

# The Constitutional Relevance of the Second Sentence of the Declaration of Independence

Dan Himmelfarb

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.<sup>1</sup>

The second sentence of the Declaration of Independence is familiar to most Americans. Indeed, the passage must rank among the most widely quoted in American political history. But have these words any significance beyond their recognizability? In particular, can they offer us any guidance in our attempt to understand the Constitution?

Few legal historians or constitutional theorists would answer in the affirmative: those scholars who do not ignore the Declaration<sup>2</sup> are likely to mention the document only in order to dismiss it. Nor is this view limited to a particular ideological camp: adherents can be found on the Right,<sup>3</sup> Left,<sup>4</sup> and Center<sup>5</sup>

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1. The Declaration of Independence para. 2 (U.S. 1776).

2. The author of a widely used constitutional law treatise mentions the Declaration only once in the course of more than 1700 pages. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-3, at 1309 (2d ed. 1988). The leading works of constitutional theory are similarly silent. *See* A. BICKEL, *THE MORALITY OF CONSENT* (1975) (no references to Declaration); R. BORK, *THE TEMPTING OF AMERICA* (1990) (same); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982) (same); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 266 (1977) (single reference to Declaration); M. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 45 (1988) (same). *But see* A. BICKEL, *THE LEAST DANGEROUS BRANCH* 65-68 (2d ed. 1986) (suggesting that insofar as tension between “principle” and “expediency” underlies American government, Declaration is source of “principle”).

3. *See, e.g.*, R. BERGER, *GOVERNMENT BY JUDICIARY* 87 (1977) (rejecting validity of “import[ing] the Declaration into the Constitution”); M. BRADFORD, *A BETTER GUIDE THAN REASON* 41 (1979) (“the Declaration is not implicit in the Constitution”); W. KENDALL & G. CAREY, *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION* 17 (1970) (suggesting that “the notion of the Declaration of Independence as the beginning [of] the American tradition” is “false”); Francis, *As We Go Marching* (Book Review), *CHRONICLES*, Sept. 1989, at 29, 32 (Declaration “is not . . . a charter of government, but a proclamation of national independence and a catalogue of the abuses of power that justified the act of separation”); Graglia, *Judicial Activism: Even on the Right, It's Wrong*, *PUB. INTEREST*, Spring 1989, at 57, 71 (contrast-

of the political spectrum.

In denying the centrality of the Declaration to the American Founding, however, contemporary scholars depart from an understanding of the document shared by some rather distinguished Americans of the past. The author of the Declaration<sup>6</sup> and the father of the Constitution<sup>7</sup> were both convinced of the Declaration's fundamentality; their view was shared by, among others, Abraham Lincoln<sup>8</sup> and Martin Luther King, Jr.<sup>9</sup>

The thesis of this Note is that the newer understanding of the Declaration is mistaken, and the older understanding correct. The thesis, more specifically, is that the Declaration of Independence is more than a propaganda instrument or legal brief; that in fact it is fundamental to a proper understanding of the Constitution; and that abundant support for this proposition can be found in the leading writings and debates of the Founding Era. Indeed, it would hardly be an exaggeration to say that the most fundamental pronouncements made in connection with the framing and ratification of the Constitution are restatements

ing Declaration, "a revolutionary manifesto attempting to justify defiance of law," with Constitution, "the foundation of a government and legal system"; Kirk, *Introduction* to A. NOCK, MR. JEFFERSON at xvi (1983) (Declaration "was meant to persuade the court of France, and the *philosophes* of Paris"; it was "a[n] . . . instrument of diplomacy[,] . . . not . . . an instrument of government").

4. See, e.g., J. ELY, DEMOCRACY AND DISTRUST 49 (1980) (describing Declaration as "a brief"); G. WILLS, INVENTING AMERICA 325 (1978) (sole purpose of Declaration was to "secur[e] . . . foreign aid in the ongoing war effort"); Treanor, *Taking the Framers Seriously* (Book Review), 55 U. CHI. L. REV. 1016, 1032 (1988) ("the Constitution is not a translation of the Declaration's . . . concerns into principles of governance").

5. See, e.g., D. BOORSTIN, THE GENIUS OF AMERICAN POLITICS 84 (1953) (Declaration is "a document of imperial legal relations rather than a piece of . . . political philosophy"); R. HOFSTADTER, THE PROGRESSIVE HISTORIANS 269 (1968) (Declaration was "a propaganda manifesto," not an "instrument[] of government"); Detweiler, *The Changing Reputation of the Declaration of Independence: The First Fifty Years*, 19 WM. & MARY Q. (3d ser.) 557, 557-58 (1962) ("[T]he [Founding] Fathers . . . viewed the Declaration principally as a proclamation of independence."); Rakove, Book Review, A.B.A. J., Sept. 1, 1987, at 120, 120 (that "the Constitution 'constitutionalizes'—or . . . incorporates—the theory of the Declaration" is a "doubtful assertion").

6. See Letter from Thomas Jefferson to the Department of State (Nov. 18, 1825), reprinted in J. HAZELTON, THE DECLARATION OF INDEPENDENCE: ITS HISTORY 155, 155 (1906) (describing Declaration as America's "Great charter").

7. See J. MADISON, *Letter to Thomas Jefferson* (Feb. 8, 1825), in 9 THE WRITINGS OF JAMES MADISON 218, 221 (G. Hunt ed. 1910) (recommending Declaration as first of "best guides" to "distinctive principles" of government).

8. See A. LINCOLN, *Letter to James N. Brown* (Oct. 18, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 327, 327 (R. Basler ed. 1953) (Declaration's recognition that "all Men are created equal" is "the great fundamental principle upon which our free institutions rest"); A. LINCOLN, *Speech at Springfield, Illinois* (June 26, 1857), in 2 *id.* at 398, 406 (that "all Men are created equal" is "a standard maxim for free society").

9. Compare M.L. KING, *I Have a Dream* (Aug. 28, 1963), in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 217, 217 (J. Washington ed. 1986) (Declaration was "promissory note to which every American was to fall heir") with A. LINCOLN, *Speech in Independence Hall, Philadelphia, Pennsylvania* (Feb. 22, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 8, at 240, 240 (Declaration was "a promise that in due time the weight would be lifted from the shoulders of all men") and T. JEFFERSON, *Letter to Roger C. Weightman* (June 24, 1826), in 10 THE WRITINGS OF THOMAS JEFFERSON 390, 391-92 (P. Ford ed. 1899) ("[T]he light of science [embodied in the Declaration] has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs . . . . These are grounds of hope for others.").

of the principles articulated in the second sentence of the Declaration of Independence.

Section I of this Note discusses the political theory set forth in the second sentence of the Declaration. Section II argues that in view of the centrality of that political theory to the debates surrounding the framing and ratification of the Constitution, the claim that the Declaration is constitutionally irrelevant is a weak one.<sup>10</sup>

### I. LIBERAL DEMOCRACY OR DEMOCRATIC LIBERALISM?: THE POLITICAL THEORY OF THE DECLARATION

As significant as the principles that are mentioned in the Declaration's second sentence are the principles that are *not*: democratic government, and the "rights of Englishmen." The implication of this silence is that the English government is flawed not because it is monarchical but because it rejects the philosophy of the "rights of man."

#### A. *From the Rights of Englishmen to the Rights of Man: A Philosophical—No Less than Political—Break with England*

"[T]he Declaration of Independence did not deny the principles of the English constitution." So writes Gordon Wood in one of the most influential historical works on the American Founding.<sup>11</sup> Wood's assertion is a dubious one. For the principles of the Declaration, far from being *derived* from the English constitution, are in important respects a *repudiation*.

