincoln wrote as follows:

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.⁶⁵

Lincoln apparently jotted those words while mulling over a plea from Alexander Stephens for a public word from him, as he prepared to assume the presidency, on his administration’s intended policy toward slavery in the existing southern states. Having previously received a personal note from Lincoln denying any purpose to “interfere . . . with [the people of the South] about their slaves,”⁶⁶ Stephens had sent back to the President-elect a suggestion in Proverbial form: “A word fitly spoken by you now,” Stephens wrote, “would be like ‘apples of gold in pictures of silver.’”⁶⁷ Stephens surely knew that Lincoln would see he was quoting from *Proverbs* 25:11 (KJV): “A word fitly spoken is like apples of gold in pictures of silver.” Lincoln’s “Fragment” took the biblical simile on a turn that was far distant (we may assume) from any thought in the mind of

63. See Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg, Nov. 19, 1863 (Final Text), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 22 (Roy P. Basler ed., 1953) [hereinafter Basler] (“Four score and seven years ago . . .”).

64. Abraham Lincoln, Fragment on the Constitution and the Union, January 1861, in 4 Basler, *supra* note 63, at 168, 169.

65. *Id.*

66. Letter from Abraham Lincoln to Alexander H. Stephens (Dec. 22, 1860), in 4 Basler, *supra* note 63, at 160.

67. Letter from Alexander H. Stephens to Abraham Lincoln (Dec. 30, 1860), in 4 Basler, *supra* note 63, at 160–61 n.1.

Stephens.

In William Forbath's persuasive expansion of Lincoln's thought:

The Framers . . . made the egalitarian principles of the Declaration of Independence the "apple of gold" of which the Constitution and the Union were merely a "silver picture . . . framed around it." They lacked, however, both the opportunity and the will to get the right fit between the Declaration and the Constitution; the constitutional frame was flawed and imperfect, but unfinished and reinterpretable. Getting the two texts to fit properly together, in Lincoln's account, was a task the Framers left to future generations, and he called on his generation of citizen-interpreters to spurn the proslavery Constitution of the Court and instead to complete the Founders' "unfinished work" of "Liberty for All."⁶⁸

"Unfinished work," of course, comes not from the "Fragment" but from Gettysburg. Forbath's use here of that resonant phrase draws the apt connection between the two documents.

If Forbath has this right, as I believe, Lincoln treated the Declaration-text as a kind of pledge by the Fathers, committing the infant nation over its lifetime to see through to completion a work of supreme law-making that stood unfinished as he wrote and spoke the words we have under review. To have invoked the Declaration text in this way, as a standing pledge for law still to come, was decidedly *not* to have claimed it as already law. In common life, if not always in speculative jurisprudence, a contrast ineluctably is drawn between law as it is and law as it might or should be. Not even lawyer Lincoln—and a formidable lawyer he was⁶⁹—could have it both ways. Except for those few (Lincoln most certainly not among them)⁷⁰ who might totally deny any gap or difference at all between

68. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 24 (1999). Basler reports: "No speech which employs the language of the fragment has been found . . ." 4 Basler, *supra* note 63, at 169 n.1. One can, however, detect an anticipation of the fragment's idea in Lincoln's famous 1857 speech on the *Dred Scott* case. See *infra* note 71 and accompanying text.

69. See generally DANIEL A. FARBER, LINCOLN'S CONSTITUTION (2003).

70. Compare Abraham Lincoln, First Inaugural Address—First Edition and Revision (March 4, 1861), in 4 Basler, *supra* note 63, 249–50 ("I believe I have [as President] no lawful right to [interfere with the institution of slavery in the States where it exists]."), with Letter from Abraham Lincoln to Albert Hodges (Apr. 4, 1864), 7 Basler, *supra* note 63, at 281, 281 ("If slavery is not wrong, nothing is wrong."). See also Abraham Lincoln & Stephen A. Douglas, Third Debate with Stephen A. Douglas at Jonesboro, Illinois (Sept. 15, 1858), in 3 Basler, *supra* note 63, at 102, 131–32 ("[A]lthough it is distasteful to me, I have sworn to support the Constitution, and having so sworn, I cannot conceive that I do support it if I withhold from that right [to have fugitive slaves 'delivered up'] any necessary legislation to make it practical."); Abraham Lincoln, Address Before the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), in 1 Basler, *supra* note 63, at 108, 112 ("[A]lthough bad laws . . . should be repealed as soon as possible, still while they continue in force . . . they should be religiously observed.").

obligations moral and legal, the obligation to conform the Constitution to the Declaration, implied by Lincoln according to Forbath, could only have been moral, not legal.

