SELF-GOVERNMENT AND THE DECLARATION OF INDEPENDENCE

Alexander Tsesis†

Legal scholars typically treat the Declaration of Independence as a purely historical document, but as this Article explains, the Declaration is relevant to legislative and judicial decision making. After describing why this founding document contains legal significance, I examine two contemporary legal issues through the lens of the Declaration's prescriptions.

Section 5 of the Fourteenth Amendment grants Congress the power to make laws that enforce the civil rights clauses in the amendment's first four sections. In City of Boerne v. Flores *and its progeny, however, the Supreme Court decided that it alone can identify fundamental rights and relegated Congress's power under Section 5 to the enforcement of judicial rulings. The* Boerne *line of precedents forecloses ordinary citizens from petitioning legislators to pass innovative laws that prohibit states from violating civil rights. This Article is the first to argue that although the Declaration of Independence lacks any enforcement mechanism, its clauses about popular sovereignty establish the people's authority to engage in representative politics in order to identify core human rights.*

The Article also demonstrates the Declaration's relevance to the issue of campaign finance reform. I use the document's statement about the inalienable rights that are retained by the people, one of which is the freedom of political expression, to analyze the Court's equation of corporations and natural people for First Amendment purposes in Citizens United v. Federal Election Commission. *I also distinguish the speech of commercial corporations from that of nonprofit associations that are organized specifically for engaging in self-government.*

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† Associate Professor of Law, Loyola University School of Law-Chicago. I am grateful for the advice of Colleen Baker, John Bronsteen, Samuel Brunson, Christopher J. Buccafusco, William M. Carter, Jr., Monica Eppinger, Rebecca Hollander-Blumoff, Jessie Hill, Olatunde Johnson, Brendan Maher, Marcia L. McCormick, William G. Merkel, Darrell A. H. Miller, Helen Norton, Kirsten Nussbaumer, Karen Petroski, Mark D. Rosen, Lawrence B. Solum, Mark Tushnet, and Lesley Wexler. I benefitted from comments on this Article at the Wake Forest University School of Law and the Washington University School of Law junior faculty workshop.

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Introduction

The Supreme Court has increasingly stressed its exclusive power to review the constitutionality of federal statutes while diminishing Congress's authority to pass popularly supported rights-protecting laws.[1] Beginning with *City of Boerne v. Flores*,[2] the Court issued a series of opinions placing significant limitations on Congress's Fourteenth Amendment Section 5 authority to independently identify and react to states' abuses of civil rights.[3] More recently, in *Citizens United v. Federal Election Commission*,[4] the Court prevented Congress from differentiating between corporations' and citizens' campaign expenditures. Unlike other scholars who have critiqued these decisions, I analyze them through the prism of the Declaration of Independence's principle of representative governance. My aim is to explain why the Declaration's statements about inalienable rights and collective self-governance are pertinent to resolving judicial, legislative, and academic debates about the rights-protecting reach of congressional authority.

I argue in this Article that although the Declaration of Independence has no enforcement provisions, it nevertheless sets constitu-

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1 *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67, 86 (2000) (holding that Congress lacked the authority to enforce the Age Discrimination in Employment Act against the states); City of Boerne v. Flores, 521 U.S. 507, 511, 532 (1997) (finding the Religious Freedom Restoration Act unconstitutional because the statute was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior").

2 521 U.S. 507 (1997).

3 Cases following the *Boerne* precedent struck provisions of the Americans with Disabilities Act, the Violence Against Women Act (VAWA), and the Age Discrimination in Employment Act. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (holding that Congress was not authorized under Section 5 to require that states abide by the terms of the Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598, 627 (2000) (finding that Section 5 of the Fourteenth Amendment did not grant Congress the authority to pass the VAWA); *Kimel*, 528 U.S. at 67 (stating that the Age Discrimination in Employment Act contains "a clear statement of Congress' intent to abrogate the States' immunity, but that the abrogation exceeded Congress' [constitutional] authority"). *Garrett* required Congress to define "with some precision" the right to be protected and to provide evidence of a "marked pattern of unconstitutional action by the States." 531 U.S. at 365, 373–74.

4 130 S. Ct. 876 (2010).

tional obligations to protect life, liberty, and the pursuit of happiness. On my account, the Declaration of Independence requires all three branches of the federal government to protect inalienable rights on an equal basis. The document's principled statements about liberal equality and political participation are foundational to the Constitution's structure. The Declaration mandates that representative government respond to lobbying efforts aimed at protecting human rights. Furthermore, the Declaration of Independence charges an independent judiciary to protect the innate rights of life, liberty, and the pursuit of happiness against tyrannical majorities. Nevertheless, the Court's excessive augmentation of judicial power places unwarrantedly rigorous standards on Congress's ability to respond to constituents' lobbying efforts to safeguard their essential interests.

Although rarely cited in contemporary case law, ever since the country's founding, social and political movements have relied on the Declaration to advance various humanitarian causes.[5] Even in the Court's most recent invocations of the document, in two cases decided during the 2010 Term, the Declaration is mentioned in passing instead of being analyzed for its substantive significance.[6] This Article pursues Professor Charles Black's invitation to accept the words of the Declaration "not as a statement of a creation already performed, but as an invitation to participate in that ongoing work of creation whose goal they define."[7] The document's elegant language makes it easier for ordinary people to understand than more technical instruments, like the Constitution and statutes, to which attorneys typically turn. In a representative democracy like the United States, the citizens' will is expressed by legislative acts. In this Article, I argue that the Supreme Court's decision to prevent Congress from defining core American values violates the people's right to develop a pluralistic conceptualization of freedom and equality. My perspective by no means discounts the role of the judiciary in constitutional interpretation, but neither does it leave all decision making about core American norms at the sole discretion of unelected officials.

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5 *See* ALEXANDER TSESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE (forthcoming 2012) [hereinafter TSESIS, FOR LIBERTY AND EQUALITY] (providing the fullest treatment to date of how social movements incorporated the rhetoric of the Declaration of Independence into their rights-based agendas).

6 *See* Stern v. Marshall, 131 S. Ct. 2594, 2609 (2011) (quoting from the Declaration to demonstrate the historic antecedent of judicial independence); Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2499 (2011) (tying the adoption of the Petition Clause in the First Amendment to the Declaration of Independence's indictment of King George III for failing to heed colonial petitions).

7 Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 31 (1970). Black made this statement in the form of a rhetorical invitation for the continued pursuit of human rights.

To date, critics have overlooked the relevance of the Declaration of Independence's statements about government by consent of the people to the *Boerne* line of cases. The nation's founding document makes clear that the ultimate decision of how to best protect inalienable rights remains vested in the people, who can go so far as to abolish despotic government and then "institute [a] new" one that is "most likely to effect their Safety and Happiness."[8] The Declaration requires the national government to be responsive to the people's legislative petitions, unlike the British monarchy from which they rebelled.[9]

The assumption that the Declaration of Independence has no legal force is unwarranted. I argue that the Court's nullification of legitimate statutory efforts to protect fundamental rights is an infringement against representative self-government, which is intrinsic to the Declaration's statement of national identity.[10] This is significantly different than the standard approach to the subject. Articles on the Court's notions of judicial review have not reflected on lessons from the Declaration's statements of popular governance. Indeed, scholars who have analyzed that founding document have typically discussed its history without delving into its contemporary significance. This Article is the first to demonstrate the Declaration's relevance to constitutional assessments of civil rights statutes and campaign finance laws.

As with laws relying on Congress's Fourteenth Amendment powers, the Supreme Court's interpretation of election legislation in *Citizens United* swept aside a popular federal law meant to protect individual rights.[11] In that case, the Court struck a law that safeguarded citizens' right to participate equally in elections. Specifically, the Court found a law that regulated corporate campaign expenditures to be unconstitutional. In this context, as in Section 5 cases, the Declaration of Independence provides Congress with principled guidelines for developing a modified campaign finance statute. Such a law must respect judicial interpretation while also empowering citizens to influence Congress's policies against abuse of federal elections.

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

9 *See id.* at para. 30 ("In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."). The Supreme Court has tangentially recognized that the First Amendment's right to petition derives from "the same tradition" as the Declaration of Independence's grievance against the British refusal to respect the colonists' petitions for redress. *See Guarnieri*, 131 S. Ct. at 2499.

10 *See* THE DECLARATION OF INDEPENDENCE para. 7 (accusing the British government of preventing representative bodies of government from effectively protecting "the rights of the people").

11 130 S. Ct. 876 (2010).

Part I presents a theory about the legal significance of the Declaration of Independence. It contrasts my robust view of how the Declaration affects congressional authority from the more restrained, conventional view. I argue that although the Declaration of Independence lacks an enforcement provision, its principles for the protection of the people's rights must guide a variety of governmental conduct.

Part II of this Article begins by analyzing the Supreme Court's narrow construction of congressional Section 5 enforcement authority under the Fourteenth Amendment. I primarily focus on the Court's explanation of its unique role as constitutional arbiter. I believe that the Declaration of Independence informs the debate over how much power Congress has to enact legislation for the protection of fundamental rights. I find that the Court's peremptory heuristic on the Fourteenth Amendment conflicts with the principles of self-governance embedded into the Declaration of Independence. The rational basis test offers the best means for the Court to examine whether a statute that expands rights abides by the self-governing principle of the Declaration.

Part III examines a connected issue about how Congress can react when the Court strikes a statute because it infringes on a judicially recognized right. Under these circumstances, I believe the strict scrutiny test is best suited to prevent legislative infringements against life, liberty, and the pursuit of happiness. I center the discussion of this Part on political speech, which is protected by the First Amendment and the Declaration of Independence. I analyze the *Citizens United* decision to identify how Congress might narrowly tailor a statute to prevent corporate finances from diluting ordinary people's participation in representative politics.

I
The Declaration of Independence as Constitutional Foundation

The Declaration of Independence recognizes that people form governments to secure their coequal interests in "unalienable Rights" like "Life, Liberty and the pursuit of Happiness."[12] The contours of representative governance were first drafted into the Declaration of

12 The Declaration of Independence para. 2 ("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 . . . .").

Independence.[13] By asserting that rights are innate, rather than created by states or nations, the Declaration recognizes that some dignity interests precede the Constitution. Ties with Great Britain were severed and a new government created, which derived its "just powers from the consent of the governed" and was designed "to secure these rights."[14] As Professor Charles L. Black, Jr. pointed out, the Declaration of Independence "commits all the governments in our country to 'securing' for . . . people certain human rights."[15]

Throughout United States history, social groups have conceived of the Declaration of Independence as a superconstitution. The notion that the Declaration serves as the American creed of liberty and equality can be traced to the eighteenth century.[16] Before and after the ratification of the Equal Protection Clause of the Fourteenth Amendment, the Declaration's statement of human equality informed those reformers who participated in progressive causes, like abolition and universal suffrage, and helped them frame the debates.[17] The Declaration establishes the obligation of national government to abide by the will of the people. General statements about the preservation of "life, liberty and the pursuit of happiness" recognize standards for political legitimacy. Accusations leveled against England characterize the general contours of autocratic conduct.

