

THE DECLARATION OF INDEPENDENCE: NO SPECIAL ROLE IN CONSTITUTIONAL INTERPRETATION

LEE J. STRANG*

INTRODUCTION

The Declaration of Independence is a beautifully written document; it is a potent symbol of our nation's birth and founding principles; but it does not and should not play a unique role in constitutional interpretation.¹ Instead, the Declaration is one source, among many, of the Constitution's original meaning. (Indeed, you heard many of my fellow panelists giving evidence of this claim regarding what they perceived as the impact of the Declaration either on a particular clause—the Necessary and Proper Clause for example²—or the Constitution's overall structure or its overall goals.³)

Frankly, this is not what I expected when I began my research into the Declaration of Independence over a decade ago. Instead, like most Americans today, I assumed that the Framers and Ratifiers either viewed the Declaration as of-a-piece with the Constitution, or at least as the interpretive key to the Constitution. I think I learned this from going to political and pro-life events with my parents, where speakers would make arguments like this: "The Declaration requires us to interpret the

* John W. Stoepler Professor of Law & Values, The University of Toledo College of Law.

1. My arguments in this Essay are based upon two articles I published and some other unpublished scholarship on which I am currently working. Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN. ST. L. REV. 413 (2006) [hereinafter *Originalism, the Declaration of Independence, and the Constitution*]; Lee J. Strang, *Originalism's Subject Matter: Why the Declaration of Independence is not Part of the Constitution*, 89 S. CAL. L. REV. 637 (2016).

² John Mikhail, *A Tale of Two Sweeping Clauses*, 42 HARV. J.L. & PUB. POL'Y 29, 39–42 (2019).

³ Randy E. Barnett, *The Declaration of Independence and the American Theory of Government*, 42 HARV. J.L. & PUB. POL'Y 23 (2019).

Fourteenth Amendment's 'person' to include unborn human beings." I assumed that that view was consistent with what went on in the Framing and Ratification of the original Constitution and the Reconstruction Amendments. Today, I'm sharing with you a sketch of some of the reasons why I changed my mind.

My thesis is that the Declaration is not the unique interpretive key to the Constitution. Instead, it is one source of the Constitution's original meaning. I will make three arguments to support that thesis. The first is a claim internal to originalist theory. The second is an historical claim. And the third is a jurisprudential claim.

First and theoretically, I argue that mainline originalist theory has no analytical space within it for the Declaration to play a special role in constitutional interpretation. To illustrate this, I describe the most prominent conception of originalism—public meaning originalism. Then, I show that public meaning originalism's process to ascertain the Constitution's original meaning treats the Declaration as one source of original meaning, and that its importance *as a source* therefore depends on the empirical-historical question of whether the original meaning in fact did privilege it.

This leads me to my second main argument, based on history. I make three moves to show that the Declaration did not play a unique interpretive role. First, I describe how the Framers and Ratifiers did not use the Declaration as the unique interpretive key to constitutional interpretation. Second, I show that, because the Declaration was inconsistent with the Constitution's text, it cannot be the interpretive key to the Constitution. Third, I explain that it was only after the Founding, during times of moral crisis, that Americans in various social movements turned to the Declaration to support their out-of-the-mainstream constitutional interpretations. This phenomenon shows that appeals to the Declaration are motivated by a desire for political and social change extrinsic to the Constitution.

Third and jurisprudentially, I show that our current constitutional practice does not recognize the Declaration as playing a unique role in constitutional interpretation. I focus on the Constitution's text, current legal practice, and Supreme Court practice (because of time constraints).

One final note before proceeding: my arguments today presume that originalism is the correct interpretive theory. I make that assumption because I think that it is the correct interpretive theory and also because many Declarationists—that is, scholars who argue in favor of the Declaration playing a unique role—adhere to this premise.⁴

I. THERE IS NO ANALYTICAL SPACE WITHIN MAINLINE ORIGINALIST THEORY FOR THE DECLARATION OF INDEPENDENCE TO PLAY A UNIQUE ROLE IN CONSTITUTIONAL INTERPRETATION

Public meaning originalism identifies the Constitution's text's public meaning when it was ratified as its authoritative meaning.⁵ Originalists have described three analytically distinct steps to identify the original meaning,⁶ none of which privileges the Declaration of Independence.