Confirmation of sorts may perhaps be found in Lincoln's famous speech from two years earlier, responding to the Supreme Court's decision in *Dred Scott v. Sandford*:

The assertion that "all men are created equal" was . . . placed in the Declaration . . . for future use. Its authors meant it to be, thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism.⁷¹

The key word for us in that statement is "now." He might have said "now finally," or "now at last." The Constitution missed the boat. We have a work of lawmaking yet to complete, by the processes we use here to get laws made. In sum, it seems to me clear that Lincoln's hallmark invocations of the Declaration-text were creedal, not legal.

B. "CONSENT OF THE GOVERNED"

1. Fast-Forward to the Present

Article I, section 4 of the Constitution provides that the manner of electing Representatives "shall be prescribed in each State by the Legislature thereof." In June 2015, in the case of *Arizona State Legislature v. Arizona Independent Redistricting Commission*,⁷² the Supreme Court had to decide whether that clause "precludes resort to an independent commission, created by initiative, to accomplish redistricting."⁷³ Answering that it does not, Justice Ginsburg, writing for the Court, drew support from the Declaration:

Our Declaration of Independence, ¶2, drew from Locke in stating: "Governments are instituted among Men, deriving their just powers from the consent of the governed." And our fundamental instrument of government derives its authority from "We the People." . . . In this light, it 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," Art. I, § 2⁷⁴

71. Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), in 2 Basler, *supra* note 63, at 398, 406.

72. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

73. *Id.* at 2655.

74. *Id.* at 2675.

Was Justice Ginsburg there putting the Declaration-text to work as interpretive context? Did she mean to say approximately:

Given that the Declaration-text propounds the principle of the consent of the governed, and given that, as history shows, the Constitution was understood or intended by its drafters and ratifiers as an implementation of the principles of the Declaration, it follows that, as between the readings of Article I, section 4 now competing before us, both facially plausible, the reading favored by the respondents must be preferred.

Opinions may differ, but to my mind it would be a stretch thus to understand Justice Ginsburg. Her opinion's main reliance is on the words of Article I, section 2 put together with readings of certain judicial precedents. She puts the Declaration-text to what I would call a creedal use, much as some other judge on some other occasion might imaginably use the Gettysburg Address or the Pledge of Allegiance. The text serves her as a canonical marker for a principle—here, government by consent of the governed—to which she expects wide agreement from Americans as one to which our laws should as far as possible be presumed to conform.⁷⁵

C. “DIGNITY INNATE”

Consider now another instance, also from June 2015. In *Obergefell v. Hodges*,⁷⁶ the Supreme Court by divided vote affirmed a constitutional right of same-sex couples to be issued state licenses to marry.⁷⁷ According to the Court, at stake in the case was a claim of the plaintiffs to “dignity.”⁷⁸ Writing in dissent, Justice Thomas objected that the dignity of the individual human being is not, in the Constitution's sight, a benefit within the power of government to grant or withhold, but rather is a given fact for government to respect. Of course no sentence to that effect can be found in the Constitution. Thomas rather found one in the Declaration-text.

75. Cf. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (“The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.”). See Mark Graber, *The Declaration of Independence and Contemporary Constitutional Pedagogy*, 89 S. CAL. L. REV. 509, 518–19 (2016) (using the term “celebrity citation” for items lawyers cite as embellishments for arguments whose legal force and logic rest completely and sufficiently on other materials); Mark Graber, *The Price of Fame: Brown as Celebrity*, 69 OHIO ST. L.J. 939, 988 (2008) (equating “celebrity citation” with a “citation of choice for obvious points about constitutional law and politics that no Justice, lawyer or major political actor disputed”).

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

77. See *id.* at 2585.

78. See *id.* at 2608 (“[The plaintiffs] ask for equal dignity in the eyes of the law. The Constitution grants them that right.”). To be clear, Justice Kennedy meant that the Constitution grants that right under the heading of “liberty.” See *id.* at 2589 (stating that “the fundamental liberties” protected by the due process clauses “extend to certain personal choices central to individual dignity and autonomy”).

The Court's majority, Thomas wrote, rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution . . . inverts the relationship between the individual and the state in our Republic. . . .