The Declaration's aspirational vision has had a remarkable influence on American notions of liberal equality, even in the days when only white males could formally participate in politics.[18] During the

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13 The Declaration of Independence remains the baseline for governmental action. The Constitution does not alter the commitment to liberal equality stated in the Declaration. *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 18 (2011) [hereinafter BALKIN, CONSTITUTIONAL REDEMPTION] ("American constitutionalism is and must be a commitment to the promises [of] the Declaration . . . ."); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 13 (1999) ("The Declaration [of Independence] and the Preamble [of the Constitution] provide the substantive criteria for identifying the people's vital interests. They show why we are dealing with a populist *constitutional* law rather than simple disagreements about the everyday stuff of political life.").

14 THE DECLARATION OF INDEPENDENCE para. 2.

15 CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 38 (1997).

16 *See, e.g.*, *Domestic Occurrences*, MASS. MAG., Jan. 1794, at 59, 62–64 (quoting Samuel Adams, Lieutenant Governor of Massachusetts, in a statement to Congress that "Representatives of the United States of America" agreed "all men are created equal, and are endowed by their Creator with certain unalienable rights," and thus instantiated "the doctrine of liberty and equality" as the "political creed of the United States" (emphasis omitted)). For further discussion of the Declaration's influence in the eighteenth century, see TSESIS, FOR LIBERTY AND EQUALITY, *supra* note 5, ch. 3.

17 *See infra* Part I.B.

18 Throughout the early nineteenth century, proponents of universal suffrage linked their advocacy to the principles of the Declaration. *See, e.g.*, JAMES CHEETHAM, A DISSERTATION CONCERNING POLITICAL EQUALITY, AND THE CORPORATION OF NEW YORK at vi, 25 (1800) (contending that the Declaration's statement that "all men are created equal" includes

Civil Rights Era, Justice Arthur J. Goldberg pithily explained this phenomenon in a concurring opinion: "The Declaration of Independence states the American creed . . . . This ideal," however, "was not fully achieved with the adoption of our Constitution."[19] To this day, the Declaration remains inspirational and informs the legal understanding of substantive rights.

Unlike the technical jargon of the Constitution, the Declaration of Independence offers ordinary people an easy guide to representative governance. Millions of Americans have heard its populist message read at Independence Day celebrations. The document differentiates self-governance from despotism. Its statements make popular sovereignty essential to legitimate statehood. The manifesto of universal rights located in its second paragraph commits the country to be accountable to the ordinary citizens.

The Supreme Court has provided minimal interpretative guidance about the Declaration of Independence.[20] Many cases mentioning the document deal with sovereignty rather than its principled statements.[21] Perhaps surprisingly, on a number of occasions the

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"the political equality of man"); *Letter III: From a Republican in the Country, to a Federalist in Baltimore*, BALTIMORE PATRIOT & MERCANTILE ADVERTISER, Aug. 3, 1820, at 2 (quoting a Baltimore citizen reminiscing about how "[i]n the year 1801, the principles of *Seventy-six* triumphed in Maryland" with the passage of the "universal" suffrage act); *Speech*, PITTSFIELD SUN (Pittsfield, Mass.), Sept. 22, 1831, at 1 (arguing that individuals without voting rights should not have to "risk their lives in defending the persons and property of the rich"); *Town of Enfield*, REPUBLICAN CHRONICLE (Ithaca, N.Y.), Apr. 18, 1821, at 3 (resolving against property qualifications in New York, "[t]hat the constitution of this state, in many particulars, is aristocratic, and incompatible with the principles set forth in the spirit of our declaration of independence").

19 Bell v. Maryland, 378 U.S. 226, 286 (1964) (Goldberg, J., concurring).

20 Jack Balkin points out that while "[c]ourts today do not hold the Declaration to be part of the Constitution," to ignore the earlier document's ideals would be to make an "empty shell" of the Constitution. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 13, at 19.

21 Most Supreme Court cases that cite to the Declaration of Independence refer to it in passing in reference to its statement about the creation of national sovereignty. *See, e.g.*, Faretta v. California, 422 U.S. 806, 828–29 (1975) (discussing state constitutions, passed shortly after the Declaration of Independence, that adopted the right to self-representation at trial); Powell v. Alabama, 287 U.S. 45, 65 (1932) ("One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence . . . ."); McCarthy v. Arndstein, 266 U.S. 34, 41 (1924) (mentioning a common-law privilege that "had been established [in England] prior to the Declaration of Independence"); Scott v. McNeal, 154 U.S. 34, 39 (1894) ("By the law of England and America, before the Declaration of Independence, and for almost a century afterwards, the absolute nullity of . . . letters [of guardianship] was treated as beyond dispute."); Cushing v. Laird, 107 U.S. 69, 78–79 (1883) (discussing the effect of a ship's master's oath on servants in the era of the Declaration of Independence); Ware v. United States, 71 U.S. (4 Wall.) 617, 630 (1866) ("A general post-office was established on the twenty-sixth day of July, 1775, the year before the Declaration of Independence."); Howard v. Ingersoll, 54 U.S. (13 How.) 381, 398 (1851) ("It is well known to all of us, when the colonies dissolved their connection with the mother country by the Declara-

Court's interpretation of the Declaration rationalized grave injustices.[22] In the best of circumstances, Supreme Court opinions have been historically grounded on the events that gave rise to the Declaration of Independence and its incorporation into American legal culture.[23] On the flip side, the Court has periodically used the document

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tion of Independence, that it was understood by all of them, that each did so, with the limits which belonged to it as a colony."); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 580 (1842) (applying the Declaration in the context of state sovereignty while dealing with personal liberty laws, noting that "[a]fter the declaration of independence in 1776, each state, at least before the confederation, was a sovereign, independent body"); Cassell v. Carroll, 24 U.S. (11 Wheat.) 134, 140 (1826) (discussing a Maryland statute that exonerated its citizens from payments for rents owed prior to the signing of the Declaration of Independence); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 160 (1824) (asserting that the Declaration of Independence granted states sovereignty); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 118–19 (1810) ("By the declaration of independence the several states were declared to be free, sovereign and independent states; and the sovereignty of *each*, not of the whole, was the principle of the revolution; there was no connection between them, but that of necessity and self defence, and in what manner each should contribute to the common cause, was a matter left to the discretion of each of the states."); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 92 (1804) (discussing a litigant who was born in Connecticut before the Declaration of Independence which therefore made him a subject of Great Britain by birth).

22 *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 589–92 (1897) (observing that during the *Lochner* Era, a substantive due process theory of the Declaration of Independence prohibited protective state regulation of employer-employee agreements); United States v. Cruikshank, 92 U.S. 542, 553–54 (1875) (parsing the Declaration of Independence as a states'-rights rather than a people's-rights document and thereby preventing the federal prosecution of mortal hate crimes); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (claiming that the framers conceived of the Declaration of Independence to apply only to whites and not to blacks).

23 In the most recent term, the Court expostulated on the Declaration of Independence's condemnation of King George III's infringement on judicial autonomy. *See* Stern v. Marshall, 131 S. Ct. 2594, 2609 (2011) (explaining how this infringement led to carefully delineated Article III judicial powers). While the majority's statement in *Stern* is brief, it provides fruitful fare for future research. Justice Joseph P. Bradley's dissent in the *Slaughter-House Cases* parsed the meaning of "life, liberty, and the pursuit of happiness" in reference to a professional monopoly. 83 U.S. (16 Wall.) 36, 115–16 (1872) (Bradley, J., dissenting). In a separate dispute between two states, the Court explained the need to view the Constitution within the context of other historical documents, including the Declaration of Independence. *See* Missouri v. Illinois, 180 U.S. 208, 219–20 (1901). Further, the Court has linked the constitutional protection of an independent judiciary to the Declaration's mention of King George III's making "judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." O'Donoghue v. United States, 289 U.S. 516, 531 (1933). Another connection the Court has made between the Declaration of Independence and the Constitution involves the Seventh Amendment's guarantee of trial by jury. *See, e.g.*, Jones v. United States, 526 U.S. 227, 246 (1999) (pointing out that the British custom of denying the right to jury trials in new statutory offenses motivated the Declaration of Independence's instantiation of the jury right); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting) (observing that the Declaration of Independence cited denial of trial by jury as a reason that the colonists sought independence from England); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 276 (1942) (explaining the relation between the rights of trial by jury and civil rights by reference to the Declaration of Independence). In preventing the use of general warrants for electronic surveillance, the Court recalled that the British use of general warrants "was a motivating factor behind the Declaration of Independence." Berger v. New York, 388

for rhetorical flourish, without grounding its statements in social, political, or jurisprudential history.[24]

In this Article, I limit my examination of the document to those paragraphs that protect the people's inalienable right to self-governance. Assessing those paragraphs is relevant to addressing the Court's increasing willingness to strike popular federal rights-protecting legislation. Recent judicial holdings, I argue in Parts II and III, run counter to core principles of representative self-government embedded in the Declaration. Before turning to the Declaration's relevance to contemporary jurisprudence, this Part discusses the substantive value of the document and how social groups have incorporated it into their ideologies.