The first step that an originalist will perform is to look for the *conventional* meaning of the text in the period of ratification.⁷ This is the standard usage of that text at the time of ratification. For example, if we are looking for the conventional meaning of

4. See, e.g., SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION (1995) (providing the best originalist justification for the Declarationist position); I. Kersch, *Beyond Originalism: Conservative Declarationism and Constitutional Redemption*, 71 MD. L. REV. 229 (2012) (making originalist-type arguments to support the Declarationist position); Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693 (2014) (same).

5. Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 269–70 (2017). For the most recent and thorough descriptions of originalism's internal architecture see Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015); Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (Apr. 11, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 [<https://perma.cc/NLN2-EQCW>]; see also Lawrence B. Solum, *Communicative and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013) [hereinafter Solum, *Communicative Content*] (providing a summary of originalism).

6. Solum, *Communicative Content*, *supra* note 5, at 479–93; see also Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181, 1195–98 (2016) (summarizing this process).

7. Solum, *Communicative Content*, *supra* note 5, at 487–88, 491, 497.

the word “religion” in the First Amendment, we look to how Americans utilized that word in 1791.⁸

The second step is an interpreter identifies the text’s *semantic* meaning by placing that conventional meaning in the context of the Constitution and applying the rules of grammar and syntax.⁹ This involves identifying how the words are put together in clauses and sentences, along with their punctuation, which may modify the text’s conventional meaning. For example, the word “religion” does not appear by itself in the Constitution or the First Amendment. It is part of a(t least one) clause that includes the phrase the “free exercise [of [religion]].”¹⁰ In this phrase, the “free exercise [of]” could impact the conventional meaning of “religion.”¹¹

Third, an interpreter takes into account *contextual enrichment*: the contemporary publicly available context in which the Constitution’s text was drafted and ratified. For example, when the “free exercise [of [religion]]” language was adopted in 1791, most states conditioned religious exercise on, for instance, not being “inconsistent with the peace or safety of this State,” as New York’s 1777 constitution provided.¹² This context may suggest that the constitutional text’s phrase carried that connotation—and that limitation—into its meaning.¹³

The Declaration of Independence is not a privileged element in any of these three steps of originalist interpretation. For ex-

8. See Lee J. Strang, *The Meaning of “Religion” in the First Amendment*, 40 DUQ. L. REV. 181 (2002) (performing this inquiry).

9. Solum, *Communicative Content*, *supra* note 5, at 487–88, 491, 497.

10. U.S. CONST. amend. I.

11. See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1114 (1990) (“The conclusion that the clause protects conduct as well as speech or belief would seem to follow from its very words: ‘exercise’ means conduct.”).

12. N.Y. CONST. of 1777, art. XXXVIII.

13. For example, Professor Philip Hamburger argued that the historical context of the time showed that “the free exercise” of religion included within that concept implicit limits. See Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 932 (1992) (arguing that the historical context showed that “the free exercise of religion tended not to be considered a particularly extensive or radical claim of religious liberty—indeed, it was a freedom espoused not only by dissenters but also by establishments.”); see also, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1456 (1990).

ample, one would not prioritize the Declaration to ascertain the conventional meaning of a word. Instead, under current originalist theory, the Declaration is simply one potential piece of evidence at steps one and three, what I described as the conventional meaning and the Framing and Ratification context. This theoretical point then makes it a contingent historical question of the extent to which the Declaration of Independence actually influenced the meaning of the Constitution in these two steps. And it is to this, my second move, I now turn.

II. THREE IMPORTANT PIECES OF HISTORICAL EVIDENCE SHOW THAT THE DECLARATION OF INDEPENDENCE DID NOT PLAY A SPECIAL ROLE IN THE CREATION OR INTERPRETATION OF THE CONSTITUTION

Here, I describe how three important pieces of historical evidence show that the Declaration of Independence did not play a unique role in the creation or interpretation of the Constitution. This evidence shows that the Declaration is one source among many of the Constitution's original meaning.