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10. There are a handful of scholars who have urged their readers to take the Declaration seriously and to understand the American regime in general, and the Constitution in particular, in light of the Declaration's principles. The most prominent of these are Walter Berns, Martin Diamond, and Harry V. Jaffa (to each of whom Section I of this Note is indebted). See W. BERNS, *TAKING THE CONSTITUTION SERIOUSLY* (1987); H. JAFFA, *AMERICAN CONSERVATISM AND THE AMERICAN FOUNDING* (1984) [hereinafter *AMERICAN FOUNDING*]; H. JAFFA, *HOW TO THINK ABOUT THE AMERICAN REVOLUTION* (1978) [hereinafter *AMERICAN REVOLUTION*]; Berns, *Does the Constitution "Secure These Rights"?*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* 59, 73-75 (R. Goldwin & W. Schambra eds. 1980); Diamond, *The Declaration and the Constitution: Liberty, Democracy, and the Founders*, *PUB. INTEREST*, Fall 1975, at 39; Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 *U. PUGET SOUND L. REV.* 351 (1987). But theirs is clearly a minority view among students of the American Founding. Moreover, while much of their work rests on the *premise* that the Declaration has constitutional relevance, there has been little in the way of a sustained or systematic attempt to *demonstrate* this proposition. These scholars have thus been criticized on the grounds that their argument represents mere assertion, that theirs is less a descriptive than a prescriptive theory. See, e.g., Rakove, *supra* note 5, at 120 ("[T]hat the . . . commitments of the Declaration offer the . . . true perspective from which to view the Constitution[] is primarily a statement of faith. . . . Berns can only assert, but not prove, that the Constitution 'constitutionalizes' . . . the theory of the Declaration."). The purpose of this Note is to show that the proposition that the Declaration has constitutional relevance is more than an *ipse dixit*.

11. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 45 (1969); cf. D. BOORSTIN, *supra* note 5, at 83 (Declaration is "succinct restatement of the Whig theory of the British revolution of 1688"); G. WILLS, *supra* note 4, at 89 (Declaration is "restatement of whig theory vindicated in the 1688 Revolution").

The Declaration of Independence is not a defense of the rights of Englishmen (or even Americans); it is a defense of the rights of man. According to the Declaration, all men have certain rights by nature; these rights exist prior to and independently of any political order. According to the Magna Carta and the (English) Bill of Rights, in contrast, the rights that belong to Englishmen (not men) derive from history, tradition, custom, convention—and kings. That is to say, it is government (rather than nature) that bestows rights.<sup>12</sup>

Thus in Magna Carta King John declares that “[w]e have *granted* . . . to all free men *of our kingdom* . . . the liberties written below.”<sup>13</sup> And the Bill of Rights states that “the late King James the Second . . . did endeavour to subvert and extirpate . . . the . . . liberties *of this kingdom*.”<sup>14</sup> Parliament presented the Bill of Rights to William and Mary for the purpose of “vindicating and asserting [Britons’] *ancient rights and liberties*.”<sup>15</sup>

The foremost defender of the English constitution fully appreciated this distinction. A central theme of Edmund Burke’s *Reflections on the Revolution in France* is that the rights of Englishmen derive not from nature but from tradition, and belong not to men in general but to Englishmen in particular. Thus Burke writes as follows:

In . . . the Petition of Right, . . . [English subjects] claim[] their franchises not on abstract principles “as the rights of men”, but as the rights of Englishmen, and as a patrimony derived from their forefathers. . . .

. . . .  
 . . . [F]rom Magna Charta to the Declaration of Right it has been the uniform policy of our constitution to claim and assert our liberties as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity—as an estate specially belonging to the people of this kingdom, without any reference whatever to any other more general or prior right.<sup>16</sup>

The American Founders, in contrast, spoke of the “rights of man.” From Left to Right—from Thomas Paine to Alexander Hamilton—the Founders agreed that the political order they were establishing rests on the proposition that all men possess certain rights by nature—rights that are not *conferred* by government, but merely *recognized*. They further agreed that their theory

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12. See H. JAFFA, CRISIS OF THE HOUSE DIVIDED 317-18 (1959) (pointing out flaw in Stephen Douglas’ claim that proposition that “all Men are created equal” means that all British subjects are entitled to same inalienable rights—flaw deriving from failure to appreciate that “[t]he rights of Britons as Britons were rights conferred by British law and hence alienable by the same process which conferred them” (emphasis in original)).

13. MAGNA CARTA art. 1 (emphasis added).

14. Bill of Rights Act, 1689, 1 W. & M., ch. 2, § 1 (emphasis added).

15. *Id.* (emphasis added).

16. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 28-29 (J.G.A. Pocock ed. 1987) (Library of Liberal Arts ed. 1955) (emphasis in original).

represented a break with the past.<sup>17</sup> As for the opponents of the Constitution, whatever their disagreements with the Federalists, the Anti-Federalists were at one with their adversaries in championing the philosophy of the “rights of man.”<sup>18</sup>

That men are equal in their possession of rights is a derived principle; it follows from the fundamental distinction between men and animals—namely, rationality. Men and animals share certain characteristics, but only men possess the use of reason.<sup>19</sup> Thus, irrespective of the differences among men, none is more a human being than another. Human beings may differ in race, gender, strength, or wisdom, but they are equal insofar as they (unlike animals) are rational creatures. The differences between species is the ultimate foundation of the philosophy of the “rights of man.”<sup>20</sup>

17. See, e.g., T. PAINE, *THE RIGHTS OF MAN* 151-54 (A. Seldon ed. 1958) (“The Independence of America . . . [was] accompanied by a Revolution in the principles . . . of Governments. . . . Government founded on . . . the . . . *Rights of Man*[] is now revolving from west to east . . . .” (emphasis in original)); T. JEFFERSON, *supra* note 9, at 391 (“May [the Declaration] be to the world . . . the signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves . . . . All eyes are opened, or opening, to the rights of man.”); J. MADISON, *Charters* (Jan. 19, 1792), in 6 *THE WRITINGS OF JAMES MADISON* 83, 83 (G. Hunt ed. 1906) (“We look back . . . with astonishment[] at the daring outrages committed . . . on the . . . rights of man . . . .”); G. WASHINGTON, *Circular Letter Addressed to the Governors of All the States on Disbanding the Army* (June 8, 1783), in 8 *THE WRITINGS OF GEORGE WASHINGTON* 439, 441 (J. Sparks ed. 1835) (foundation of American government “was not laid in the gloomy age of ignorance and superstition, but at an epocha [sic] when the rights of mankind were better understood and more clearly defined, than at any former period”); A. HAMILTON, *The Farmer Refuted* (Feb. 23, 1775), in 1 *THE PAPERS OF ALEXANDER HAMILTON* 81, 122 (H. Syrett ed. 1961) (“The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sunbeam, in the whole *volume* of human nature, . . . and can never be erased or obscured by mortal power.” (emphasis in original)); cf. E. BURKE, *supra* note 16, at 57 (sarcastically putting following words into mouth of defender of French Revolution: “I have lived to see *the rights of men* better understood than ever” (emphasis in original)). The philosophical movement from the “rights of Englishmen” to the “rights of man” is also embodied in the distinction between colonial charters and state constitutions. Compare, e.g., *NEW ENGLAND CHARTER OF 1620*, in 3 *AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS*: 1492-1908, at 1827, 1839 (F. Thorpe ed. 1909) (inhabitants of New England “shall have and enjoy all [the] Liberties . . . of . . . [English] subjects . . . , as if they had been . . . born within . . . England”) and *VA. CHARTER OF 1606*, in 7 *id.* at 3783, 3788 (inhabitants of Virginia “shall HAVE and enjoy all Liberties . . . as if they had been . . . born[] within . . . England” (emphasis in original)) with *MASS. CONST. OF 1780*, Declaration of Rights art. I, in 3 *id.* at 1888, 1889 (“[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights”) and *VA. CONST. OF 1776*, Bill of Rights § 1, in 7 *id.* at 3812, 3813 (“all men are by nature equally free and independent, and have certain inherent rights”).