When the Framers proclaimed in the Declaration of Independence that “all men are created equal” and “endowed by their Creator with certain unalienable Rights,” they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. . . . 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. Today's decision casts that truth aside.⁷⁹

It evidently followed, in the view of Justice Thomas, that in the name of human dignity you cannot ascribe to the state a positive duty to provide people with benefits such as might accompany admission to a civically recognized state of marriage. One may agree or not with that inference or with the reading of the Declaration-text from which it depends. My concern here, though, is solely with a question about what sort of use we should see Justice Thomas making of the Declaration-text.

Agreeing with the Court that a premise of human dignity inheres in the substantive guarantees of the Fourteenth Amendment, Thomas apparently finds that premise to be such that it can possibly suffer contradiction from the state's oppressive intrusions into a person's life and affairs, but never at all from the state's provisions and distributions of benefits.⁸⁰ That represents a negative-libertarian construction of the amendment so exceptionally strict and contentious—it drew but a single concurring vote⁸¹—as plainly to require a supporting argument. It was to

79. *Id.* at 2631, 2639–40 (Thomas, J., dissenting).

80. Justice Thomas had made a similarly negative-libertarian invocation of the Declaration-text on at least one prior occasion. Concurring in the Court's invalidation of a racial affirmative-action plan in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), Thomas wrote:

As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. *See* Declaration of Independence (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness”).

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

81. *See Obergefell*, 135 S. Ct. at 2631 (Thomas, J., joined by Scalia, J., dissenting).

the Declaration-text that Thomas looked for support.

We can easily fit this use of the text to the interpretive-contextual model. It is a historical fact—so runs the argument—that the Fourteenth Amendment was meant by its drafters and ratifiers to enact into law the normative claims of the Declaration-text, and furthermore that the text was understood by them to carry the strictly negative-libertarian conception of human dignity. True, that argument runs into the difficulty that some historians would very sharply dispute the historical claims on which it rests its reading of the Fourteenth Amendment.⁸² But since that sort of potential difficulty plainly attends every instance of reliance on original understanding to decide a constitutional case, its presence here cannot go to show that Thomas did not make an interpretive-contextual use of the Declaration-text in *Obergefell*.

Yet it is not fully clear that he did, and that is because another possibility remains that cannot be entirely discounted. Thomas's words, if you look at them closely ("foundation upon which this Nation was built"), could also be read to suggest that the Declaration-text stands as American supreme law, above or side-by-side with the Constitution, and that as such it demands the strictly negative-libertarian reading of the Fourteenth Amendment, lest the amendment itself be found undeclarational. Thus understood, Thomas would be making a primary-legal deployment of the Declaration-text.

CONCLUSION: COMPARING THE MODALITIES OF USE

We return to our opening example. The Supreme Court has to choose between a uniform and a non-uniform reading of the ACA. The Declaration-text might have a bearing on that choice, in any or all of the three modalities we have respectively called primary-legal, contextual, and creedal. In any of those modes of use, the direction of the bearing of the text would depend on whether we give it the sort of classical-liberal, negative-libertarian construction favored by Justice Thomas⁸³ and Professor Zuckert⁸⁴ or the sort of positive social-state construction favored

82. See WILLS, *supra* note 51, at 173, 237–39, 247 (concluding that Thomas Jefferson followed philosophers of the Scottish enlightenment, who "laid special emphasis on the happiness of the people as the basis of any regime's legitimacy" and whose views were "more conducive to egalitarianism than Locke's"); *id.* at 235, 255 (denying that Jefferson was "a Lockean individualist, basing the social contract on property rights"); Akhil Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlement*, 13 HARV. J.L. & PUB. POL. 37, 39–40 (1990) (finding behind the Thirteenth Amendment a "republican vision" providing a "right to sustenance and shelter" that should be read "even more broadly in the wake of the later adoption of the Fourteenth and Fifteenth Amendments").

83. See *supra* Part III.C.

84. See *supra* note 21.

by Professors Black⁸⁵ and others.⁸⁶ But then how are we to decide between these competing constructions?