A. Construing the Declaration of Independence

With judicial precedents parsing the Declaration so diffuse, it is important to look to another source for interpreting the document. If the Supreme Court was correct to state that "it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence,"[25] whom can we trust with that grave responsibility? Certainly the judiciary plays a role in protecting against legislative and

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U.S. 41, 58 (1967); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 389 (1978) (Marshall, J., dissenting) (discussing structural racism in the Declaration of Independence and the Constitution to demonstrate the need for affirmative action); Laird v. Tatum, 408 U.S. 1, 19 (1972) (Douglas, J., dissenting) (connecting civilian governance of the military with the Declaration of Independence's statement that the king "has affected to render the Military independent of and superior to the Civil power"); Cramer v. United States, 325 U.S. 1, 14 n.19 (1945) (mentioning an anecdote about Benjamin Franklin at the time of the signing of the Declaration to show that the revolutionaries realized their acts were treasonable). In *United States v. Amistad*, in which the Court granted freedom to several Africans who had been kidnapped into slavery, their counsel referred to the Declaration's principles of justice as a source for judicial evaluation. 40 U.S. (15 Pet.) 518, 549 (1841). The Court reproduced counsel's understanding of the document but did not cite to it in the holding. *See id.*

24 Justice Clarence Thomas has particularly infused the Declaration of Independence with a libertarian interpretation that is distinct from its historic understanding. For instance, despite the fact that abolitionists always relied on the document to argue against slavery and the inequality connected with it, Justice Thomas regarded programs aimed at ending educational inequality in colleges to be contrary to "the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause." Grutter v. Bollinger, 539 U.S. 306, 378 (2003) (Thomas, J., dissenting). Thereby, Justice Thomas equated efforts to end inequality, for which, as I show later in Part I, most antidiscrimination groups in the nineteenth century had relied on, with those to discriminate based on race. Similarly suspect is the Court's attempt to link an individual's right to bear arms with the Declaration of Independence. District of Columbia v. Heller, 554 U.S. 570, 586 (2008). My research for a book on social movements' reliance on the Declaration of Independence showed no comparable interpretation of the document at any point in United States history. *See generally* Tsesis, For Liberty and Equality, *supra* note 5. Justice John Paul Stevens, in his dissent to *Heller*, came to a similar conclusion by a different research methodology. *See Heller*, 554 U.S. at 639–43 (Stevens, J., dissenting).

25 Cotting v. Godard, 183 U.S. 79, 107 (1901).

executive abuses. But judges are not the source of sovereign power. According to the Declaration of Independence, the people retain power to organize government according to principles most likely to secure their safety and happiness.[26]

One might expect there to be circumstances in which the Court insufficiently recognizes important nuances about the people's rights to safety and pursuit of happiness. In such situations, the people are likely to lobby elected officials demanding the enactment of laws needed to enjoy essential liberties. Representative government can facilitate the process of identifying what Justice William O. Douglas explained to be "the ideas of 'life, liberty, and the pursuit of happiness,' expressed in the Declaration of Independence, [which] later found specific definition in the Constitution itself, including of course freedom of expression and a wide zone of privacy."[27] Abraham Lincoln also explained the relation between the Declaration and Constitution by reference to the biblical proverb, "A word fitly spoken is like an apple of gold in a frame of silver."[28] The Declaration, Lincoln believed, was the apple of gold and the Constitution its frame.[29] That is to say, the Declaration is the substance of the law, and the Constitution the framework for upholding it.

Many scholars have taken a more constrained perspective, viewing the Declaration as principally a document of national sovereignty rather than a statement of popular governance. Professor Carlton F.W. Larson, for instance, raises concern about treating the document as primarily a statement of rights.[30] Overemphasizing the document's second paragraph, he believes, raises the possibility that the judiciary will revive *Lochner* Era-style substantive due process analysis.[31] Larson warns about overemphasizing the document's statement about innate

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26 *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[W]henever 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.").

27 Ferrell v. Dall. Indep. Sch. Dist., 393 U.S. 856, 856 (1968) (Douglas, J., dissenting to a denial of certiorari).

28 MICHAEL P. ZUCKERT, THE NATURAL RIGHTS REPUBLIC: STUDIES IN THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION 13 (1996) (noting that Lincoln used this proverb in a written meditation); *see* PROVERBS 25:11.

29 ZUCKERT, *supra* note 28, at 13.

30 *See* Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 711 (2001) ("[S]cholars focus almost exclusively on the second sentence of the Declaration, and they conclude that the Declaration is primarily about natural law and the protection of natural rights. . . . Not surprisingly, arguments of this sort have been a resounding failure in the legal academy.").

31 *See id.* at 701–11, 784–85.

human rights: "Lacking specificity, the passage could be used to support almost anything."[32]

Larson's downplaying of the second paragraph echoes similar intellectual strains in the work of Professor Saikrishna B. Prakash. Prakash is even more categorical than Larson in thinking the Declaration to be virtually meaningless and useless as an interpretive tool.[33] Justice Antonin Scalia has similarly asserted that "[t]he Declaration of Independence . . . is not a legal prescription conferring powers upon the courts."[34] Such perspectives about the document overlook the people's ability, rather than the judiciary's prerogative, to identify the rights listed in the second paragraph and lobby Congress to enact appropriate legislation to protect them. Diminishing the Declaration's value as a tool for the people's empowerment to seek vindication of their rights dismisses as undefinable its broad phrases about life, liberty, and the pursuit of happiness, as if constitutionally important phrases—about due process and equal protection—were not likewise ambiguous. Someone adopting Prakash's point of view might be consistent by arguing that the Due Process and Equal Protection Clauses of the Fourteenth Amendment are too ambiguous to be of any practical use.[35] To the contrary, the clauses have been instrumental to the recognition of civil rights, despite criticisms about their ambiguity.[36]

Standards and norms become pertinent in specific cases. As with the Due Process and Equal Protection Clauses, the general values for

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32 *See id.* at 763. Larson's solution of understanding paragraph 2 of the Declaration within the context of other paragraphs is undoubtedly correct, but he is mistaken to believe that all that can be gleaned from such a holistic reading of the document is a condemnation of tyranny. *See id.* at 762–78.

33 Saikrishna B. Prakash, *America's Aristocracy*, 109 YALE L.J. 541, 553–54 (1999) ("The Declaration has a little more substance [than the constitutional Preamble], but that is not saying much. Though it gets the patriotic juices flowing . . . [its] principles tell us nothing concrete.") (reviewing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999)).

34 Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

35 Prakash, *supra* note 33, at 553–54 (attacking Tushnet's conception of a "thin Constitution" supplemented by the principles of the Preamble and the Declaration of Independence).

36 Contemporary scholars have offered contradictory assessments of *Lochner v. New York*, 198 U.S. 45 (1905), with some claiming it to be regressive and others thinking it to be the progenitor of progressive substantive due process precedents. *See* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12–13 (2003) (claiming that *Lochner* was "the progenitor of modern substantive due process cases such as *Griswold v. Connecticut*, *Roe v. Wade*, and *Lawrence v. Texas*" (footnotes omitted)). While *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), heralded the civil rights era, Herbert Wechsler strongly denounced the majority's reliance on the Equal Protection Clause. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–32 (1959) (claiming that *Brown* should have been decided on associational rather than equal protection grounds). Charles Black, Jr., on the other hand, defended the *Brown* opinion. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425–26 (1960).

which the Declaration of Independence stands become pertinent within the context of specific circumstances; living details provide a window into the significance of general provisions.[37] Although the people define the content of "unalienable rights" within the context of their own time, they are not rudderless in their assessment.[38] The people can look to the terms of the Declaration, which are grounded in the Revolution and in specific statements differentiating autocratic from representative government.[39]

Another counterargument against drawing on norms set by the Declaration of Independence conceives of that document to be devoid of any constitutional mandates. David E. Guinn presents a typical formulation of this perspective, stating that the Declaration's authors regarded it merely "as a public statement of grievances intended . . . to enlist" support for independence from Britain.[40] The idea behind this point is that the Declaration's statements about rights were ornamental rather than substantive. To the contrary, I believe the remonstrance against autocracy has historical and contemporary relevance. Statements decrying King George III's unwillingness to accept the colonists' petitions are about particular events, but they also set lasting principles in favor of representative government and against class privilege.[41]

The narrow understanding of the document is not limited to legal scholars. Some prominent historians have also adopted it. In their seminal books about the Declaration of Independence, Professors David Armitage and Pauline Maier give little weight to the claim that its statement about human dignity influenced the founding generation. In their view, the document mainly functioned to criticize King George III and to proclaim sovereignty.[42] Armitage and Maier deemphasize clauses about individual rights and highlight grievances against King George III.[43]

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37 *See supra* notes 22–23.

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

39 *See infra* notes 251, 253.

40 David E. Guinn, *Constitutional Intent and Interpretation: A Response to Black's View of Constitutional Rights*, 11 GEO. MASON U. C.R. L.J. 225, 238 (2001).

41 *See* Larson, *supra* note 30, at 762–78.

42 DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 17 (2007) (stating that "[t]he American Declaration . . . was a document of state-making," with any concern for rights being barely noticed); PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 160–64, 213–15 (1997) (arguing that the Declaration of Independence's statement of rights had little influence on the founding generation and only became influential through later reinterpretations of the document).

43 While Armitage grandly claims that "[t]he Declaration's statements regarding rights to 'Life, Liberty and the Pursuit of Happiness' were strictly subordinate to . . . claims regarding the rights of states," he offers only one example to prove his point. ARMITAGE, *supra* note 42, at 17. And even that example—the response of Continental troops to the reading of the document—is not revealing of early understandings of its text. Further,

I think that their views correctly conceive of the Declaration of Independence's antityrannical features but are too dismissive of its role in establishing principles for self-government.[44] In fact, the Supreme Court has linked the one-person–one-vote doctrine, which is so fundamental to the contemporary understanding of electoral equality, to the Declaration and through it to constitutional provisions.[45] The value that the Declaration places on representational government continues to dictate constitutional theory.[46]

Even before the ratification of the Constitution, the Declaration established a system of representation that derived its "just powers from the consent of the governed" and was constituted "to secure" the rights of "Life, Liberty and the pursuit of Happiness."[47] Such a clear statement speaks against another scholar's conclusion that the Declaration's charges against the King of England's "obstructions of the legislative process" are unconnected with the document's recitation of fundamental rights.[48] To the contrary, the Declaration's accusations about British infringements of the people's self-governance are intrinsically connected with the colonists demand that government safeguard their rights.

The Declaration of Independence announces that the people have the right to establish a representative government on the basis of principles and institutions they believe will best impact "their Safety

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although Pauline Maier asserts that the Declaration of Independence was rarely read in early Independence Day celebrations, the little evidence we have of those facts indicates that public readings of the document became common in the aftermath of the Revolution. *Cf. New-York, July 2. Celebration of the Fourth of July, by the Tammany Society, or Columbian Order*, N.Y. DAILY GAZETTE, July 2, 1791, at 2 ("On entering the Church [for the celebration], the music will perform until the audience are seated, after which the Declaration of Independence will be read . . . ."); *New-York, July 5*, AM. MINERVA (N.Y.C., N.Y.), July 5, 1794, at 3 ("The Anniversary of American Independence . . . was celebrated . . . and the declaration of Independence was read . . . ."); *Thursday; St. Tammany Fishing; Company; Schuylkill; American; Declaration Independence*, GENERAL ADVERTISER (Phila., Pa.), July 8, 1793, at 2 ("[T]o celebrate the eighteenth anniversary of American Independence . . . the Declaration of Independence was read . . . .").