18. See, e.g., Martin, *Mr. Martin's Information to the General Assembly of the State of Maryland*, in 2 *THE COMPLETE ANTI-FEDERALIST* 27, 61 (H. Storing ed. 1981) (“those rights, to which God and Nature had entitled us, not in particular, but in common with all the rest of mankind”); *Essays by William Penn* No. 1 (Jan. 2, 1788), in 3 *id.* at 168, 169 (“those rights, which man holds by inheritance from all-bountiful nature”); see also Warren, *Observations On the New Constitution, And on the Federal and State Conventions. By a Columbian Patriot*, in 4 *id.* at 270, 274 (“man is born free and possessed of certain unalienable rights”). For a more detailed discussion of the relevance of the Declaration's principles to Anti-Federalist thought, see *infra* text accompanying notes 75-95.

19. Cf. J. LOCKE, *The First Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* § 86, at 242 (P. Laslett rev. ed. 1963) (3d ed. 1698) (“Man . . . is[] directed . . . by his Senses and Reason, . . . Animals by their Sense, and Instinct”).

20. Cf. J. LOCKE, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT*, *supra* note 19, § 4, at 309 (“there [is] nothing more evident, than that Creatures of the same species and rank . . . should . . . be equal one amongst another without Subordination or Subjection”). Harry V. Jaffa has suggested that the Declaration's “[w]e hold these Truths to be self-evident” is a self-conscious echoing of

## B. *Ends and Means*

The Progressive historians of the early twentieth century, led by Charles Beard, interpreted the Constitution as an antidemocratic document, a reaction against the genuinely democratic Revolutionary period.<sup>21</sup> This interpretation of the Founding has in large measure been abandoned, its economic reductionism exposed.<sup>22</sup> Yet the repudiation has been less than complete. For there are many scholars today whose view is not far from Beard's: 1787 was a repudiation (or betrayal) of 1776; the principles of the aristocratic Constitution are inconsistent with those of the democratic Declaration.<sup>23</sup>

The problem with this view is that the Declaration is not concerned with democracy—or, for that matter, with any particular form of government. According to the Declaration, the end of legitimate government is the protection of rights: “[T]o secure these Rights, Governments are instituted among Men.” *How* these rights are to be secured is another matter. It is the Constitution that is concerned with the means toward this end. “[T]o secure these Rights,” the Constitution has established a democratic government.<sup>24</sup>

The Declaration is a liberal document;<sup>25</sup> the Constitution is a democratic document.<sup>26</sup> The Declaration addresses the question of ends; the Constitution

Locke's “there [is] nothing more evident.” AMERICAN FOUNDING, *supra* note 10, at 21; AMERICAN REVOLUTION, *supra* note 10, at 40, 109.

21. See, e.g., 3 V. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 411 (1930) (Declaration is “classical statement of . . . humanitarian democracy,” whereas Constitution was “designed to serve property rather than men”); J. SMITH, THE SPIRIT OF AMERICAN GOVERNMENT 218-19 (1907) (“The Constitution . . . was a reaction against and a repudiation of the theory of government expressed in the Declaration of Independence . . .”). See generally C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913) (classic statement of Constitution-as-antidemocratic thesis).

22. See, e.g., R. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF “AN ECONOMIC INTERPRETATION OF THE CONSTITUTION” (1956); F. McDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958).

23. Thus Gordon Wood:

[W]hile Beard's interpretation . . . in a narrow sense is undeniably dead, the general interpretation of the Progressive generation of historians—that the Constitution was in some sense an aristocratic document designed to curb the democratic excesses of the Revolution—still seems to me to be the most helpful framework for understanding the politics and ideology surrounding the Constitution.

G. WOOD, *supra* note 11, at 626; see also *id.* at 513 (“The Constitution was intrinsically an aristocratic document designed to check the democratic tendencies of the [Revolutionary] period . . .”); cf. H. ARENDT, ON REVOLUTION 215-281 (1965) (arguing, in chapter entitled “The Revolutionary Tradition and Its Lost Treasure,” that insofar as Constitution secured not “public freedom”—i.e., democratic participation—but only “negative liberties,” it failed to “preserve the revolutionary spirit,” thereby “cheat[ing] [the American people] of their proudest possession”).

24. See Berns, *supra* note 10, at 73-75; Diamond, *supra* note 10.

25. Leo Strauss's definition of liberalism—“that political doctrine which regards as the fundamental political fact the rights . . . of man and which identifies the function of the state with the protection . . . of those rights”—serves as a perfect description of the political theory of the Declaration. L. STRAUSS, NATURAL RIGHT AND HISTORY 181-82 (1953).

26. Or, in the language of the Founders, a “republican” document. See THE FEDERALIST No. 10, at 81-84 (J. Madison) (C. Rossiter ed. 1961) [hereinafter all citations to *The Federalist* are to this edition]

addresses the question of means. The Declaration is concerned with the purpose of government; the Constitution is concerned with the form of government. The Declaration is not only chronologically but also conceptually prior to the Constitution, which merely describes those “Principles” and “Powers” that “seem most likely” to achieve the proper ends of government. The Constitution presupposes the Declaration. And according to the standards of the Declaration, the legitimacy of a government depends not on how democratic it is, but on whether it “secure[s] these Rights.” In this regard, it might be appropriate to think of the Founders not as liberal democrats, but as democratic liberals.

### C. *Neutrality as to Forms*

The *raison d'être* of government, according to the Declaration, is the protection of rights. But there is another feature that distinguishes legitimate from illegitimate government—namely, consent. Governments “deriv[e] their just Powers from the Consent of the Governed.” The necessity of government by consent is a corollary of the equality of rights among men. For if men are by nature free and equal, then none may rule another without his consent.<sup>27</sup>

But the doctrine of consent is not the equivalent of—nor does it necessarily imply—popular government. A people can choose (i.e., consent to) a *form* of government in which the people do not participate in the *operation* of government. Choosing a form of government (consent) and choosing those who rule (democracy) are two distinct concepts.<sup>28</sup> Implicit in the Declaration is the proposition that a legitimate government requires the former but not the latter: such a government must be “of the people,” but it need not be “by the people.” Thus the suggestion that the Declaration contains a “fundamental presupposition against kings”<sup>29</sup> is a dubious one. For the Declaration appears to regard as

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(distinguishing between democratic government, in which “a small number of citizens . . . administer the government in person,” and republican government, in which “the scheme of representation takes place”); see also *id.* No. 14, at 100 (J. Madison) (similar).

27. Cf. J. LOCKE, *supra* note 20, § 95, at 374 (“Men being . . . by Nature, all free, equal, and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own Consent.”) (emphasis in original).