A. *The Declaration Did Not Play a Unique Role in Constitutional Creation or Interpretation During the Framing and Ratification*

First, the Framers and Ratifiers did not use the Declaration as a special key to the creation or interpretation of the Constitution. In my research on the period of the Framing and Ratification, I uncovered very few statements regarding the Declaration, and none arguing or assuming that it would play a unique role in constitutional interpretation.¹⁴ Instead, the Framers and Ratifiers typically employed the Declaration for three purposes.

First, the Declaration was identified for its practical impact as the creator and point of independence from the United Kingdom. We heard this from Professor Mikhail earlier.¹⁵ For example, during the Constitutional Convention, Rufus King and Lu-

14. Strang, *Originalism, the Declaration of Independence, and the Constitution*, *supra* note 1, at 439–57.

15. Mikhail, *supra* note 2, at 31–34.

ther Martin debated the Declaration's impact.¹⁶ King contended that the states became one collective entity, whereas Martin argued that each of the thirteen colonies became independent states.¹⁷

Second, the Declaration was used to bolster an argument for or against the Constitution's merits, when the meaning of the provision was agreed upon by the debate participants.¹⁸ For example, in the Pennsylvania Ratification Convention, ratification opponent John Smilie argued that a Bill of Rights was indispensable because it established the parameters for those in power.¹⁹ And to support his position, he quoted the Declaration for the proposition that America should secure its rights through a Bill of Rights lest the right to abolish government identified in the Declaration become "mere sound without substance."²⁰ Both sides of the debate utilized the Declaration as a tool to argue for or against an inclusion of a Bill of Rights, but not as the Constitution's interpretive key.²¹

Third, the Framers and Ratifiers used the Declaration for rhetorical impact. Take, for example, *The Federalist Papers*, the most comprehensive argument, from that period, in favor of ratification. It cited the Declaration . . . twice, and both times for the unexceptional proposition that it is legitimate to change one's form of government.²² This is also the consensus of most historians. Pauline Maier, for example, concluded: "Participants in the extensive debates over the creation and ratification of the Constitution mentioned the Declaration very infrequently and then generally cited to its assertion of the people's right to abol-

16. JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787, HELD AT PHILADELPHIA (June 19, 1787), reprinted in 5 ELLIOT'S DEBATES 212-13 (2d ed. 1907).

17. *Id.* at 212 (remarks of Rufus King); *id.* at 213 (remarks of Luther Martin).

18. Strang, *Originalism, the Declaration of Independence, and the Constitution*, *supra* note 1, at 440.

19. John Smilie, *Address at the State Constitutional Ratification Convention for the Commonwealth of Pennsylvania* (Nov. 28, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA, 385-86 (Merrill Jensen ed., 1976).

20. *Id.* at 385.

21. Strang, *Originalism, the Declaration of Independence, and the Constitution*, *supra* note 1, at 442-43.

22. THE FEDERALIST NO. 40 (James Madison); THE FEDERALIST NO. 45 (James Madison).

ish or alter their governments and to found new ones.”²³ In sum, the historical evidence shows that the Declaration of Independence was one source, among many, of the Constitution’s original meaning.

B. *The Declaration of Independence is Inconsistent with the Constitution’s Text*

Beyond the historical evidence that the Declaration did not play a unique role in constitutional creation or interpretation, are the often dramatic inconsistencies between the Declaration’s provisions and the Constitution’s text. These contradictions make it difficult to attribute to the Declaration a special interpretive role.