44 *See* ARMITAGE, *supra* note 42, at 17 ("The American Declaration . . . was a document of state-making, not of nation-formation.").

45 Reynolds v. Sims, 377 U.S. 533, 557–58 (1964) (adopting the historical perspective that the one-person–one-vote concept was linked to the Declaration of Independence); Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.").

46 A core concept of the Declaration of Independence is that the people have the right to petition their direct representatives to instruct them on legislative policy. *See* Adderley v. Florida, 385 U.S. 39, 49 n.2 (1966) (Douglas, J., dissenting) (identifying the Declaration as an antecedent to "the right to petition for the redress of grievances").

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

48 Larson, *supra* note 30, at 770 ("Many of the charges against the King address obstructions of the legislative process. These obstructions do not directly abridge any individual's life, liberty, or the pursuit of happiness, but they do interfere dramatically with the people's right to self-government.").

and Happiness."[49] The document justifies waging revolution in response to the British denial of colonial control over the legislative process. Additionally, the document maintains that the people retain the right to abolish their government when it is consistently unresponsive to their lobbying efforts against public abuses.[50] The people's ultimate recourse, "duty," and "right" is to "throw off" dictatorial power that prevents them from legislating for themselves.[51] The Declaration condemns King George III for preventing colonial governors from executing laws "of immediate and pressing importance" to the people.[52] The King's demand that people living in large districts "relinquish the right of Representation in the Legislature" or be subject to unfavorable treatment further eroded their interests.[53] Repeated dissolution of "Representative Houses . . . [that] oppos[ed] with manly firmness [the King's] invasions on the rights of the people" made it impossible for the people to influence the course of legislation.[54] Meanwhile, the colonists were taxed but given no representation in Parliament.[55] These grievances were as much accusations against the King as rejections of future unrepresentative governance.[56] The passages renounce the British government for being unresponsive to the people and provide a negative model against which the new nation's commitment to popular sovereignty can be measured.

The Declaration of Independence committed the country to a system of government answerable to the will of the people. The Declaration's statements on legislative representation differ from the Guarantee Clause of the Constitution,[57] which commits the federal government to intervening against state, rather than national, disruptions of representative governance.[58] The legitimacy of the govern-

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49 *See* THE DECLARATION OF INDEPENDENCE paras. 3–29 (identifying the colonists' grievances against the British government).

50 *See id.* at para. 2 ("[W]henever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it . . . .").

51 *Id.* (stating that King George III had reduced colonists "under absolute Despotism, [and as such,] it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security"); *id.* at para. 24 (accusing King George III of "suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever").

52 *Id.* at para. 4.

53 *Id.* at para. 5.

54 *Id.* at para. 7.

55 *Id.* at para. 19 (accusing the King of "imposing Taxes on us without our Consent").

56 *See id.* at para. 2 (criticizing the system of unrepresentative government before citing specific examples within the British monarchy).

57 U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

58 David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1213 (2006) ("[B]y its plain terms the Guarantee Clause applies only to states").

ment requires the people's consent to its policies and enactments.[59] Professor Frank Michelman describes the representational process to establish norms "through public dialogue" that are later "expressed as public law."[60] I think his explanation of the constitutional integration of principles and individual rights is also applicable to the Declaration of Independence: "Subjective rights reflect norms governing the state's immediate treatment of persons, while objective principles point to more comprehensive states of social affairs—'equality,' for example—which the constitution commits the state to pursue and uphold."[61] The general principles of the Declaration state the objective and equal human interests in liberty, life, and happiness, but they also indicate an individual's unique interests that are not mixed with the general public's.[62] The practical judgment that Michelman explains in detail as associated with "endorsement of both a general standard and a specific application"[63] also requires cognizable public morality as it is stated in general, promissory terms by the Declaration of Independence. The representational process of democratic politics can identify general ideals applicable to the protection of individual safety and equal status.

The Declaration's statement about "unalienable Rights" places limits on specific majoritarian preferences. Implicitly, not every policy established by representational politics is legitimate. I am therefore skeptical about Professor Akhil Reed Amar's equation of popular sovereignty with majority rule.[64] Amar is undoubtedly correct that "popular majority rule in making and changing constitutions" was one of the "bedrock principles in the Founding, Antebellum, and Civil War

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59 *See id.* at 1222 (noting that having people choose electors lends legitimacy to the electoral process).

60 Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 27 (1986) [hereinafter Michelman, *The Supreme Court 1985 Term*].

61 Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378, 1386 (2004).

62 I disagree with Michelman's claim that a liberal state need not have any ontological sense of human nature but only respond to "people's self-concepts relative to politics." Frank I. Michelman, *The Subject of Liberalism*, 46 STAN. L. REV. 1807, 1827 (1994) (book review). The Declaration of Independence provides a general statement of rights that cannot be infringed by majoritarian stereotypes. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (noting that "unalienable Rights" are "endowed" by a "Creator" and that "Governments are instituted" to "secure these rights"). Objective standards allow for public regulations that are not beholden to discriminatory public demands.

63 Michelman, *The Supreme Court 1985 Term*, *supra* note 60, at 28.

64 Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458, 482 (1994) ("[M]ajoritarian popular sovereignty principles are clearly a part of the U.S. Constitution in both word and deed, whether one focuses on the very act of ordainment and establishment or on the texts of the Preamble and the First, Ninth, and Tenth Amendments.").

eras."[65] The Declaration's recognition of "unalienable Rights," however, was meant to prevent ruthless majorities from hijacking the legislative process to harm other groups and individuals.[66]

In my view, statutes that protect individual rights are only legitimate if they further the liberal equality scheme of the Declaration of Independence. Therefore, it is national principles rather than majoritarian politics that justify the expansion or contraction of rights. Majorities cannot, for instance, undermine the document's explicit protection of unalienable rights or choose to end representational governance because these are imbedded within the very structure of national ethos. The framework of the Declaration, therefore, sets limits on democratic politics. Disputes about the nature of inalienable rights will inevitably arise, with some groups claiming that the expansion of rights for some infringe on others' interests. An explanation of how to resolve such conflicts will require a separate article; suffice it to say here that judicial resolution of such disputes will require an integrative approach that accounts for textual, historical, structural, prudential, ethical, and doctrinal interpretations of the Declaration.[67] The method draws meaning from "structures and relationships" of the Declaration of Independence "in all its parts or in some principal part" in a similar way to how Professor Charles Black described constitutional construction.[68] This interpretive methodology begins with the text of the document but also looks closely at its structure, principles, and history to ascertain the significance of specific paragraphs to concrete circumstances.[69]

The constitutional power to enforce the Declaration's aspirational principles already exists. The original Constitution granted no specific power to enact legislation for safeguarding life, liberty, and the pursuit of happiness. The Fourteenth Amendment, however, expanded Congress's power into the realm of civil rights. As Justice Clarence Thomas pointed out, prior to the ratification of the Reconstruction Amendments the institution of slavery was the worst sign of

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65 Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994).

66 *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

67 Here, I am following Professor Philip Bobbitt's six-part model of Constitutional Interpretation. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 4–8 (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991).

68 CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969).

69 The Declaration contains an overarching structure that is ascertainable from an analysis of individual passages in relation to its overall purposes of representational governance. Each paragraph cannot, therefore, be read separately but must instead be integrated into its overall structure of federal sovereignty. For an interesting account of how structural interpretation of the Constitution is intrinsic to formalist and functionalist interpretations of the Constitution, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1971–72 (2011).

the nation's failure to live up to "the principles of equality, government by consent, and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure."[70] Thus, the Fourteenth Amendment's framers expanded Congress's authority to prevent such grave human rights abuses.

During debates on the proposed Fourteenth Amendment, Senator Luke P. Poland of Vermont asserted that the Declaration of Independence and the Constitution had inspired the drafting of the Fourteenth Amendment's first clause, containing the Due Process, Privileges and Immunities, Equal Protection, and Citizenship Clauses.[71] An Illinois Congressman likewise linked the new constitutional safeguards to the Declaration of Independence, asking rhetorically how anyone can "have and enjoy equal rights of 'life, liberty, and the pursuit of happiness' without 'equal protection of the laws?'"[72] Similarly, Speaker of the Thirty-Ninth Congress, Schuyler Colfax, stressed his "love" for Section 1 of the Fourteenth Amendment "because it is the Declaration of Independence placed immutably and forever in our Constitution."[73] A convention for military veterans, which gathered in Pittsburgh six days after Congress had voted to pass the proposed Fourteenth Amendment onto the states for ratification, unanimously adopted an explanatory resolution stating: "[W]ith the beginning of the war the nation took a new departure, and henceforth her Constitution will be read in the interests of liberty, justice and security, according to the lights of its preamble and the immortal declaration of independence . . . ."[74] These original sentiments heralded the opportunity for representative government to rely on Congress's Section 5 power to provide protections for inalienable civil rights.

The Declaration of Independence's guarantee of political self-determination was made enforceable through a different Reconstruction Amendment. Throughout debates on the Fifteenth Amendment, references to the Declaration focused on the document's consent clauses. Advocates of the Fifteenth Amendment regarded the Declaration's clauses about democratic consent to be endorsements of the will of people rather than the policies of states. There was no need for them to resolve whether voting was a natural right that could not be denied by positive law or simply a conventional right within the regu-

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70 McDonald v. City of Chicago, 130 S. Ct. 3020, 3059 (2010) (Thomas, J., concurring).

71 CONG. GLOBE, 39TH CONG., 1ST SESS. 2961 (1866).

72 *Id.* at 2539 (statement of Rep. John F. Farnsworth).

73 Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5, 73 (1949) (quoting Colfax's speech as reported in CIN. COM., Aug. 9, 1866, at 2).

74 *The Soldiers in Council!*, ADAMS SENTINEL (Gettysburg, Pa.), June 19, 1866, at 4.

latory power of states. What mattered, in the words of Senator Joseph Abbott, was that according to the Declaration of Independence, "all political power was vested in the people."[75] Various congressmen, like Senator Charles Sumner[76] and Representative William Loughridge,[77] related their plea for a constitutional guarantee of voting rights to the colonists' outcry against taxation without representation. One of the Declaration's indictments against King George III was that he had imposed taxes without Americans' consent. At the Civil War's end, Representative Charles M. Hamilton, a lawyer and veteran, explicitly connected the right to vote to the wording of the Declaration:

> Without the elective franchise; without a voice in the making of laws by which he is controlled and to which he is amenable; without an option as to who shall administer them or how they shall be administered, what insurance has a man of his life, what security for his liberties, what protection in his pursuit of happiness?[78]

Self-government was a vacuous concept to anyone who had been denied the right to cast a ballot. The Declaration of Independence set representational government as a *sine qua non* of national purpose. Denying a large segment of the population the right to self-determination violated Americanism in the way the Declaration had defined it. Thus, the political self-government assured by the Declaration of Independence became enforceable through the Fifteenth Amendment.