28. See D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 119 (1984) (distinguishing between choosing and judging form of government, on the one hand, and choosing and judging rulers, on the other); Diamond, *supra* note 10, at 49; cf. J. LOCKE, *supra* note 20, § 132, at 399 (“[When men] first unit[e] into Society, . . . [they] may employ all th[eir] power in making Laws for the Community . . . , and Executing those Laws by Officers of their own appointing; and then the *Form* of the government is a . . . *Democracy*: Or else may put the power of making Laws into the hands of a few select Men . . . ; and then it is an *Oligarchy*: Or else into the hands of one Man, and then it is a *Monarchy* . . . .”) (emphasis in original); T. JEFFERSON, *Letter to Edmund Randolph* (Aug. 18, 1799), in 7 *THE WRITINGS OF THOMAS JEFFERSON* 383, 385 (P. Ford ed. 1896) (“[A] nation . . . may [declare the law] by a single person, . . . or by a few persons, . . . or by . . . our present republican [government].”).

29. C. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 7 (1922); see also *id.* at 30 (Declaration evidenced “strong antipathy to kings”); H. ARENDT, *supra* note 23, at 129 (Declaration represents “rejection on principle of monarchy and kingship”); cf. R. PERRY, *PURITANISM AND DEMOCRACY* 125 (1944) (Declaration is “American democratic creed”).

legitimate any form of government that "secure[s] these Rights" and "deriv[es] [its] . . . Powers from the Consent of the Governed." Far from being an ultra-democratic document, the Declaration contains no presumption against non-tyrannical kings.<sup>30</sup>

That the Declaration is form-neutral seems clear from its language. By saying that in order to secure rights, governments are instituted among men, the Declaration suggests that there is more than one form of government that can secure rights and win the consent of the people. This view is reinforced by the language that immediately follows: "[W]hensoever *any Form* of Government becomes destructive of these Ends [i.e., the security of rights], it is the Right of the People to alter or to abolish it." And in instituting new government, the people have wide latitude: they may "lay[] its Foundation on such Principles, and organiz[e] its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness."

Then there is the "long Train of Abuses and Usurpations."<sup>31</sup> Were monarchical government *ipso facto* illegitimate, there would presumably be no need to submit facts to a "candid World";<sup>32</sup> pointing out that George III was a king would have been sufficient to establish the illegitimacy of British government.<sup>33</sup> It is tyrannical kings, not kings in general, against whom the Declaration contains a presumption. This interpretation is supported by the last sentence of the third-to-last paragraph: "A Prince, whose Character is thus marked by every act which may define a Tyrant, is unfit to be the Ruler of a Free people."<sup>34</sup> "Prince" and "Tyrant," apparently, are not equivalents.

Government, according to the Declaration, exists for the purpose of securing the rights of man. Democracy is merely an instrument toward that end, one of several forms of government to which a people might consent. The core of the political theory of the Declaration, in short, is not popular government but the security of rights and government by consent.<sup>35</sup>

30. John Hart Ely is another who, by confounding consent and democracy, (mis)interprets the Declaration as a democratic document. In support of his theory that the purpose of judicial review is to reinforce representative democracy, Ely writes that "[e]ven . . . the Declaration of Independence . . . signals its appreciation of the critical role of (democratic) process," and then cites (in italics) that portion of the Declaration that reads: "deriving their just Powers from the Consent of the Governed." J. ELY, *supra* note 4, at 89-90. Ely's theory of judicial review rests on the (mistaken) premise that "majoritarian democracy is . . . the core of our entire system." *Id.* at 7. Indeed, Ely's theory appears to stand the theory of the Declaration on its head: rather than (democratic) government's being instituted to secure rights, certain rights are enumerated in order to reinforce representative democracy.

31. The Declaration of Independence para. 2 (U.S. 1776). The list of grievances appears in paragraphs 3-29.

32. *Id.* para. 2.

33. See Diamond, *supra* note 10, at 50; Mansfield, *Thomas Jefferson*, in *AMERICAN POLITICAL THOUGHT* 23, 27 (M. Frisch & R. Stevens eds. 1971).

34. The Declaration of Independence para. 30 (U.S. 1776).

35. David Epstein has suggested that insofar as it considers "representation in the legislature" to be an "inestimable" (though not a natural or inalienable) right, The Declaration of Independence para. 5 (U.S. 1776), and rejects taxation without "Consent," *id.* para. 19, the Declaration gives "some guidance" as to forms of government. Thus, while the Declaration does not reject monarchy, it does recommend a govern-



## II. THE DECLARATION IN THE CONSTITUTION: AN ANALYSIS OF THE FRAMING AND RATIFYING DEBATES IN LIGHT OF THE DECLARATION'S SELF-EVIDENT TRUTHS

The political theory articulated in the second sentence of the Declaration consists of several fundamental propositions. First, all men are naturally and equally endowed with certain inalienable rights.<sup>36</sup> Second, the purpose of government is the safeguarding of these rights.<sup>37</sup> Third, because all men are by nature free and equal, none can rule another without his consent; thus, legitimate government rests on the consent of the governed.<sup>38</sup> Fourth, a democracy is not the only legitimate form of government—i.e., the only form of government that is potentially capable of securing rights and gaining the assent of the people.<sup>39</sup> Fifth, when government becomes destructive of its legitimate ends—i.e., the safeguarding of rights—the people may “alter or abolish”—i.e., withdraw their consent from—government.

These propositions, far from being constitutionally irrelevant, are in fact central to the most important writings and debates surrounding the framing and ratification of the Constitution. They are embodied—often explicitly, always implicitly—in the records of the Constitutional Convention; in the preeminent defense of the Constitution (*The Federalist*); and in the writings of the opponents of the Constitution (the Anti-Federalists).

### A. Framing the Constitution: The Philadelphia Convention

The participants in the Constitutional Convention were concerned less with political theory than with the structure and institutional arrangements of government. While there was little discussion of first principles during the Convention, however, one would be mistaken to suggest that there was no “reference to the political principles of the Declaration.”<sup>40</sup> For it seems clear that the deliberations at Philadelphia presupposed widespread acceptance of the political theory of the Declaration. It seems clear, in particular, that the delegates agreed that the end of legitimate government is the safeguarding of rights.

Gouverneur Morris, for example, stated that American government is “instituted for [the] protection of the rights of mankind.”<sup>41</sup> For Charles Pinckney, “extending to its citizens all the blessings of civil & religious liberty”

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ment “at least partly popular.” D. EPSTEIN, *supra* note 28, at 215 n.5.

36. See *supra* text accompanying notes 11-20.

37. See *supra* text accompanying notes 24-26.

38. See *supra* text accompanying note 27.

39. See *supra* text accompanying notes 29-35. This proposition is implicit in the Declaration.

40. Detweiler, *supra* note 5, at 562.

41. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 222 (M. Farrand rev. ed. 1937) [hereinafter RECORDS].

was the "great end," the "object of our government."<sup>42</sup> And the "end of all our deliberations," according to James Madison, was establishing a government that would "provide for the safety, liberty and happiness of the Community."<sup>43</sup>

Indeed, union was thought to be necessary precisely because the Confederation had proven inadequate to the task of securing rights. A national government, said Madison, is necessary for, among other things, "providing more effectually for the security of private rights . . . Interferences with these were evils which had more perhaps than any thing else, produced this convention."<sup>44</sup>

The delegates to the Convention were in agreement on the ends of government; their arguments concerned the most effective way to achieve those ends.<sup>45</sup> And while most delegates believed that some version of republican government would be best suited to the protection of rights, at least one—Alexander Hamilton—did not. Throughout the Convention Hamilton voiced his dissatisfaction with popular government.<sup>46</sup> Indeed, on the very last day of the Convention Hamilton could still be heard to say that "[n]o man's ideas were more remote from the plan than his own."<sup>47</sup> Nevertheless, Hamilton "professed himself to be as zealous an advocate for liberty as any man whatever, and trusted he should be as willing a martyr to it though he differed as to the form in which it was most eligible."<sup>48</sup> Thus Hamilton, in agreement with the Declaration, recognized that the popular form of government is not the only one capable of securing rights. And while Hamilton of course ultimately signed the Constitution, even those who refused to sign judged the Constitution by the standards of the Declaration.<sup>49</sup>

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42. SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 113 (J. Hutson ed. 1987).

