

## THE DECLARATION OF INDEPENDENCE AND THE AMERICAN THEORY OF GOVERNMENT: “FIRST COME RIGHTS, AND THEN COMES GOVERNMENT”

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The topic of this panel is the Declaration of Independence, to which I devoted a chapter of my recent book, *Our Republican Constitution*.<sup>1</sup> I want to draw on that book to make five points.

First, the Constitution is not our founding document—the Declaration is. In its words, it was “[t]he unanimous Declaration of the thirteen United States of America,”<sup>2</sup> in Congress. After the founding, the Framers took two cracks at forming a national government. We began with the Articles of Confederation in 1776, before changing to the Constitution in 1789. And one might consider the Reconstruction Amendments in 1868 to be a third try at forming a government. But the Declaration remained the political fountainhead of them all.

Second, the Declaration served as a bill of indictment, “submitted to a candid world.”<sup>3</sup> To legally justify armed resistance to the crown as something other than treason, it presented a “long train of abuses” that the British Crown in Parliament had committed against the rights of the people of the United States. By this declaration, the colonists “dissolve[d] the political bands which have connected them with another,” and “assume[d], among the powers of the earth, the separate and equal station to which the Laws of Nature and Nature’s God entitle them.”<sup>4</sup> In sum, the Declaration was viewed as abolish-

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1. RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016).

2. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

3. *Id.* para. 2.

4. *Id.* para. 1.

ing the social contract with Great Britain and establishing a state of nature between two independent polities.

Third, the Declaration then *officially* identified the political theory on which the United States was founded. I stressed “officially” because this theory was drafted by a committee, edited by the Congress as a whole, and unanimously adopted by representatives of the thirteen states. And it was only after this official act that what the Declaration refers to as the “Form of Government” was established, first by the Articles and later by the Constitution.<sup>5</sup> These constitutional structures were simply the means to the ends that were announced in the Declaration.

Fourth, the end for which these different governments were established is described in the Declaration’s two most famous sentences, which everyone knows:

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.<sup>6</sup>

While this passage is familiar, its component parts must be separated out.

(a) “[A]ll men are created equal . . . .”<sup>7</sup> This is an affirmation of the fundamental equality of each individual person. It speaks not of groups, but of individuals. Indeed, as the original draft read before it was edited, “all men are created equal *and independent*; that from that equal creation they derive rights inherent and inalienable.”<sup>8</sup>

(b) The Declaration refers to “certain unalienable Rights.”<sup>9</sup> What does it mean to say a right is inalienable or unalienable? It means it cannot be surrendered up to the general government.<sup>10</sup> In the canonical words of George Mason’s draft of the

5. *Id.* para. 2.

6. *Id.*

7. *Id.*

8. THOMAS JEFFERSON, DRAFT OF THE DECLARATION OF INDEPENDENCE (1776), reprinted in THE LIFE OF THOMAS JEFFERSON 172–73 (Henry S. Randall ed., 1858) (emphasis added).

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

10. BARNETT, *supra* note 1, at 38–41.

Virginia Declaration of Rights, which he wrote just weeks before the Declaration and which Jefferson had before him when he wrote the Declaration<sup>11</sup>: “[a]ll men are born equally free and independent and have certain inherent natural rights of which *they cannot by any compact deprive or divest their posterity.*”<sup>12</sup> This means that such rights are not and cannot be alienated by the adoption of a compact or a constitution.<sup>13</sup>

(c) Next, “among these are the unalienable rights of Life, Liberty, and the pursuit of Happiness.”<sup>14</sup> Once again, this succinctly echoes Mason’s draft Declaration of Rights, which referred to “the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety.”<sup>15</sup> Notice that each of these rights belongs to the people as individuals. They are not group rights. They are not collective rights. They are the individual rights of We the People, each and every one.

(d) We now arrive at what may be the most important sentence identifying the American theory of Government, “[t]hat *to secure these rights*, Governments are instituted among Men, deriving their just powers from the consent of the governed.”<sup>16</sup> The expressly stated end of government is to “secure” the *individual* natural “rights” named in the preceding sentence. In short, governments are instituted among men as a means of securing the individual rights of each and every person, and the effective protection of these rights is the end against which such governments are to be judged.<sup>17</sup> Because of the failure of the British government to fulfill the political function of securing the individual rights of each one of us, the Declaration concludes that “these united Colonies are, and of Right ought to be, Free and Independent States . . . and that all political con-

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11. See PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 125–26 (1998).

12. VA. DECLARATION OF RIGHTS § 1 (1776) (emphasis added).

13. BARNETT, *supra* note 1, at 38–41.

14. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

15. VA. DECLARATION OF RIGHTS § 1 (1776).

16. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

17. BARNETT, *supra* note 1, at 41, 44.

nection between them and the State of Great Britain, is and ought to be totally dissolved.”<sup>18</sup>

The political theory announced in the Declaration of Independence can be summed up in a single sentence: *First come rights, and then comes government*.<sup>19</sup> This proposition is not, as some would say, a *libertarian* theory of government.<sup>20</sup> The Declaration of Independence shows it to be the officially adopted *American Theory of Government*.