B. Adoption by Social Movement

The Fourteenth Amendment enabled Congress to enact legislation to protect the inalienable rights proclaimed by the Declaration of Independence. Section 5 enables Congress to use its power to respond to the lobbying efforts of groups demanding greater equal liberty.[79]

After the nation's founding and into the twenty-first century, groups who lobbied for rights legislation often invoked the Declaration. They applied the Declaration's principled statements about popular sovereignty to the antislavery, women's suffrage, and labor movements. The document's ideals came alive through key moments of progress for a nation that often tolerated forms of tyranny surpassing those that the colonists identified with the British monarchy.

One indicator that the Declaration of Independence served as a superconstitution for progressive movements was the abolitionists' re-

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75 CONG. GLOBE, 40TH CONG., 3D SESS. 980 (1869).

76 *Id.* at 903.

77 *Id.* at 200 app.

78 *Id.* at 100 app.

79 U.S. CONST. amend. XIV, § 5 (ratified July 9, 1868) ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

liance on the document at a time when several constitutional clauses protected the institution of slavery.[80] As the historian David Brion Davis has written, "[T]he Declaration of Independence was the touchstone, the sacred scripture for later American abolitionists, for blacks like David Walker as well as for whites like Benjamin Lundy and William Lloyd Garrison."[81] Many of the founders understood the incompatibility of their philosophical statements about natural equality with the institution of slavery. An author, writing under the pseudonym "American in Algiers," demonstrated this perspective. He referred to the Declaration of Independence as "the fabric of the rights of man" and faulted those who bound Africans to slavery while they enjoyed "the Rights of Man."[82] New Jersey Quaker leader David Cooper underscored the contradictions between Revolutionary principles of equality and the institution of slavery in two printed columns. He quoted from the Declaration's second paragraph in the left-hand column: "We hold these truths to be self-evident, that *all men* are created *equal* . . . ."[83] Adjacent to this quote, in the right-hand column, Cooper excoriated slaveholders for their hypocrisy:

> If these solemn *truths*, uttered at such an awful crisis, are *self-evident*: unless we can shew that the African race are not *men*, words can hardly express the amazement which naturally arises on reflecting, that the very people who make these pompous declarations are slave-holders, and, by their legislative[conduct], tell us, that these blessings were only meant to be the *rights* of *white men* not of *all men* . . . .[84]

Also during the postrevolutionary period, the Pennsylvania Society for Promoting the Abolition of Slavery relied on the second paragraph of the Declaration in its effort to remove "this evil . . . from the land."[85] The inhumanity of slavery and its incongruity with the Declaration's aspirations became an oft-elaborated theme in antislavery writings.

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80 The most explicit constitutional protections of slavery were the Importation, Three-Fifths, and Fugitive Slave Clauses. *See* Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. Rev. 307, 319–22 (2004) [hereinafter Tsesis, *Furthering American Freedom*]; *see also* Wendell Phillips, The Constitution: A Pro-Slavery Compact 3–7 (Negro Univs. Press 1969) (1844); William M. Wiecek, The Sources of Antislavery Constitutionalism in America, 1760–1848, at 62–83 (1977).

81 David Brion Davis, *American Slavery and the American Revolution*, *in* Slavery and Freedom in the Age of the American Revolution 262, 275–77 (Ira Berlin & Ronald Hoffman eds., 1983).

82 The American in Algiers, or The Patriot of Seventy-Six in Captivity 23–24 (N.Y.C., J. Buel 1797).

83 David Cooper, A Serious Address to the Rulers of America, on the Inconsistency of Their Conduct Respecting Slavery 14 (London, J. Phillips 1783).

84 *Id.*

85 Constitution and Act of Incorporation of the Pennsylvania Society, for Promoting the Abolition of Slavery 34 (Phila., J. Ormrod 1800).

The outrage against slavery had become radicalized at the height of the Jacksonian Era. William Lloyd Garrison, the most prominent abolitionist of the era, mocked the "Southern slaveholders, and their Northern abettors" for "the ringing of bells[and] the kindling of bonfires" on the Fourth of July that purported to celebrate the "'self-evident truths' of the Declaration of Independence."[86] If a British threepenny tax on tea was reason enough to fight the Revolution, he wrote, "[H]ow much blood may be lawfully spilt, in resisting the principle, that one human being has a right to the body and soul of another . . . ?"[87]

Garrison was not alone. In its 1833 Declaration of Sentiments, the American Anti-Slavery Society proclaimed that the preamble to the Declaration of Independence was the "corner-stone" of the "Temple of Freedom."[88] A similar view appeared in the great Unitarian minister William E. Channing's 1835 book, *Slavery*. The institution, he wrote, was an evil repugnant to the "indestructible rights of every human being" on which Americans anchored the Declaration of Independence.[89]

Supporters of women's suffrage played a prominent role in the abolitionist movement. Finding no constitutional basis for their call for reform, they too turned to the Declaration of Independence. Elizabeth Cady Stanton's Declaration of Sentiments, which became the suffragettes' statement of purpose after it was published at the 1848 Seneca Falls Convention, was modeled closely on the Declaration of Independence. Stanton adopted much of the language of the Declaration of Independence's second paragraph to better ground the demand for women's suffrage on the nation's founding ideology, stating, "We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights . . . ."[90] The Declaration of Sentiments further avowed "[t]hat woman is man's equal,"[91] thereby drawing inspiration from the original Declaration and expanding its meaning.

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86 William Lloyd Garrison, *Incendiary Doctrines*, LIBERATOR (Bos.), Mar. 18, 1837, at 1.

87 *Id.*

88 *Declaration of Sentiments of the American Anti-Slavery Society* (1833), *in* THE PLATFORM OF THE AMERICAN ANTI-SLAVERY SOCIETY 7, 7 (N.Y.C., Am. Anti-Slavery Soc'y 1853) (emphasis omitted).

89 WILLIAM E. CHANNING, SLAVERY 21, 32, 46 (Bos., James Munroe & Co. 1835).

90 Elizabeth Cady Stanton, *Declaration of Sentiments and Resolutions*, COLL. OF STATEN ISLAND LIBRARY, http://www.library.csi.cuny.edu/dept/history/lavender/2decs.html (last visited Mar. 6, 2012) (showing the Declarations of Independence and Sentiments side-by-side).

91 Elizabeth Cady Stanton, *Resolutions of the Seneca Falls Convention*, COLL. OF STATEN ISLAND LIBRARY, http://www.library.csi.cuny.edu/dept/history/lavender/2decs.html (click "Go to Resolutions of the Convention") (last visited Mar. 6, 2012) (showing the Declarations of Independence and Sentiments side-by-side).

Compatibly, the *Liberator*, which was the foremost newspaper of immediatist abolitionists, expressed its aversion for voting restrictions that burdened women unequally because they ran counter to the Declaration of Independence's statement that "governments derive their just powers from the consent of the governed."[92] Many similar feminist demands for the right to participate in politics found a national statement of rights in the Declaration of Independence.[93]

As abolitionists and women's rights advocates, so too labor organizers relied on the Declaration to bolster their claims. Union organizers first used that rhetoric in the late 1820s,[94] and their successors continued to sound it out during the New Deal Era.[95] Members of President Franklin D. Roosevelt's administration, like Secretary of the Interior Harold Ickes and Postmaster General James A. Farley, understood the Declaration of Independence to provide Americans with a guarantee to equal opportunity and believed they needed to act on the Declaration's principles.[96]

The Declaration of Independence's multiple statements about a representative polity remain as pertinent today as they were at other moments of social advancement. The people, through their representatives in Congress, retain the power to define the meaning of the

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92 *See* Sarah E. Wall, *The Rights of Woman*, LIBERATOR (Bos.), Mar. 6, 1857, at 40; *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

93 *See, e.g.*, WENDELL PHILLIPS, *Woman's Rights*, *in* SPEECHES, LECTURES, AND LETTERS 11, 11–13 (Bos., Walker, Wise & Co. 1864) (decrying the absurdity of excluding half of humanity from the Declaration of Independence's formula of natural equality); *Natural Equality: The Abolitionists Hold with the Declaration*, COLORED AM. (N.Y.C.), Mar. 3, 1838 (stating that the Declaration of Independence requires both abolition and women's marital rights).

94 *See, e.g.*, EDWARD PESSEN, MOST UNCOMMON JACKSONIANS: THE RADICAL LEADERS OF THE EARLY LABOR MOVEMENT 26–33 (1967) (discussing the Working Men's party); GEORGE HENRY EVANS, THE WORKING MEN'S DECLARATION OF INDEPENDENCE (1829), *reprinted in* WE, THE OTHER PEOPLE: ALTERNATIVE DECLARATIONS OF INDEPENDENCE BY LABOR GROUPS, FARMERS, WOMAN'S RIGHTS ADVOCATES, SOCIALISTS, AND BLACKS, 1929–1975, at 47, 47–49 (Philip S. Foner ed., 1976) (using the Declaration of Independence as a basis to argue for equal rights for the working class).

95 Labor groups discovered that at a time of great economic distress, the principles of the Declaration of Independence informed their efforts for equality. Labor organizations like the AFL, the International Union of Journeymen Horseshoers of the United States and Canada, and the United Brotherhood of Maintenance of Way Employes [*sic*] and Railway Shop Laborers continued to invoke the Declaration in their efforts to increase wages, strike without being under the threat of injunctions to diminish the power of corporate monopolies, and improve work environments. *See* Samuel Gompers, *Editorials*, 28 AM. FEDERATIONIST 568, 570 (July 1921); *Harding and the Constitution*, 23 INT'L HORSESHOERS' MONTHLY MAG., Sept. 1922, at 5, 5–6; *Anti-Unionists Quack Patriots*, RAILWAY BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES J. (Detroit), Dec. 1920, at 25.

96 *Farley Defends Air Mail Action*, MIAMI DAILY NEWS-RECORD, Feb. 23, 1934, at 13 (promising that incoming administration would seek to make the principles of the Declaration of Independence and the Preamble to the Constitution realities through the "reorganization of our economic, social and political life"); *Ickes Hits Public on Slum Neglect*, N.Y. TIMES, Sept. 30, 1934, at 33 (asserting that the modicum of public support needed to enjoy "liberty and a chance at happiness").

rights to "life, liberty and the pursuit of happiness." The founding principles remain permanent fixtures of national sovereignty, but each generation can further define, elaborate, and clarify their meanings. Parts II and III of the Article review an unsettling trend of recent Supreme Court decisions to disrupt the people's right to engage in the expansion of their rights through the legislative process.