43. 1 RECORDS, *supra* note 41, at 53; *see also* 3 *id.* at 60 (letter of Madison to Jefferson) (delegates' goal is to "propose[] a Government that will secure [the people's] liberties"); *cf.* 2 *id.* at 119 (remarks of George Mason) ("primary object" is "the preservation of the rights of the people"). *But cf.* 1 *id.* at 605 (remarks of James Wilson) ("[H]e could not agree that property was the sole or the primary object of Govern. & Society. The cultivation & improvement of the human mind was the most noble object.").

44. 1 *id.* at 134; *see also* 3 *id.* at 551 (Madison's Preface to Convention Debates) ("[T]he members of the Federal Convention of 1787[] [were devoted] to the object of devising and proposing a constitutional system which should best supply the defects of that which it was to replace, and best secure the permanent liberty and happiness of their country.").

45. *See* 1 *id.* at 425 (remarks of Elbridge Gerry) ("[He] wished we could be united in our ideas concerning a permanent Govt. All aim at the same end, but there are great differences as to the means.").

46. *See, e.g., id.* at 424 ("He acknowledged himself not to think favorably of Republican Government . . ."); *cf. id.* at 289 ("Let one branch of the Legislature hold their places for life or at least during good-behaviour. Let the Executive also be for life.").

47. 2 *id.* at 645-46.

48. 1 *id.* at 424.

49. *See, e.g., 3 id.* at 128 (letter of E. Gerry to President of Senate and Speaker of House of Representatives of Mass.) ("[C]onceiving as I did, that the liberties of America were not secured by the system [i.e., because the proposed Constitution is unable "to secure these Rights"], it was my duty to oppose it.").

## B. *For Ratification: The Federalist*

In support of his contention that the Declaration is irrelevant to a proper understanding of the Constitution, Garry Wills has pointed out that the Declaration is cited only once in the best-known commentary on the Constitution.<sup>50</sup> That the authors of *The Federalist* include only a single passage from the Declaration is certainly correct.<sup>51</sup> What is not correct is that the principles of the Declaration are absent from the pages of *The Federalist*. On the contrary: the political theory of the Declaration is central to *The Federalist's* argument.

### 1. *Securing "these Rights"*

A major purpose of *The Federalist* is to convince its readers that the government established by the Constitution will be equal to the task of securing rights. Among the means toward this end are an energetic government ("essential to the security of liberty");<sup>52</sup> federalism ("a . . . security . . . to the rights of the people");<sup>53</sup> separation of powers ("essential to the preservation of liberty");<sup>54</sup> an independent judiciary ("requisite to guard the . . . rights of individuals");<sup>55</sup> a multiplicity of factions (the "security for civil rights" and for "religious rights");<sup>56</sup> and an extended territory ("the best security . . . for the rights of every class of citizen").<sup>57</sup>

But before arranging the *structure* of government, the Framers of the Constitution had to choose a *form* of government. *The Federalist* explains why republican government is the preferred form. "Republics"—that is, governments "in which the scheme of representation takes place"—are superior to "pure democracies," because the latter are susceptible to the dangers of faction, and thus "have ever been found incompatible with personal security."<sup>58</sup> A "pure

50. G. WILLS, *supra* note 4, at 324; *see also* Detweiler, *supra* note 5, at 562-63; Treanor, *supra* note 4, at 1032.

51. The quotation (actually a misquotation) refers to the "right of the people to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.'" THE FEDERALIST No. 40, at 253 (J. Madison).

52. *Id.* No. 1, at 35 (A. Hamilton); *cf. id.* No. 70, at 423 (A. Hamilton) (energetic executive is essential to "security of liberty").

53. *Id.* No. 51, at 323 (J. Madison); *see also id.* No. 28, at 181 (A. Hamilton) ("If [the people's] rights are invaded by either [government], they can make use of the other as the instrument of redress.").

54. *Id.* No. 51, at 321 (J. Madison); *see also id.* at 323 (separation of powers is "a . . . security . . . to the rights of the people"); *id.* No. 47, at 301 (J. Madison) ("[T]he preservation of liberty requires that the three great departments of power should be separate and distinct."); *id.* (separation of powers is "essential precaution in favor of liberty").

55. *Id.* No. 78, at 469 (A. Hamilton).

56. *Id.* No. 51, at 324 (J. Madison).

57. *Id.*

58. *Id.* No. 10, at 81 (J. Madison).

democracy” is rejected because of its deficiencies regarding the protection of rights.<sup>59</sup>

The “security of rights,” the “preservation of liberty”: this, according to *The Federalist* (no less than to the Declaration), is the end of government. It is the form and structure of government that are the means toward this end.

## 2. Fundamental Pronouncements

But the principles of the Declaration play a more explicit role in *The Federalist*. In *Federalist* 10 Madison defines a “faction” as a threat to, among other things, “the rights of . . . citizens.”<sup>60</sup> It is the regulation of factions—and thereby the protection of rights—that is, according to *The Federalist*, the “principal task” of government.<sup>61</sup> Elsewhere Madison writes that “[g]overnment is instituted . . . for [the] protection of the . . . persons of individuals,”<sup>62</sup> and that “[j]ustice is the end of government.”<sup>63</sup>

Still elsewhere Madison refers to the “great principle of self-preservation[,] . . . the transcendent law of nature and of nature’s God, which declares that the safety and happiness of society are the objects at which all political institutions aim.”<sup>64</sup> The right of self-preservation is generally thought to be the most fundamental of natural rights and the one from which all others—including

59. David Epstein has suggested that by using the word “form” or “forms” four times in the eleventh paragraph of *Federalist* 10, *id.* at 80-81, Madison is “drawing attention to the fact that popular government is one among several possible forms.” D. EPSTEIN, *supra* note 28, at 89. That *The Federalist* follows the Declaration in recognizing that there is more than one form of legitimate government is also suggested by the following passage: “[W]henever and however [government] is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers.” THE FEDERALIST No. 2, at 37 (J. Jay) (emphasis added). It is worth noting that Jay’s assertion that there is “[n]othing . . . more certain” than this proposition—which has to do with the formation of a social contract (a concept that is implicit in the Declaration’s second sentence, *see infra* note 87)—and that it is “undeniable,” THE FEDERALIST No. 2, at 37, appears to be another way of saying that he “hold[s] th[is] Truth[] to be self-evident.” (In a draft of the Declaration, Jefferson began the second sentence with the phrase “We hold these truths to be sacred & undeniable.” T. JEFFERSON, *Declaration of Independence* (July 4, 1776), in 2 THE WRITINGS OF THOMAS JEFFERSON 42, 42 (P. Ford ed. 1893) (facsimile of rough draft) (emphasis added).)

60. THE FEDERALIST No. 10, at 78 (J. Madison).

61. *Id.* at 79.

62. *Id.* No. 54, at 339 (J. Madison).

63. *Id.* No. 51, at 324 (J. Madison). “Justice,” as the word is used in *The Federalist*, appears to have a liberal—as opposed to classical or communitarian—meaning. That is to say, the word has to do with the security of rights (rather than the promotion of the public good, for example). *See* D. EPSTEIN, *supra* note 28, at 62, 66, 83-85, 92, 98-99, 144-45, 162-63; *see also* Diamond, *The Federalist*, in AMERICAN POLITICAL THOUGHT, *supra* note 33, at 51, 63; Kristol, *The Problem of Separation of Powers: Federalist 47-51*, in SAVING THE REVOLUTION 100, 129 (C. Kesler ed. 1987).