We could try to settle it by looking to see which construction in fact prevailed among some relevant public at some relevant moment in past historical time, granting that we cannot always count on anything like a clear consensus of historians examining the question. But let us for now pass by the consensus problem and simply ask, with regard to each of the three modalities, what would be the relevant moment in historical time? For the creedal use, the answer is easy—or rather we should say the question does not even come up. When Justice Ginsburg makes her creedal use of the Declaration-text in the *Arizona* case, what matters is *her* construction of its meaning and that of her contemporaneous audience. Her creedal invocation of the text will be persuasive just insofar as her construction of it rings bells for her audience. With creedal uses of the Declaration-text in constitutional-legal argument, we do not have to bother at all about the tangle of issues surrounding the historical mode of constitutional interpretation.

How does it work with contextual uses? The conversational salience of the Declaration-text in the birth-process of the Reconstruction amendments is, we say, a part of the historical record on which we depend to help with resolution of the meanings of the amendments. If, say, a party to *King v. Burwell* were to rely on that feature of the record to support a reading of the amendments that would make unconstitutional the non-uniform reading of the ACA, the reference could only be to the understanding of the Declaration-text held by the amendment's framers and ratifiers at the time of framing and ratification. We would want to know how *they* construed the instrument they took as a guide. (Notice how the same conclusion seems to hold if we say the amendments were meant to "incorporate" the Declaration-text.⁸⁷ They wouldn't have meant to incorporate it like a pig in a poke, regardless of what they or anyone else understood it to say and to signify.) Unlike with a purely creedal use of the Declaration-text, a use of it as interpretive context for the Reconstruction amendments does face the problem of likely enduring disagreements among historical investigators as between, say, a negative-libertarian and a positive social-state construction of the text. But at least we would know to which historical moment we should be looking.

Now, what if we say the Declaration-text stands in the United States

85. See *supra* note 20.

86. See *id.*

87. See Tsesis, *Constitutional Interpretation*, *supra* note 19, at 391.

as primary supreme law side-by-side with the Constitution? Then we necessarily start up for the Declaration text the full tangle of debates that rage around the historical mode of constitutional interpretation. I see no way to avoid that conclusion. Not only do we confront a prospect of endless *historikerstreite* over which among sundry competing constructions prevailed at this or that historical moment, we fight over which historical moments to look at. Do we, for example, choose “original meaning originalism” or “living originalism?”⁸⁸

Convergence on an agreed set of meanings for the Declaration-text does not currently seem to be on the cards. Historians’ reports of progressive-redistributive deployments of the Declaration over the course of American politics sometimes come packaged with remarks about the “subversive” capacities of natural-rights talk⁸⁹ and the unpredictable uses to which the Declaration can be put.⁹⁰ Nor will resort to the original understanding help, in case that is what you might be hoping. A professional who has done the work first hand may claim to know the truth about that. For the rest of us, though, we pay our money and we take our choice over which professionals to follow on the question of whether the Declaration’s eighteenth-century message on inalienable rights represents an embrace or rather a rejection of a “classical liberal,” Locke-inspired political ideology.⁹¹

Extending the domain of constitutional-legal argument to this terrain is not, to me, an enticing prospect, nor can I see it as likely to lead toward improved constitutional decisionmaking. I say let the Declaration stay what it mainly now is: a symbol of national commitment to the pursuit of social justice, an available rhetorical template for American political argument, and—for legal advocates and opinion writers—an icon for some creedal

88. See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

89. RODGERS, *supra* note 34, at 47.

90. See *id.* at 69; WILLS, *supra* note 51, at xxiv–xxv (“We have cited [the Declaration], over the years, for many purposes, including the purpose of deceiving ourselves The Declaration has been turned into something of a blank check for idealists of all sorts to fill as they like.”).

91. Differences are recounted in Farber, *supra* note 55, at 463. Compare BECKER, *supra* note 36, at 62 (referring to “John Locke, in whose book Jefferson found so well expressed the ideas which he put into the Declaration”), *id.* at 72, 79 (ascribing Lockean philosophy to Jefferson et al. as “the common sense of the matter” and “commonplace doctrine”), *id.* at 63–65 (ascribing to Locke the idea that human makers of a political contract, if acting according to their natures as given them by God, would aim to effectuate the precept that “no one ought to harm another in his life, liberty, and possessions”), RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 18 (2014) (tracing the Declaration’s connection to a “central Lockean premise” through the Massachusetts constitution of 1780), and RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE LAW OF EMINENT DOMAIN* 9–19 (1985) (describing the “Lockean system” and asserting that it was “dominant at the time when the Constitution was adopted”), with sources cited *supra* note 82.

truths of American democracy: platitudes, no doubt, but of which occasional sharp reminders can sometimes serve a good purpose.