This argument was previewed by my fellow panelist Dr. Zuckert in his prior scholarship, and he identified slavery as being the most prominent example of this conflict.²⁴ The Declaration has the inspiring phrase “all men are created equal.”²⁵ The original Constitution, by contrast, accommodated slavery in multiple ways. The Constitution accommodated slavery by helping slave masters recover escaped slaves through the Fugitive Slave Clause.²⁶ The Constitution prohibited Congress, until at least 1808, from eliminating the supply of new slaves by ending the slave trade.²⁷ Moreover the Constitution provided that slave states’ congressional representation would be augmented by counting, for population purposes, “three fifths of all other Persons.”²⁸ The Constitution’s accommodation of slavery and the denial of equality it entailed make it very difficult, if not impossible, to interpret the Constitution using the Declaration.

Relatedly, if the Constitution is to be read in light of the Declaration, how did the institution of slavery—contrary to the Declaration’s claim of human equality—survive until the Civil

23. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 169 (1998).

24. See Michael P. Zuckert, *Legality and Legitimacy in Dred Scott: The Crisis of the Incomplete Constitution*, 82 *CHI.-KENT L. REV.* 291, 308 (2007) (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 620 (Curtis, J., dissenting)).

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

26. U.S. CONST. art. IV, § 2, cl. 3.

27. *Id.* art. I, § 9, cl. 1.

28. *Id.* art. I, § 2, cl. 3.

War when even its most prominent opponents, including President Lincoln, did not argue that slavery was unconstitutional?²⁹ This long-standing inconsistency shows that the Declaration cannot be the Constitution's interpretive key.

Third, if the Constitution is to be read in light of the Declaration, why was it necessary to adopt the Thirteenth, Fourteenth, and Fifteenth Amendments to eliminate slavery and promote equality?³⁰ Should not "all men are created equal" have been enough?³¹

Fourth, given the Southern states' economic interest in slavery, they would not have ratified the Constitution if it completely embodied the Declaration of Independence's principles. Abolition of slavery was a deal-breaker and to make the deal—to create the union—the Framers conceded on the point of equality.³²

Fifth, only relatively few, relatively radical abolitionists argued that the Constitution, without necessity of amendment, outlawed slavery. For example, during and following the Civil War, few abolitionists argued that the Constitution, properly interpreted in light of the Declaration, abolished slavery without amendment.³³ And, even those who believed the Constitution did not need to be amended to abolish slavery recognized that their views were unconventional. For instance, Senator Charles Sumner from Massachusetts, who was a Declarationist, recognized that his views were the minority position and, therefore, worked to pass statutes and constitutional amend-

29. See Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861) ("I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.").

30. U.S. CONST. amends. XIII, XIV, XV.

31. Cf. DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 76–77 (2007).

32. LAWRENCE GOLDSTONE, *DARK BARGAIN: SLAVERY, PROFITS, AND THE STRUGGLE FOR THE CONSTITUTION* 1–7 (2005); see also Abraham Lincoln, *Speech at Chicago, Illinois* (July 10, 1858), in 2 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 484, 501 (R. Basler ed., 1953) ("[W]e could not get our constitution unless we permitted them to remain in slavery, we could not secure the good we did secure if we grasped for more, and having by necessity submitted to that much, does not destroy the principle that is the charter of our liberties.").

33. E.g., LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 42 (Boston, Bela Marsh 1845).

ments to secure them.³⁴ In sum, the Declaration's inconsistency with the Constitution's text shows that it cannot be the interpretive key to the Constitution.

C. *The Declaration of Independence Was Most Commonly Invoked to Defend Out-of-the-Mainstream Constitutional Interpretations*

The third piece of historical evidence, which shows that the Declaration does not possess a unique role in constitutional interpretation, is that, in times of subsequent national moral crisis, Americans turned to the Declaration to support their out-of-the-mainstream constitutional interpretations.³⁵ Though surprising to most Americans today, in the immediate aftermath of the Revolution, the Declaration fell out of the public's consciousness only to be subsequently resurrected by reform movements that have used it for a variety of purposes.³⁶

Thereafter and throughout American history, social movements have utilized the Declaration to support their unconventional constitutional visions.³⁷ This began with the abolitionists in the 1820s and continued with the suffragettes in the mid-to-late 19th century, the modern Civil Rights Movement and, more recently, the Pro-Life Movement.³⁸