64. THE FEDERALIST No. 43, at 279 (J. Madison); *cf. id.* No. 3, at 42 (J. Jay) (“safety” is first object of government (emphasis in original)). The foremost authority on *The Federalist* calls the passage in *Federalist* 43, which echoes the Declaration both linguistically and substantively, “[p]erhaps the most explicit fundamental utterance of *The Federalist*.” Diamond, *supra* note 63, at 62. Elsewhere Diamond writes that “men cannot act on a political scale so vast as [the Founders] did without having and employing a view of the politically fundamental; and it is this view which provides the crucial perspective for the understanding of their particular actions and thoughts.” *Id.* at 61.

those enumerated in the Declaration's second sentence—derive.<sup>65</sup> It should also be noted that Madison's assertion that self-preservation is the object of *all* governments (assuming the phrase "political institutions" may properly be construed as a synonym for "governments") is consistent with the Declaration's (implicit) claim that there is more than one form of government capable of securing rights.<sup>66</sup>

The Declaration says that a legitimate government not only secures rights but also rests on the consent of the governed. *The Federalist* says so as well: "American [government] ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of . . . power ought to flow immediately from that pure, original fountain of all *legitimate* authority."<sup>67</sup> And *The Federalist* recognizes the right of the people to judge as well as to choose—that is, to "alter or abolish" a government that becomes destructive of its legitimate ends.<sup>68</sup> In their references to the right to "alter or abolish," moreover, the authors of *The Federalist* use language that suggests agreement with the Declaration's recognition that there is more than one form of legitimate government: the right is said to belong to "a majority of *every* national society,"<sup>69</sup> and to be "paramount to *all* . . . forms of government."<sup>70</sup>

Even the Declaration's recognition that "all Men are created equal" is implicit in *The Federalist*. While the Constitution condoned and protected the institution of slavery, the authors of *The Federalist* suggest that condoning slavery is not the equivalent of denying that all men are naturally and equally endowed with rights. Men are slaves not by nature but by convention or positive law. And because it is not government but nature that is the source of

65. See Jaffa, *Natural Rights*, in 11 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 85, 86 (1968) ("According to the teaching developed primarily by Hobbes and Locke, there are many natural rights, but all of them are inferences from one original right, the right that each man has to preserve his life. All other natural rights . . . are necessary inferences from the right of self-preservation, or are conceived as implicit in the exercise of that primary right."); cf. J. LOCKE, *supra* note 19, § 88, at 244 ("The first and strongest desire God Planted in Men, and wrought into the very Principles of their Nature [is] that of Self-preservation . . .").

66. But see THE FEDERALIST No. 39, at 240 (J. Madison) (republican form of government is only one "reconcilable with . . . the fundamental principles of the Revolution").

67. THE FEDERALIST No. 22, at 152 (A. Hamilton) (emphasis added); see also *id.* No. 49, at 313 (J. Madison) ("the people are the only legitimate fountain of power"); *id.* No. 37, at 227 (J. Madison) ("all power should be derived from the people"); *id.* No. 46, at 294 (J. Madison) ("the ultimate authority . . . resides in the people alone").

68. See *id.* No. 40, at 253 (J. Madison) ("abolish or alter"); *id.* No. 39, at 246 (J. Madison) ("alter or abolish"); *id.* No. 78, at 469 (A. Hamilton) ("alter or abolish"); *id.* at 470 ("annul[] or change[]"); *id.* No. 28, at 180 (A. Hamilton) ("original right of self-défense").

69. *Id.* No. 39, at 246 (J. Madison) (emphasis added).

70. *Id.* No. 28, at 180 (A. Hamilton) (emphasis added). In support of his claim that the Declaration is constitutionally irrelevant, William Michael Treanor points out that the document is quoted only once in *The Federalist*, see *supra* note 51, and goes on to say that "the quoted language does not concern . . . unalienable rights." Treanor, *supra* note 4, at 1032. In fact, unalienable rights are precisely what the quoted language concerns. The right to judge government makes no sense apart from a standard of legitimacy. And that standard, according to the Declaration, is the ability to secure (unalienable) rights. Thus the right to "alter or abolish" government is nothing other than the right to withdraw consent from a government that has "become[] destructive of these Ends"—i.e., a government that is unable "to secure these Rights."

rights, slavery must be viewed as a failure to *recognize* rights rather than a refusal to *confer* them.

Slaves are to be considered in “the *unnatural* light of property”;<sup>71</sup> it is by positive law (not by nature) that slaves have been “degraded from the human rank, and classed with . . . irrational animals.”<sup>72</sup> That the rights of slaves “have been taken away”<sup>73</sup>—or, more specifically, have not been recognized by the government—presupposes that those rights belong to slaves by nature. The implication is that the authors of *The Federalist* are in agreement with the Declaration’s “rights of man” philosophy: all men—slaves no less than nonslaves—are equally endowed with rights by virtue of their common humanity. The further implication is that *The Federalist*, contrary to the assertion of one scholar who denies the Declaration’s constitutional relevance, is not silent on “the topic of equality.”<sup>74</sup>

### C. *Against Ratification: Anti-Federalist Writings*

Those who subscribe to the “classical republican” interpretation of the Founding<sup>75</sup> generally take a great interest in the opponents of the Constitution,

71. THE FEDERALIST No. 54, at 338 (J. Madison) (emphasis added); *cf. id.* No. 42, at 266 (J. Madison) (slave trade is “unnatural traffic” (emphasis added)).

72. *Id.* No. 54, at 337 (J. Madison); *see also id.* (“the laws [of positive government] have transformed the Negroes into subjects of property”); *id.* (that slaves are property is “the character bestowed on them by the [positive] laws under which they live”); *id.* at 339 (slaves are “debased by servitude [not by nature] below the equal level of free inhabitants”).

73. *Id.* at 337.

74. W. KENDALL, WILLMOORE KENDALL CONTRA MUNDUM 351 (1971).

75. According to historians of the “classical republican” school, the philosophical focus of the colonial and Revolutionary periods was the community rather than the individual; society was viewed as an “organic” or “corporate” entity rather than as an association of individuals; and the end of government was thought to be the inculcation of virtue or the promotion of the common good rather than the protection of individual rights. “Classical republicanism,” in short, is a philosophical alternative to liberalism. A leading member of the “classical republican” school describes the political theory of the American Revolution as follows:

The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the . . . goal of their Revolution. . . . By 1776 the Revolution came to represent a final attempt . . . to realize the traditional . . . ideal of a corporate society, in which the common good would be the *only objective* of government.

. . . .

To make . . . the public good[the *exclusive end* of government became for the Americans . . . the central tenet of the[ir] . . . faith . . . .