II
Civil Rights Legislation

The Declaration of Independence established a representative polity committed to the protection of inalienable rights.[97] The framers outlined government's legislative obligation to respond to the people's entreaties for safeguarding their lives, liberties, and pursuit of happiness. Recent Supreme Court jurisprudence, however, has reduced the people's ability to influence congressional representatives to pass rights-protecting laws. The Court has forbidden Congress from expanding rights any further than the definitions set by judicial precedents. This model of Fourteenth Amendment enforcement authority runs counter to the Declaration of Independence's statements about self-governance.

This Part begins with a brief history of judicial review. It then discusses the Court's diminished deference to lawmakers. Finally, it analyzes judicial constraints on legislative power in light of the Declaration's principle of popular sovereignty to derive the appropriate level of review for civil rights statutes.

A. Judicial Deference

The Supreme Court has long established its authority to rule on the constitutionality of congressional acts.[98] Chief Justice John Mar-

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97 This is not to say that the nation became an egalitarian state. A letter published in abolitionist Frederick Douglass's newspaper, *The North Star*, mocked the Declaration of Independence's assertion that "all men are created equal." J.D., *The "Ever-Glorious Fourth,"* N. Star (Rochester, N.Y.), July 13, 1849, at 2. The author insisted that the document needed to be rewritten to say, "All men are not created equal; but many are made by their Creator, of baser material, and inferior origin, and are doomed now and forever to the sufferance of certain wrongs—amongst which is Slavery!" *Id.* To blacks, the Fourth of July was "but a mockery and an insult." *Id.* To the advocates of slavery, the author surmised, "[l]iberty and equality" meant no more than firecrackers, raised flags, and other raucous festivities. *Id.*

Despite the nation's failure, the document nevertheless committed the country to equal freedom. In this context, an ex-slave's daughter described her father's awakening when he heard the Declaration read aloud. From that moment, she wrote, "he resolved that he would be free, and to this early determination, the cause of human freedom is indebted for one of its most effective advocates." Josephine Brown, Biography of an American Bondman, by His Daughter 18 (Bos., R.F. Wallcut 1856).

98 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) (noting that the Constitution gave the Court "appellate jurisdiction in all cases in law and equity arising under the

shall, writing for the majority in *Marbury v. Madison*, explained that no law "repugnant to the constitution" was enforceable because "the constitution controls any legislative act repugnant to it."[99] *Marbury* nowhere suggested that only the judiciary can interpret the Constitution. The Court's purpose was to identify its own power to review federal actions rather than precluding the other two branches of government from doing so.

The obligation of officials to comply with judicial interpretation of the Constitution was even more firmly established in *Cooper v. Aaron*.[100] The case arose when public school officials in Little Rock, Arkansas refused to desegregate pursuant to the judgment in *Brown v. Board of Education*.[101] Under the circumstances, it was critical for the Court to assert its authority by declaring that the "federal judiciary is supreme in the exposition of the law of the Constitution."[102] Yet, the decision in no way limited Congress's ability to exercise its power under the Fourteenth Amendment to protect inalienable rights recognized in the Declaration of Independence. Rather, the Court made it clear that no state or federal law could override constitutional precedents.[103] The *Cooper* decision announced the rule that the Court's judgments cannot be contravened, but not that the Court is the sole interpreter of the Constitution.[104]

Whereas *Cooper* and *Marbury* established state and federal officials' duties to follow the Court's dictates, *Katzenbach v. Morgan* described Congress's power to interpret its Fourteenth Amendment Section 5 power.[105] In his majority opinion, Justice William J. Bren-

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constitution and laws of the United States . . . and under such regulations as congress shall make").

99 *Id.* at 176–77. Marshall reasoned that no statute could violate the Constitution because the "powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Id.* at 176. The judiciary's role is "to say what the law is," and to strike any statute in conflict with the Constitution. *Id.* at 177–78.

100 358 U.S. 1 (1958).

101 *See id.* at 5–12; Brown v. Bd. of Educ., 349 U.S. 294, 299–301 (1955) (remedy); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (judgment).

102 *See Cooper*, 358 U.S. at 18 (analyzing the significance of *Marbury*). Laurence Tribe has pointed out that the Court's proclamation of its supreme authority to interpret the Constitution derives from the misstatement that the Court "announces a general norm of wide applicability." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3–4, at 34 (2d ed. 1988). In reality, Article III of the Constitution limits judicial authority to "cases" or "controversies." In *Cooper*, the Court appears to mistakenly equate its precedents with the Constitution itself. *See id.*

103 *See Cooper*, 358 U.S. at 18.

104 *See id.*

105 Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) ("By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18."). *Morgan* arose from a challenge to section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e) (2006). Voters challenged Congress's ability to rely on its Section 5,

nan understood the Fourteenth Amendment to be an expansion of congressional, rather than judicial, power.[106] The Court rejected the claim that Section 5's legislative authority relegated Congress "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional."[107] The appropriate standard of review for the statutory enforcement of the Equal Protection Clause is a rational basis test derived from *McCulloch v. Maryland*.[108] The Supreme Court in *Morgan* analogized Section 5 to the classical construct of the broad powers articulated by the Necessary and Proper Clause.[109] *Morgan* signaled the Court's deference to Congress whenever statutes were reasonably calculated to address state evils. The majority placed no requirement on Congress to present any actual findings about the existence of state-wide violations; indeed, such a requirement would have contradicted its earlier statement that no congressional findings were needed to demonstrate that a statute was a "reasonable and appropriate means toward its solution."[110]

A crucial component of the *Morgan* opinion, which the Rehnquist Court would later repudiate,[111] was the Court's recognition that Section 5 was "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[112]

Fourteenth Amendment power to prohibit the enforcement of a state literacy test requirement for voting. *Morgan*, 384 U.S. at 648. The issue was particularly controversial because seven years earlier the Court had decided that there was no constitutional bar against literacy voting tests in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 53–54 (1959). Section 4(e) was Congress's attempt to abrogate the *Lassiter* holding.

106 *Morgan*, 384 U.S. at 648 & n.7 (writing that the historical evidence suggests that "the sponsors and supporters of the Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary").

107 *Id.* at 648–49.

108 17 U.S. (4 Wheat.) 316 (1819).

109 *See Morgan* 384 U.S. at 650; *see also McCulloch*, 17 U.S. at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."). As long as the Court can "perceive a basis upon which the Congress might [have] resolve[d] the conflict as it did," the majority in *Morgan* would regard Congress's use of its Section 5 power to be legitimate. *See Morgan,* 384 U.S. at 653. The Court's willingness to accept the hypothetical possibility is important because in fact Congress had made no findings to rationalize the need for abrogating state literacy tests.

110 Katzenbach v. McClung, 379 U.S. 294, 299 (1964) (upholding Title II of the Civil Rights Act of 1964). In the companion case to *McClung*, the Court did not second-guess congressional findings in determining that Congress enacted a rational policy to prohibit segregation in public places engaged in interstate commerce. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964).

111 *See infra* Part II.B.

112 *Morgan*, 384 U.S. at 651. In an earlier concurrence, Justice Brennan, writing for himself and two other Justices, had already asserted that when viewed through the "proper perspective, § 5 of the Fourteenth Amendment appears as a positive grant of legislative

Early supporters of this strong theory of legislative authority, like Archibald Cox, believed *Morgan* required judicial deference to lawmakers so long as Congress had a conceivable reason for passing a law expanding Due Process and Equal Protection Clause rights.[113] Cox acknowledged that this power was not absolute, but limited by previous Court interpretations of the Constitution.[114] That is, Congress can act freely within the confines of the Equal Protection and Due Process Clauses but not in violation of judicial interpretations of them. *Morgan* recognized that Section 5 grants Congress the power to elaborate on constitutional norms set out by the Fourteenth Amendment but not to ignore judicial precedents.

The rational scrutiny of Congress's enforcement power preserves both *Marbury*'s doctrine of judicial review and Section 5's grant of legislative authority. *Morgan* set a baseline for federal statutes to safeguard the equal protection and substantive due process values of the Fourteenth Amendment without trampling the Court's unique role of judicial review. It provided Congress with the latitude to act according to its institutional role as a representative branch so long as it did not infringe on any of the fundamental liberties previously identified by the Supreme Court. *Morgan* recognized Congress's power to identify rights not yet acknowledged by the Court, making the legislature an affirmative actor in the struggle to advance civil rights. The Court and Congress could thereby engage in a dialogue, informing each other about the nature of inalienable rights.[115]

B. *City of Boerne v. Flores* and Its Progeny

In a Rehnquist Court Era case, the Supreme Court distanced itself from its earlier deference to Congress's authority to identify state violations against Section 1 of the Fourteenth Amendment and to ad-

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power." United States v. Guest, 383 U.S. 745, 784 (1966). That power was not merely remedial, but provided Congress with the authority to make laws "reasonably necessary" to "achieve civil and political equality for all citizens." *Id.* at 782, 784.

113 Archibald Cox, *The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106 n.86 (1966) ("According to the conventional theory [as it is set out in *Morgan*] . . . the Court has invalidated state statutes under the due process and equal protection clauses only when no state of facts which can reasonably be conceived would sustain them").

114 Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 254 (1971) (stating that Congress is constitutionally precluded from reading "into the Constitution new general rules of law that have been rejected by the Court, regardless of whether they expand or dilute constitutional rights").

115 Stephen L. Carter, *The* Morgan *"Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 824 (1986) ("The *Morgan* power . . . is best understood as a tool that permits the Congress to use its power to enact ordinary legislation to engage the Court in a dialogue about our fundamental rights, thereby 'forcing' the Justices to take a fresh look at their own judgments.").

dress them through its Section 5 enforcement power.[116] In *City of Boerne v. Flores*, the Court took a significant step toward weakening popular governance by prohibiting Congress from rendering substantive interpretations of Section 5.[117] The case effectively restricts the people from developing constitutional values through their elected representatives and places the exclusive power to protect rights in the only unelected branch of government. That methodology undercuts the Declaration of Independence's promise of government by consent.