What this phenomenon shows is that appeals to the Declaration were motivated by the movements' goals of political, social, and legal change, which were themselves stimulated by contemporary social and legal environments.³⁹ These appeals were not the product of historical claims about what the Constitution, properly interpreted, actually meant.⁴⁰ In other words, this shows that appeals to the Declaration originate ex-

34. DAVID HERBERT DONALD, CHARLES SUMNER 132–59 (De Capo Press 1996) (1960).

35. See ALEXANDER TESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE (2012) (providing an analysis of how social movements incorporated the rhetoric of the Declaration of Independence into their rights-based agendas).

36. See MAIER, *supra* note 23, at 168 (describing how the Declaration was “all but forgotten” after the Revolution).

37. TESIS, *supra* note 35.

38. Strang, *Originalism, the Declaration of Independence, and the Constitution*, *supra* note 1, at 415–31.

39. *Id.*

40. *Id.*

trinsically to the Constitution and are not intrinsic to the Constitution or to its history.

III. THREE FACETS OF CURRENT LEGAL PRACTICE EXCLUDE A SPECIAL INTERPRETIVE ROLE FOR THE DECLARATION OF INDEPENDENCE

My third set of arguments is jurisprudential in nature, and my claim here is that our current legal practice does not recognize the Declaration as playing a unique role in constitutional interpretation. The Declaration does not fit three important facets of our constitutional practice. This claim relies on a “thin” Hartian conception of law: law is those norms recognized as law by the practice of relevant legal officials, such as judges.⁴¹ I am utilizing this conception of law because it is widely held and, in this context, accurate.⁴² I make three moves to support this claim: first, the Constitution’s text identifies the Declaration as not playing a unique role; second, our current legal practice does not include a unique role for the Declaration; and third, the Supreme Court’s practice does not have room for a unique interpretive role for the Declaration.

A. *The Constitution’s Text Identifies the Declaration as Not Playing a Unique Role*

The Constitution’s text is at the center of our legal practice.⁴³ The Constitution’s text identifies only the written Constitution as the subject matter of constitutional interpretation. In particular, constitutional “indexicals” show that only the written Con-

41. H.L.A. HART, *THE CONCEPT OF LAW* 55–56, 100, 110 (3d ed. 2012).

42. *Id.*; Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006); Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1348 (2018) (“The main contending camps in contemporary Anglophone legal philosophy are, broadly speaking, Hartian and Dworkinian.”).

43. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY*, at x-xi (2012); Richard H. Fallon, Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 47, 55 (Matthew D. Adler & Kenneth Einar Himma eds., 2009); Kenneth Einar Himma, *The U.S. Constitution and the Conventional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra*, at 95, 111.

stitution is the subject matter of constitutional interpretation.⁴⁴ Indexicals are the Constitution's text's reference to what the Constitution is.⁴⁵ Beginning with the Preamble and ending with the Ratification Clause in Article VII, the Constitution repeatedly identifies the document in the National Archives as "this Constitution."⁴⁶ The Constitution's text also makes explicit that the Constitution was temporally expressed at the point in time when it was ratified. Article VII identified the particular time in which the "We the People" from the Preamble "[e]stablished" "this Constitution."⁴⁷ The Supremacy Clause then privileges "[t]his Constitution" as the "supreme Law of the Land."⁴⁸ The Constitution's indexicals and chronological identifiers, when coupled with the Supremacy Clause, identify the written Constitution—and only it—as the Constitution.

The Declaration of Independence is not identified by the written Constitution as a facet of the "supreme Law of the Land."⁴⁹ Therefore, the Declaration does not play a unique role in constitutional interpretation.

B. *Current Legal Practice Does Not Include a Unique Role for the Declaration*

Three important facets of our constitutional practice also exclude the Declaration of Independence from playing a unique role in constitutional interpretation. First, our Constitution is identified by its provenance, which excludes the Declaration. Constitutional provenance is the origin of a constitution.⁵⁰ Constitutional provenance is crucial because it is the characteristic that explains why a particular document—the document in the

44. Christopher R. Green, "This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism, 84 NOTRE DAME L. REV. 1607, 1641–67 (2009); see also Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 Nw. U. L. REV. 857, 864–72 (2009); Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Un-written Constitution*, 81 U. CHI. L. REV. 1385, 1391–92 (2014).