G. WOOD, *supra* note 11, at 53-55 (emphasis added); *see also* J. POCKOCK, THE MACHIAVELLIAN MOMENT 507 (1975) (“Not all Americans were schooled in [the republican] tradition, but there was (it would almost appear) no alternative tradition in which to be schooled.”); *cf.* Wood, *The Intellectual Origins of the American Constitution*, NAT’L F., Fall 1984, at 5, 7 (“In 1787, classical republicanism was the basic premise of American thinking—the central presupposition behind all other ideas.”). The “republican revival” has of late been given a great deal of attention in the law reviews. *See, e.g.*, Fallon, *What is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1696 (1989) (“a plausible case can be made that the republican influence [on the Framers of the Constitution] far outweighed that of . . . liberalism”); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1540 (1988) (“Republican thought played a central role in the framing period . . . .”); White, *The Studied Ambiguity of Horwitz’s Legal History*, 29 WM. & MARY L. REV. 101, 108 (1987) (“[A]t the time of the fram[ing] . . . , republicanism was . . . a mainstream ideology.”). For a critique of the “classical republican” interpretation of the Founding, see T. PANGLE, THE

whom they regard as the Founding generation's last adherents to a nonliberal or even antiliberal conception of society and government. Gordon Wood is typical in this regard; he describes the Anti-Federalists as "fervent defenders of the traditional assumption that the state was a cohesive organic entity with a single homogeneous interest."<sup>76</sup> Yet a close reading of Anti-Federalist writings reveals that this interpretation ignores the centrality of liberal (as opposed to classical) principles to the political thought of the Anti-Federalists,<sup>77</sup> in the debates over the ratification of the Constitution, even the opponents of ratification subscribed to the principles contained in the Declaration's second sentence. Thus the suggestion that "the Declaration played almost no part in the debates over ratification of the Constitution"<sup>78</sup> seems plainly wrong—unless the implication is that it played "no part" because both sides were in agreement as far as its principles were concerned.

The Declaration says that "all Men are created equal." The Anti-Federalist "Cato" said that equality is "enjoyed by nature,"<sup>79</sup> and the Anti-Federalist "Republicus" spoke of a "perfect natural equality among mankind."<sup>80</sup> The Declaration says that "to secure these [unalienable] Rights, Governments are instituted among Men." This principle appears with as much frequency and consistency in the speeches and essays of the Anti-Federalists as does any fundamental proposition. Statements like the following permeate Anti-Federalist writings: "the[] great object in forming society is an intention to secure . . . natural rights";<sup>81</sup> government exists "to secure . . . those rights to which . . .

SPIRIT OF MODERN REPUBLICANISM 28-39 (1988).

76. G. WOOD, *supra* note 11, at 499. The authors of a popular constitutional law casebook offer a similar interpretation:

Antifederalist thought derived in large measure from classical republicanism . . . . The animating principle of the . . . antifederalist case was that of civic virtue—the willingness of citizens to subordinate their private interests to the general good. . . .

In the view of the antifederalists, government's *first task* was to ensure the flourishing of . . . public-spiritedness. . . .

. . . Civil society was to . . . inculcat[e] virtue . . . .

. . . .

. . . [T]he antifederalists attacked the proposed Constitution on the ground that it was inconsistent with the . . . principles of republicanism.

G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 5-6 (1986) (emphasis added); see also Kerber, *Making Republicanism Useful*, 97 *YALE L.J.* 1663, 1666 (1988) ("Antifederalists[] were heirs of the classical republican tradition"); Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *YALE L.J.* 694, 713 (1985) ("Anti-Federalists remained largely faithful to traditional republican ideology").

77. See H. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 5, 83 n.7 (1981); see also T. PANGLE, *supra* note 75, at 33-34; Dry, *Anti-Federalism in The Federalist: A Founding Dialogue on the Constitution, Republican Government, and Federalism*, in *SAVING THE REVOLUTION*, *supra* note 63, at 40, 46; Dry, *The Case Against Ratification: Anti-Federalist Constitutional Thought*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 271, 276 (L. Levy & D. Mahoney eds. 1987); Kenyon, *The Political Thought of the Antifederalists*, in *THE ANTI-FEDERALISTS* at xxi, xxvii-xxviii, xcvi-xcviii (C. Kenyon ed. 1985).

78. G. WILLS, *supra* note 4, at 324; see also Treanor, *supra* note 4, at 1032.

79. *Letters of Cato* No. 3, in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 18, at 109, 109.

80. *Essays by Republicus* No. 1 (Feb. 16, 1788), in 5 *id.* at 160, 161.

81. *Essays by The Impartial Examiner* No. 1 (Feb. 20, 1788), in 5 *id.* at 173, 176.

[men] are all naturally, equally, and unalienably entitled";<sup>82</sup> "certain unalienable . . . rights . . . should be made the basis of every constitution";<sup>83</sup> the "great end[]" of government is "the preservation of . . . *natural rights*";<sup>84</sup> "[m]en . . . agree to enter into society[] [so] that . . . the rights of *each* individual may be protected and secured";<sup>85</sup> "liberty ought to be the direct end of . . . Government."<sup>86</sup> The Anti-Federalists, moreover, made frequent use of social contract language,<sup>87</sup> which implies a rejection of the "organic" conception of society and an acceptance of the prepolitical nature of rights.<sup>88</sup>

Indeed, one of the major points of disagreement between Federalists and Anti-Federalists concerned the kind of government that would most successfully secure rights;<sup>89</sup> the ratification debates centered on the form—not the purpose—of government. Thus the Anti-Federalists argued that "the liberty . . . of [the citizenry will be] . . . insecure, or rather destroyed, if the proposed constitution should be established,"<sup>90</sup> that "a union upon the proposed plan is certain destruction to liberty,"<sup>91</sup> and that "the new constitution will . . . destroy the rights and liberties of the people."<sup>92</sup>

The Declaration says that government derives its "just Powers from the Consent of the Governed." The Anti-Federalist "Brutus" said that "consent[] [is] the foundation on which [government] is established."<sup>93</sup> The Declaration

82. *Essays by Republicus* No. 1, *supra* note 80, at 162.

83. *Letters from the Federal Farmer* No. 2 (Oct. 9, 1787), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 230, 231-32.

84. *Essays by the Impartial Examiner* No. 1, *supra* note 81, at 174 (emphasis in original).

85. *Id.* at 175 (emphasis in original).

86. P. Henry, Speech in the Virginia State Ratifying Convention (June 5, 1788), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 211, 212.

87. According to social contract theory, men renounce their right to judge and punish offenses committed against them in exchange for government's agreement to guarantee their self-preservation. That is to say, they give up one right so that government may secure others. *See, e.g.,* J. LOCKE, *supra* note 20, § 87, at 367 (describing movement from state of nature, where men have power "to judge of, and punish the breaches of th[e] Law [of Nature] in others, as [they are] perswaded the Offence deserves," to political society, where "every one of the Members hath quitted this natural Power").

88. Compare, e.g., *Essays of John DeWitt* No. 2, in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 20, 21 ("A people, entering into society, surrender such a part of their natural rights, as shall be necessary for the existence of that society.") and *Essays of an Old Whig* No. 4, in 3 *id.* at 30, 33 ("Men when they enter into society, yield up a part of their natural liberty, for the sake of being protected by government.") with THE FEDERALIST No. 2, at 37 (J. Jay) ("[W]henever . . . [government] is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers.").

89. *See* W. BERNS, *supra* note 10, at 104 (Anti-Federalists thought small, agrarian, homogeneous republic would best secure rights; Federalists thought extended, commercial, heterogeneous republic would best secure rights).

90. Workman, *Essays of Philadelphensis* No. 12, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 136, 137.

91. T. Tredwell, Speech in the New York State Ratifying Convention, in THE ANTI-FEDERALISTS, *supra* note 77, at 392, 404.