Boerne held that Congress exceeded its Section 5 power in passing the Religious Freedom Restoration Act (RFRA).[118] The majority found the law to be neither congruent nor proportional to any judicially recognized violation of the Fourteenth Amendment.[119]

Congress passed RFRA to signal its disapproval with the Supreme Court's ruling in *Employment Division v. Smith*.[120] In that case, the Court had relied on the least rigorous standard of review, the rational basis test, to validate a state's decision to terminate the employment of a social worker who partook in narcotics for religious observance.[121] The state had passed the law as part of its secular effort to protect public health against the harmful effects of illicit substances.[122] The Court refused to apply the strict scrutiny test to review a generally applicable law that restricted a religious ritual of the Native American Church.[123] Congress passed RFRA to reinstate the strict scrutiny standard for reviewing state conduct that substantially burdens the exercise of religion.[124] The Court regarded this to be a statutory effort to nullify its holding in *Smith*.[125]

Boerne was among a line of precedents, discussed below, that rejected the legitimacy of popular governance characterized by core, na-

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116 *See* Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1838–41 (2006) (discussing Rehnquist Court modifications to the prior Commerce Clause precedents).

117 *See* 521 U.S. 507, 519 (1997) (pointing out that Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation").

118 *Id.* at 536.

119 *Id.* at 520, 536.

120 *See id.* at 512; Emp't Div. v. Smith, 494 U.S. 872, 882, 886–87 (1990).

121 *Smith*, 494 U.S. at 882, 886–87.

122 *Id.* at 890. Justice Sandra Day O'Connor's concurrence in *Smith* expressed certainty that the state's interests were both legitimate and significant "in enforcing laws that control the possession and use of controlled substances by its citizens." *Id.* at 904 (O'Connor, J., concurring). She further explained that an individual's right to exercise religious rituals is not absolute but subject to potential criminal liability. *Id.* at 894.

123 *Id.* at 877–82.

124 *See* 42 U.S.C. § 2000bb-1(b) (2006); *Boerne*, 521 U.S. at 512.

125 The Court regarded RFRA to be a direct challenge to judicial review. *Boerne*, 521 U.S. at 512 ("Congress enacted RFRA in direct response to the Court's decision in . . . *Smith* . . . .").

tional values that cannot be encroached upon by the states.[126] The Court proclaimed its exclusive prerogative to define rights contained in Section 1 of the Fourteenth Amendment. This judicial exclusivity runs afoul of core principles of representative governance derived from the Declaration of Independence. Rather than take seriously the potential legitimacy of popular governance, the Court claimed constitutional interpretation for itself and nullified a bipartisan law.[127] Writing for the majority in that case, Justice Anthony Kennedy stated: "Shifting legislative majorities [cannot be allowed to] change [the significance of] the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."[128] His understanding of the structure of national governance equated the Court's interpretation of the text to the Constitution itself—after all there is nothing in the actual Constitution that states *Boerne*'s holding that the rational basis standard of review applies to laws of general applicability that incidentally burden religious practices—and dismissed the people's ability to more zealously guard religious freedoms against state intrusions. This was not a case of the Court guarding against the tyrannical will of a majority seeking to constrict minority rights, but of governing majorities attempting to expand a minority's religious right against state overreaching.[129]

The Court's decisive break from *Morgan* was also evident in *Kimel v. Florida Board of Regents*, which held that state employers are immune from private monetary claims under the Age Discrimination in Employment Act (ADEA).[130] Going a step further than *Boerne*, where the Court rejected Congress's interpretation of the freedom of religion protected by the First Amendment, *Kimel* denied Congress's ability to

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126 The holding in *Boerne* retains *Smith*'s "neutral law of general applicability" test in matters involving state laws that burden religion. *See id.* at 532–37. However, RFRA's "compelling interest" test continues to apply to Free Exercise challenges of laws targeting religion. For an example of a challenge to the Controlled Substance Act, see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–34 (2006).

127 Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 676 (2006) (stating that RFRA passed "by nearly unanimous votes in both houses" of Congress); Richard Murphy, *The* Brand X *Constitution*, 2007 BYU L. REV. 1247, 1273 (2007) (asserting that RFRA was a "hugely popular" measure).

128 City of Boerne v. Flores, 521 U.S. 507, 529 (1997).

129 Other authors have argued, to the contrary, that it was RFRA that overreached by attempting to compromise judicial integrity to interpret the Constitution. *See* Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute,* 56 MONT. L. REV. 39, 71–78 (1995) (arguing that the RFRA was an attempt to violate separation of powers principles); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 469–73 (1994) (claiming that RFRA was an instance of overreaching); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 173–74 (1995) (claiming that RFRA "is a challenge to the concept of judicial supremacy in the interpretation of the Constitution").

130 Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000).

impose existing civil rights law on states.[131] The decision turned back Congress's effort to rely on Section 5 to expand federal rights.[132] The Court found that state sovereign immunity sheltered the states from congressional expansion of antidiscrimination laws even though the Court had earlier found that the ADEA was a valid exercise of Congress's Commerce Clause power.[133] The creation of a federal cause of action against states, however, fell under Section 5 of the Fourteenth Amendment.[134] The Court decided that the Act was not congruent and proportionate because Congress had insufficient evidence of states committing age discrimination to impose federal liability.[135] The decision required Congress to provide the Court with evidence of a "pattern of constitutional violations" by the state.[136] It effectively barred elected representatives from protecting a vulnerable segment of the population from state discrimination.

Relying on its *Kimel* rationale, in *Board of Trustees of the University of Alabama v. Garrett*, the Court found that state employers are also immune from private monetary damages claims under the Americans with Disabilities Act (ADA).[137] The majority in *Garrett* rejected Congress's attempt to require state agencies to abide by a national standard for the treatment of disabled employees.[138] This decision came as a bit of a surprise given Congress's identification of an extensive pattern of state discrimination against the disabled.[139] The Court rejected Congress's competence to follow the popular will by passing a law to protect the special needs of a vulnerable group. As I argue later, the Court violated an essential element of representative democ-

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131 *Id.* at 81.

132 *Id.* at 88–91.

133 *See id.* at 91; *see also* EEOC v. Wyoming, 460 U.S. 226, 243 (1983) ("The extension of the ADEA to cover state and local governments . . . was a valid exercise of Congress' powers under the Commerce Clause.").

134 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996) (holding that Section 5 of the Fourteenth Amendment is the proper source of authority for overriding state sovereign immunity). The Court found that the Fourteenth Amendment, unlike the Commerce Clause of Article I, Section 8, modified the Eleventh Amendment's grant of state sovereign immunity. *See id.* at 59, 65–66.

135 *See Kimel*, 528 U.S. at 88–89.

136 *Id.* at 82 (quoting Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640 (1999)).

137 531 U.S. 356, 374–76 (2001).

138 *Id.* at 360 (barring ADA lawsuits against the states on the basis of Eleventh Amendment sovereign immunity).

139 *Id.* at 389–424 (Breyer, J. dissenting) (appending pages of reported state discrimination that Congress discovered through the hearings of the House Committee on the Judiciary, the Subcommittee on Civil and Constitutional Rights, the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce, and the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation).

racy from the Declaration of Independence—legislating by consent of the governed.[140]

A five-Justice majority in *United States v. Morrison* further diluted representative governance by striking the popular Violence Against Women Act (VAWA).[141] Contrary to any presumption that the judiciary always protects individuals against whimsical, political policymaking,[142] *Morrison* rejected a legislative effort to provide a private remedy for the victims of sexual violence. VAWA was intended to combat widespread gender discrimination in state courtrooms.[143] The Court faulted Congress for relying on its Section 5 authority despite the massive evidence lawmakers compiled of gender discrimination against victims of domestic violence and rape.[144]

The tenuous nature of the Court's steady rejection of self-government was also apparent in *Nevada Department of Human Resources v. Hibbs*.[145] There, the Court upheld a private cause of action against state violations of the Family Medical Leave Act (FMLA), even though evidence of pervasive discrimination was arguably weaker in *Hibbs* than it had been in *Kimel* and *Garrett*.[146] The Court asserted that it

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140 *See infra* text accompanying notes 166–67.

141 529 U.S. 598, 627 (2000).

142 There is an extensive literature on the Court's capacity to safeguard minority rights. Alexander Bickel first used the term "[c]ounter-[m]ajoritarian [d]ifficulty" in ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962). For the vast treatment of the debate, see, for example, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 46–78 (2001) (defending judicial review as a democratic institution); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION *passim* (2009) (narrating the history of social movement activism and its relation to judicial review); Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373 *passim* (1998) (grounding procedurally fair judicial decisions against legislative enforcement of substantive values); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1340–41, 1351–52 (2004) (defending the judiciary's ability to be countermajoritarian); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 *passim* (1995) (discussing legislative policy distortion as a result of judicial review); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 523–607 (2002) (describing a wide variety of countermajoritarian approaches); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1521 (1990) (observing that the "mid-century obsession with the countermajoritarian difficulty seems a little quaint, if not peculiar").

143 J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-End Relationships*, 36 U.C. DAVIS L. REV. 407, 435 (2003) (stating the congressional purpose behind VAWA).

144 *Morrison*, 529 U.S. at 626 (2000). In his dissent to the case, Justice David H. Souter asserted that lawmakers had amassed a "mountain of data" over the course of four years from nine congressional hearings and twenty-one state task forces that demonstrated patterns of gender discrimination. *See id.* at 628–31 (Souter, J., dissenting).

145 538 U.S. 721 (2003).

146 *See id.* at 735–37 (2003). The evidence indicated that "[f]ifteen States provided women up to one year of extended maternity leave, while only four provided men with the same." *Id.* at 731; *see also* Serena Mayeri, *Constitutional Choices: Legal Feminism and the Histori-*

would defer to Congress's use of Section 5 power because the FMLA prohibited gender discrimination, requiring a heightened level of scrutiny.[147] As such, the decision relied on the intermediate standard of scrutiny applicable to gender discrimination cases.[148] *Kimel* and *Garrett*, on the other hand, concerned disability and age discrimination, which are both subject to rational basis review.[149] That distinction, even if one were to accept the Court's premise that state discrimination based on age and disability do not deserve heightened scrutiny, does not explain why in *Morrison* the Court did not review VAWA on the basis of intermediate scrutiny. VAWA was intended to combat widespread gender discrimination in state courtrooms,[150] a goal that seems at least as substantially related to an important government interest as providing medical leave to take care of sick relatives.

The contradiction in *Hibbs* and *Morrison* is not merely about two distinct causes of action. At heart, it appears that the Court can manipulate the rhetoric of judicial review to uphold laws it conceives to accord with federalism and to strike those it does not. Absent in its assessment is the willingness to yield to the popular will, guaranteed by the Declaration of Independence, for the expansion of rights. Both the FMLA and VAWA were liberty-enhancing laws whose application to the states should have been deferentially upheld under the

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cal Dynamics of Change, 92 CALIF. L. REV. 755, 833 (2004) (comparing the amount of evidence in *Hibbs*, *Garrett*, *Kimel*, and *Morrison*).