45. Green, *supra* note 44, at 1610.

46. U.S. CONST. pmb.; *id.* art. VII.

47. *Id.* art. VII.

48. *Id.* art. VI, cl. 2.

49. *Id.*

50. See generally Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715 (2011) (explaining this concept).

National Archives—is our polity’s constitution and why other documents are not.⁵¹ Americans in 1787, and today, recognize(d) that the Framing and Ratification process identified the Constitution, and that the Ratifiers possessed the authority to designate the document now located in the National Archives as the U.S. Constitution.⁵² No matter how much more normatively attractive another document is, it is not the U.S. Constitution if it did not go through that Framing and Ratification process.

This same provenance excludes the Declaration of Independence from being the subject of constitutional interpretation. This provenance identifies—includes—only one subject matter: the written Constitution in the National Archives. The Declaration is not identified by that provenance.

Second, our practice of Constitutional amendment shows that the Declaration of Independence is not part of the Constitution and therefore is not a subject of constitutional interpretation. It does so by identifying constitutional amendments as having the authority to displace existing constitutional text and all other facets of our legal practice that are contrary to the amendment.⁵³ The Constitution also recognizes that these changes—amendments—are equivalent to and part of the written Constitution.⁵⁴ The Constitution’s authorization of amendments shows that documents and practices outside of the written Constitution (and its amendments) are not the Constitution, and that the sole subject of constitutional interpretation is the written Constitution itself and its amendments.

The amendment process does not amend the Declaration. Therefore the Declaration is not a subject matter of constitutional interpretation.

Third, all federal officers take action that identifies only the written Constitution as the subject matter of constitutional interpretation. All officers take an oath to support only “the Constitution of the United States.”⁵⁵ This is the same “Constitution

51. *Id.* at 738.

52. Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 *Nw. U. L. Rev.* 703, 716–17 (2009).

53. U.S. CONST. art. V.

54. *Id.*

55. 5 U.S.C.A. § 3331 (2018).

of the United States” identified in Title I of the United States Code.⁵⁶ The officers’ oaths bind them to follow the Constitution and to privilege it over the Declaration.

C. *Supreme Court Practice Does Not Have Room for a Unique Interpretive Role for the Declaration*

My third jurisprudential argument is that Supreme Court practice identifies the written Constitution as the sole subject matter of interpretation. The common thread running through the seven Supreme Court practices I identify below is their prioritization of the written Constitution over other potential sources of constitutional law, including the Declaration of Independence.

First, the Supreme Court explains its rulings as required by the written Constitution. For example, in *District of Columbia v. Heller*,⁵⁷ the Court stated that:

The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. . . . Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.⁵⁸

Second, the Supreme Court justifies changes in constitutional doctrine by reference to the written Constitution. For instance, in *Crawford v. Washington*,⁵⁹ the Court stated:

Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. . . . In this case, the State admitted Sylvia’s testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is suffi-

56. 1 U.S.C.A., at lxi (2018).

57. 554 U.S. 570 (2008).

58. *Id.* at 636.

59. 541 U.S. 36 (2003).

cient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.⁶⁰

Third, the Supreme Court defends even its most controversial decisions as required by the written Constitution. Repeatedly, the plurality opinion in *Planned Parenthood v. Casey*,⁶¹ justified its ruling by reference to the written Constitution.⁶² “Constitutional protection of the woman’s decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment.”⁶³

Fourth, the Supreme Court, even when it is implausible, identifies the written Constitution as the reason for its actions. I think the best example of this occurred in *Dickerson v. United States*.⁶⁴ Even though the Supreme Court in general, and Justice Rehnquist in particular, had repeatedly stated that *Miranda v. Arizona*⁶⁵ was not constitutionally required, in *Dickerson*, Chief Justice Rehnquist cagily claimed that *Miranda* “announced a constitutional rule,” was a “constitutional decision,” was “constitutionally based” and “constitutionally required.”⁶⁶