92. Yates, *Address by Sydney* (June 14, 1788), in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 115, 120.

93. *Essays of Brutus* No. 2 (Nov. 1, 1787), in 2 *id.* at 372, 373. The leading student of the Anti-Federalists identifies "Brutus" as one of the preeminent and prototypical Anti-Federalists, one who "explored or at least exposed the theoretical ground that most other Anti-Federalists took for granted." H. STORING, *supra* note 77, at 6. It should be noted that the necessity of government by consent, for "Brutus," is a corollary



says that “whenever . . . Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it.” A minority of the Maryland Ratifying Convention proposed the following amendment to the Constitution: “[W]henever the ends of government are perverted, . . . the people may . . . reform the old, or establish a new government . . . .”<sup>94</sup> The Anti-Federalists, finally, in agreement with the Declaration, appear to have recognized the plurality of legitimate forms of government.<sup>95</sup> Thus the opponents—no less than the proponents—of ratification viewed the Constitution in light of the political theory of the Declaration.<sup>96</sup>

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of man’s natural freedom and equality. It should also be noted that in so deriving the concept of consent, “Brutus” borrowed language from the Declaration. Thus:

[T]he people of America . . . hold this truth as self evident, that all men are by nature free. No one man, therefore, or any class of men, have a right, by the law of nature, . . . to assume or exercise authority over their fellows. The origin of society then is to be sought . . . in the united consent of those who associate.

*Essays of Brutus* No. 2, *supra*, at 372-73 (emphasis added). For additional Anti-Federalist views on consent, see *Essays of John DeWitt* No. 1, in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 16, 16-17 (necessity of government “founded upon . . . consent” is “universally acknowledged”); Warren, *supra* note 18, at 274 (“the origin of all power is in the people”).

94. *Address of a Minority of the Maryland Ratifying Convention* (May 6, 1788), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 92, 98; see also *Letters from the Federal Farmer* No. 17 (Jan. 23, 1788), in 2 *id.* at 330, 336 (“the people have a right to change the government when the majority chuse it”); cf. *Essays of an Old Whig* No. 7, in 3 *id.* at 43, 44 (“The people have an undoubted right to judge of every part of the government which is offered to them . . .”).

95. See, e.g., *Essays by the Impartial Examiner* No. 1 (Mar. 5, 1788), in 5 *id.* at 183, 185 (“[T]he security [of natural rights] ought to be the end of all governments.” (emphasis added)); *Essays by William Penn* No. 1, *supra* note 18, at 169 (“Government . . . may be defined [as] a human institution by which certain powers are delegated by the people to one or more citizens to . . . secure to each individual[] the enjoyment of his natural rights . . .”) (italics in original; emphasis added)); *Essays of an Old Whig* No. 7, *supra* note 94, at 44 (people have right “to adopt such form of government as they should think fit”); Warren, *History of the Rise, Progress and Termination of the American Revolution* ch. 31, in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 18, at 197, 198 (“the principles that produced the revolution . . . were grounded on . . . [the people’s] right of adopting their own *modes* of government” (emphasis added)); cf. Winthrop, *Letters of Agrippa* No. 16 (Feb. 5, 1788), in 4 *id.* at 109, 114 (“Whatsoever way shall be chosen to secure our rights . . .”). But see *Essays by William Penn* No. 2 (Jan. 3, 1788), in 3 *id.* at 171, 172 (“[A]ll power residing originally in the people, and being derived from them, they ought to be governed by themselves only, or by their immediate representatives.”).

96. The chief architect of the Bill of Rights was James Madison, the first of whose proposed amendments to the Constitution was a statement of the first principles of government. Those principles concerned the purpose of government (“Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of . . . pursuing and obtaining happiness and safety”); the necessity of government by consent (“all power is originally vested in, and consequently derived from, the people”); and the right to “alter or abolish” government (“the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution”). 1 ANNALS OF CONG. 451 (J. Gales ed. 1789). The proposed amendment, which of course was not adopted, represented a rather straightforward attempt to constitutionalize the political theory of the Declaration. (In defending the proposed amendment, Madison described its statement of first principles as “a truth, and so self-evident that it cannot be denied.” *Id.* at 746.)

## CONCLUSION

On those occasions when the Framers and ratifiers of the Constitution felt it necessary to recur to first principles, they were invariably echoing propositions articulated in the Declaration's second sentence—a sentence that might fairly be said to represent the philosophical infrastructure of the Constitution. What are the implications of this fact?

A few ideas suggest themselves. First, those whose constitutional theories rest on the premise that the essential feature of American government is popular rule<sup>97</sup> must confront evidence to the contrary in the Declaration and in the Framing and ratifying debates. That evidence suggests that it is the security of rights that is the essential feature of American government; that democracy is merely a means toward that end, one of several forms of government to which a people might consent; that the American regime, in short, is liberal primarily, democratic only secondarily.<sup>98</sup>

Second, the proposition that the Constitution must be understood in light of the Declaration has no necessary implications for the question of judicial review, which is a distinct (albeit related) problem. That the Framers and ratifiers of the Constitution were democratic liberals rather than liberal democrats—that they viewed democracy as instrumental rather than fundamental—might lead one to conclude that there is nothing problematic about unelected judges' invalidating democratically enacted legislation in the name of individual rights, that the famous "counter-majoritarian difficulty"<sup>99</sup> is not a difficulty at all, and that judicial review is not a "deviant institution"<sup>100</sup> in the American system of government. But this is merely a possible and not a necessary conclusion. For just as those who emphasize the democratic character of American government can disagree about the proper nature and scope of judicial review,<sup>101</sup> so too can those who emphasize its liberalism.<sup>102</sup> Thus, with respect to the question of judicial review in particular and the role of

97. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 2, at 23 (democracy is "basic principle of our government"); R. BORK, *supra* note 2, at 253 (democracy is "basic institution" of American government); J. ELY, *supra* note 4, at 7 (democracy is "core of the American governmental system"); cf. Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 471 (1989) ("We are democrats first . . .").

98. See *supra* text accompanying notes 24-35, 45-48, 66 & 69-70; *supra* note 59; *supra* note 95 and accompanying text.

99. A. BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 2, at 16-23.

100. *Id.* at 18.

101. Compare, e.g., R. BORK, *supra* note 2 (because Constitution's fundamental concern is majoritarian democracy, courts should play limited role) with J. ELY, *supra* note 4 (because Constitution's fundamental concern is majoritarian democracy, courts should play active role).

102. Compare, e.g., Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have? The Case of Associational Freedom*, 10 *HARV. J.L. & PUB. POL'Y* 101 (1987) (because Constitution rests on natural rights theory, courts should play active role) with Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 *SUP. CT. REV.* 49 (because Constitution rests on natural rights theory, courts should play limited role).

courts in general, the implications of the Declaration's constitutional relevance are unclear.

Third, those who argue for the "classical republican" interpretation of the Founding or seek to effect a "republican revival"<sup>103</sup> should be careful not to overstate their case. For whatever the merits of their approach, it seems clear that the most fundamental pronouncements made during the framing and ratifying debates had less to do with communitarianism, promotion of virtue, and the "organic" society than with individual liberty, protection of rights, and the social contract.

At a minimum, the fact that the principles of the Declaration's second sentence played a central role in the framing and ratification of the Constitution requires us to draw the following conclusion: the prevailing scholarly consensus misconceives the relevance of the Declaration. According to that consensus, the Declaration is a work of propaganda, an instrument of separation, or a lawyer's brief—anything, in short, but a statement of foundational principles designed to serve as a guide for the framers of a constitution of government. This view should not go unchallenged.

Thus, before entering into a discussion of *Marbury v. Madison*<sup>104</sup> (or even of the language of the Constitution itself), it seems entirely appropriate for authors of constitutional law casebooks to direct their readers' attention, and for teachers of constitutional law classes to direct their students' attention, to the second sentence of the Declaration of Independence. Rather than being ignored, dismissed, or trivialized, these words should be the starting point for anyone who seeks to understand the meaning and purpose of the Constitution.

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103. See *supra* notes 75-76 and accompanying text.

104. 5 U.S. (1 Cranch) 137 (1803).