- According to the American Theory of Government, the rights of individuals do not originate with any government but pre-exist its formation;
- According to the American Theory of Government, the protection of these rights is both the purpose and first duty of government;
- According to the American Theory of Government, at least some of these rights are so fundamental that they are inalienable, meaning that they are so intimately connected to one’s nature as a human being that they cannot be transferred to another even if one consents to do so;
- According to the American Theory of Government, because these rights are inalienable, even after a government is formed, they provide a standard by which its performance is measured; in extreme cases, a government’s systemic violation of these rights or failure to protect them can justify its alteration and abolition. In the words of the Declaration, “whenever any Form of Government becomes destructive of these ends,” that is the securing of these rights, “it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”<sup>21</sup>

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

19. See BARNETT, *supra* note 1, at 41. For an extended explanation and defense of these natural rights, see RANDY E. BARNETT, *STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 171, 354 (2d ed. 2014). For a summary of the argument presented there, see BARNETT, *supra* note 1, at 44–51 (explaining “why the Declaration was right”).

20. See, e.g. Ed Whelan, *Randy Barnett’s Our Republican Constitution—Part 2*, NAT’L REV. (Aug. 12, 2016, 7:58 PM), <https://www.nationalreview.com/bench-memos/barnett-republican-constitution-2/> [<https://perma.cc/N7FH-FPG7>].

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

My fifth and final point concerns the passage “deriving their just powers from the consent of the governed.”<sup>22</sup> Does this entail that the inalienable rights of We the People, as individuals, can be altered or abolished by popularly elected legislators representing the consent of the governed? Hardly.

Representative government is merely one means among several to the ends of protecting what the Ninth Amendment refers to as the “rights . . . retained by the people.”<sup>23</sup> Neither by acts of legislation nor by the Constitution itself may the people “divest their posterity”<sup>24</sup> of these inalienable rights to “life, liberty, and the pursuit of happiness.”<sup>25</sup>

According to this passage, governments may exercise not *all* powers, not *unlimited* powers, but only their “*just* powers.”<sup>26</sup> A just power is one that is within the competence of a legitimate government, which the Declaration defines as one that secures the inalienable natural rights of We the People, each and every one.<sup>27</sup>

So, the “consent of the governed” is not about popular governance by a representative assembly superseding (rather than securing) pre-existing individual rights. This passage is about *which* government is to govern the polity that the declaration is establishing: the American people.<sup>28</sup> Will the American people be governed by Crown and Parliament of Great Britain or by the governments of the United States? Will it be governed by separate state governments, a consolidated national government, or some combination of state and national governments? It is the matter of “who governs” that the Declaration says is to be decided by “the consent of the governed.”<sup>29</sup>

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22. *Id.*

23. U.S. CONST. amend. IX.

24. VA. DECLARATION OF RIGHTS § 1 (1776) (emphasis added).

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

26. *Id.* (emphasis added).

27. See Randy E. Barnett & Evan D. Bernick, No Arbitrary Power: An Originalist Theory of the Due Process of Law 49 (March 26, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3149590> [<https://perma.cc/73JP-NYBQ>] (explaining the concept of legislative “competence”).

28. See BARNETT, *supra* note 1, at 41–43, 73–78.

29. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed”).

The original public meaning of the text of the Declaration of Independence is distinct from the original public meaning of the U.S. Constitution.<sup>30</sup> The Constitution, however it is properly interpreted, does not justify itself. To be legitimate, it must be consistent with political principles that are capable of justifying it.<sup>31</sup> Moreover, these same publicly identified original principles are needed inform how the original public meaning of the Constitution is to be faithfully to be applied when the text of the Constitution is not alone specific enough to decide a case or controversy.<sup>32</sup>

The original principles that the Founders thought underlie and justify the Constitution were neither shrouded in mystery nor to be found by parsing the writings of Locke, Montesquieu, or Machiavelli.

The American Theory of Government was officially articulated and adopted in the Declaration of Independence.

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30. See Lee J. Strang, *The Declaration of Independence: No Special Role in Constitutional Interpretation*, 42 HARV. J.L. & PUB. POL'Y 43, 46–47 (2019); see also Lee J. Strang, *Originalism's Subject Matter: Why the Declaration of Independence Is Not Part of the Constitution*, 89 S. CAL. L. REV. 637, 670 (2016) (“Therefore, the natural law tradition’s conception of law supports my earlier claim that the written Constitution is the sole subject of constitutional interpretation, and the Declaration is not part of the Constitution”).

31. See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 7–86 (2d. ed. 2014) (discussing the concept of “constitutional legitimacy”).

32. See Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: An Unified Theory of Originalism*, 107 GEO. L.J. 1, 32 (2018) (“The Constitution’s provisions, like the Constitution as a whole, are calculated to perform particular functions, and they would be without value if they did not do so. Truly understanding and applying the text may require an understanding of those functions.”).