Fifth, the Supreme Court subordinates other forms of constitutional argument to the written Constitution, even when it would be plausible to use these other forms autonomously. For example, in *NLRB v. Noel Canning*,⁶⁷ the Court refused to rely on a longstanding constitutional tradition to supplant the constitutional text, even though it was invited to do so by the administration.⁶⁸ Instead, the Court found that the phrase “Recess of the Senate” was ambiguous and relied on the originalist interpretive method of “liquidation” to argue that constitutional

60. *Id.* at 68–69.

61. 505 U.S. 833 (1992).

62. *Id.* at 865, 901 (plurality opinion).

63. *Id.* at 846.

64. 530 U.S. 428 (2000).

65. 384 U.S. 436 (1966).

66. *Id.* at 432, 438, 440, 444.

67. 134 S. Ct. 2550 (2014).

68. *Id.* at 2559–60.

tradition had fixed the meaning of the phrase to permit intra-recess appointments.⁶⁹

Sixth, dissenting justices appeal to the written Constitution against existing doctrine. Justice Ginsburg in *NFIB v. Sebelius*⁷⁰ agreed with Chief Justice Roberts that “the minimum coverage provision is a proper exercise of Congress’ taxing power Unlike THE CHIEF JUSTICE, however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision . . . [and] that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it.”⁷¹ On the other end of the jurisprudential spectrum, Justice Scalia argued in the same case that:

Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it. It can assuredly do that, by exercising the powers accorded to it under the Constitution. The question in this case, however, is whether the complex structures and provisions of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA) go beyond those powers. We conclude that they do.⁷²

Lastly, neither the Supreme Court, nor its justices, claim that their conclusions are at variance with the written Constitution. Despite the widespread belief in different versions of non-originalism—including versions that permit trumping the written Constitution with other modalities—both on and off the Supreme Court, no Supreme Court opinion or justice’s opinion states that it is contrary to the written Constitution.⁷³

In sum, Supreme Court practice, like the other important facets of our constitutional practice I described earlier, shows that our constitutional practice does not recognize the Declaration of Independence as part of the Constitution and therefore as holding a privileged place in constitutional interpretation.

69. *Id.* at 2560–64.

70. 567 U.S. 519 (2012).

71. *Id.* at 589 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

72. *Id.* at 2642 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

73. AMAR, *supra* note 43, at xi.

IV. CONCLUSION

Let me close with a couple of caveats. First, my arguments dealt with constitutional *interpretation*: interpreting the Constitution's original meaning. There is another facet of originalist theory that has developed over the last fifteen years. Professor Barnett pioneered this distinction between interpretation and *construction*.⁷⁴ Construction occurs (at least) when the Constitution's original meaning is underdetermined—where it does not provide one right answer to a legal question.⁷⁵ A Declarationist could argue that in the so-called “construction zone,” where the original meaning is not determinate, an interpreter should rely on the Declaration to construe—to create—constitutional meaning. My arguments do not address that move.

Second, I am not addressing the Reconstruction period or amendments. My arguments focused on the original Constitution, and a Declarationist could argue with greater plausibility that the Declaration was central to the creation and maybe the interpretation of the Reconstruction Amendments.⁷⁶ I also do not address that move.

In sum, I have argued that the proper role the Declaration of Independence in constitutional interpretation is one source of the original meaning. That is an important role, but it is limited, and more limited than what Declarationists have argued.

74. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118–30 (2004); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 65–72 (2011).

75. Barnett, *Interpretation and Construction*, *supra* note 74, at 68–69.

76. See, e.g., Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMPLE L. REV. 361, 383–410 (1993) (making this argument and collecting historical evidence); Alexander Tsesis, *The Declaration of Independence and Constitutional Interpretation*, 89 S. CAL. L. REV. 369, 390–97 (2016) (same).