147 *See Hibbs*, 538 U.S. at 736.

148 *See id.*

149 The Court's presumption that gender discrimination is more invidious and pervasive than age and disability discrimination is questionable. The success rate for claims of disability discrimination is 56%, sex discrimination 50%, sex harassment 56%, and age discrimination 37%. Robert C. Bird, *An Employment Contract "Instinct with an Obligation": Good Faith Costs and Contexts*, 28 PACE L. REV. 409, 422 (2008). Summary judgment and settlement dispositions similarly indicate that all three discrimination classifications are similarly prevalent: "ADA employment discrimination cases appear to result in slightly fewer summary judgment dispositions (18% compared to 21.8% for race, sex, and age) and are slightly more likely to settle (73.7% compared to 69.1% for race, sex, and age)." Charlotte L. Lanvers, Note, *Different Federal District Court, Different Disposition: An Empirical Comparison of ADA, Title VII Race and Sex, and ADEA Employment Discrimination Dispositions in the Eastern District of Pennsylvania and the Northern District of Georgia*, 16 CORNELL J.L. & PUB. POL'Y 381, 396 (2007). The complaint numbers are also comparable: "OCR [Office for Civil Rights] received 283 complaints about sex discrimination, as compared to 946 about race or national origin discrimination and 2,624 regarding disability discrimination." Julie A. Davies & Lisa M. Bohon, *Re-Imaging Public Enforcement of Title IX*, 2007 BYU EDUC. & L.J. 25, 50 n.124 (2007).

150 The Court found Congress exceeded its Section 5 power by providing a private cause of action to the victims of gender motivated crimes rather than solely providing a remedy against state officials. *See* Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 2003 SUP. CT. REV. 357, 446–47; Timothy Zick, Marbury *Ascendant: The Rehnquist Court and the Power to "Say What the Law Is,"* 59 WASH. & LEE L. REV. 839, 880 (2002).

rational basis standard of review.[151] At bottom, the Court regards itself to be the sole expositor of constitutional rights, empowered to turn back popular efforts to protect essential interests against state intransigence. Such an outcome is counterindicated by the Declaration's assertion that sovereignty to protect rights remains with the people. In *Morrison*, the Court acted as a superlegislature, overturning a bipartisan political effort, while in *Hibbs* it chose to give Congress a pass.

A similar lack of symmetry exists in *Tennessee v. Lane*,[152] which, like *Hibbs*, permitted Congress to abrogate state sovereign immunity. *Lane* upheld Title II of the ADA's provision for private damages arising from discrimination in the access to court facilities as a valid exercise of Section 5 authority.[153] The Court relied on a standard of review approaching strict scrutiny because the facts giving rise to the complaint involved the fundamental right of access to judicial proceedings.[154] The holding in *Lane* is irreconcilable with *Boerne*, where the Court struck a law that protected religious freedom. Both access to the courts and free exercise of religion are subject to strict scrutiny review, indicating that the analyses should have been similar.[155] Both Title II and the RFRA demonstrate the popular will to protect fundamental rights. The Court's ambivalence about the Declaration of Independence's guarantees of popular sovereignty creates inconsistency and appears to be doctrinaire and authoritarian, qualities of government the document condemns.

None of these cases inquires into whether laws against workplace or courtroom discrimination accord with the underlying purposes of government as they were laid down in the Declaration. In assessing

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151 That such rights-expansion might limit the interests of some privileged individuals, who may be unwilling to provide protections against discrimination, is commensurate with the Declaration's safeguards of the people's inalienable rights at the expense of aristocratic interests. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

152 *See* 541 U.S. 509, 533–34 (2004).

153 *See id.* at 525–29.

154 *See id.* at 522–23, 529 (stating that the federal statute "seeks to enforce a variety of . . . basic constitutional guarantees, infringements of which are subject to more searching judicial review").

155 *See* Lewis v. Casey, 518 U.S. 343, 350–51 (1996) (stating that the fundamental right to access to the courts includes reasonable access to information needed to prepare defense); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 579 (1993) (Blackmun, J., concurring) ("When a law discriminates against religion as such, as do the ordinances in this case, it automatically will fail strict scrutiny . . . ."); Bounds v. Smith, 430 U.S. 817, 828 (1977) ("We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."); Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 20 (2007) (stating that "access to courts receives strict scrutiny").

Congress's scope of authority, the Court did not reflect on the role of legislators as representatives of the people.

C. Declaration of Independence Analysis of Section 5 Cases

The Declaration of Independence contains a variety of paragraphs indicating that citizens retain the prerogative to expand civil rights through their elected representatives.[156] All three branches of government are, in fact, obligated to abide by the Declaration's directive that national government establish policies "most likely to effect [the people's] Safety and Happiness."[157] This statement creates the impression that, for its part, the legislative branch must respond to constituents' demands for laws likely to improve the general welfare and safeguard dignity interests.

Title II of the ADA,[158] which *Lane* upheld, was just such a law because it protected important interests "like the right of access to the courts . . . that are protected by the Due Process Clause of the Fourteenth Amendment."[159] Without adequate access to courts, disabled defendants would be denied the Sixth Amendment right to confront witnesses.[160] Beyond being a positive grant of the Sixth Amendment, the right to trial affects individual safety and happiness; indeed, the demand for fair trials was one of the underlying justifications for independence from Great Britain.[161] The Declaration lays the ground-

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156 *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 32 ("We, therefore, the Representatives of the united States of America . . . do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States . . . .").

157 *See id.* at para. 2.

158 For the text of the ADA as it pertains to the fundamental right of access to the courts, see 42 U.S.C. §§ 12132, 12165 (2006).

159 *Lane*, 541 U.S. at 523; *see id.* at 522–23 ("Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review," such as the right to confront witnesses). The Court regarded Title II to be essential to the enjoyment of basic rights. *See id.* at 529 ("Title II [of the ADA] is aimed at the enforcement of a variety of basic rights, including the right of access to the courts at issue in this case, that call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications.").

160 The Sixth Amendment applies to the states through Fourteenth Amendment incorporation. *See* Danforth v. Minnesota, 552 U.S. 264, 270 (2008) (stating the Sixth Amendment, including the right to confront witnesses, is incorporated by the Due Process Clause of the Fourteenth Amendment); Collins v. Youngblood, 497 U.S. 37, 51 (1990) ("[T]he Sixth Amendment right to trial by jury . . . was incorporated and made applicable by the Fourteenth Amendment against the States."); Morris v. Slappy, 461 U.S. 1, 16 (1983) (Brennan, J., concurring) (asserting that the Sixth Amendment right to counsel was incorporated through the Fourteenth Amendment).

161 The Declaration of Independence makes a variety of accusations against the British monarch for suspending the right to fair trial. These accusations help explain why the Sixth Amendment is part of the Bill of Rights. THE DECLARATION OF INDEPENDENCE para.

work for establishing a government mandate to protect the people's access to courts, accusing King George III of often depriving the colonists "of the benefits of Trial by Jury."[162] Rather than evaluate whether the ADA's guarantee of access to courts was a reasonable exercise of representative government consistent with the Declaration of Independence,[163] the Court distinguished this right from the one struck down in *Garrett*.[164]

The new Section 5 precedents erect a barrier, preventing citizens from effectively lobbying Congress to pass federal protections against state infringements of essential rights.[165] I maintain that cases prohib-

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11 (U.S. 1776) (stating that King George III "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries"); *id.* at para. 20 (accusing King George III of "depriving us in many cases, of the benefits of Trial by Jury"). In the years leading up to the American Revolution, colonial pamphlets often berated the British Parliament for suspending the right to fair trial. *See, e.g.*, *Resolutions of the Stamp Act Congress, October 19, 1765*, *reprinted in* DAVID F. BURG, THE AMERICAN REVOLUTION 372, 373 (2d ed. 2007) (writing to Parliament to emphasize the importance that The Stamp Act Congress places on the right to jury trial). The First Continental Congress, two years before the passage of the Declaration of Independence, had issued a statement of colonial rights, including the right to trial by jury. *See* David L. Ammerman, *The Tea Crisis and Its Consequences, Through 1775*, *in* A COMPANION TO THE AMERICAN REVOLUTION 195, 198 (Jack P. Greene & J.R. Pole eds., 2004).

The framers were concerned to establish a balance of power that provided checks against abuses. They recognized that the legislature could become unbridled without review. *See* THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961) (warning against "danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations").

162 THE DECLARATION OF INDEPENDENCE para. 20.

163 *See generally* Edmond N. Cahn, *Madison and the Pursuit of Happiness*, 27 N.Y.U. L. REV. 265, 265 (1952) ("The thesis is that Madison's political philosophy of republicanism corresponds to the ethical doctrines and convictions which are epitomized in a single phrase of the Declaration of Independence. And the phrase is 'the pursuit of happiness.'" (emphasis omitted)); J.B. Holden, A Lecture Delivered Before the Law Class of the University of Mississippi (Nov. 27, 1922), *in* 1 MISS. L. REV. 23, 27 (1922) (stating that the Constitution restates the Declaration of Independence's principles of republican governance); Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171, 227 (2002) (pointing out that "the Declaration of Independence . . . displays an obvious commitment to political principles that concern the foundation and structure of government and that are in deep tension with expansive judicial power—namely, popular sovereignty, democratic representation, federalism, and human equality"); Liav Orgad, *Creating New Americans: The Essence of Americanism Under the Citizenship Test*, 47 HOUS. L. REV. 1227, 1262 (2011) (assessing the role of sources other than the formal text of the Constitution on the national polity, listing these sources as "the Declaration of Independence, historical tradition, and the general political philosophy of American democracy, including, the idea of self-government, the rule of law, and the economic system of the United States"). The Declaration of Independence helped create a governmental structure that provided a national purpose to thirteen widely differing states. *See* Clarence Manion, *Two Preambles: A Distinction Between Form and Substance*, 12 NOTRE DAME LAW. 109, 121 (1937).

164 *See Lane*, 541 U.S. at 521–22, 533–34.

165 *See, e.g.*, United States v. Morrison, 529 U.S. 598, 626 (2000) (rejecting a legislative effort to provide a private remedy for the victims of sexual violence despite the massive evidence of gender discrimination against victims of domestic violence and rape).

iting Congress from expanding rights in accordance with the will of the people violate the consent doctrine of the Declaration of Independence. The power to strengthen protections of constitutional interests lies in the hands of the people, not in the sole discretion of unelected judges.[166] The Declaration's manifesto of popular sovereignty devotes at least eleven paragraphs to the importance of legisla-

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166 The Court's efforts to characterize the rights at issue in *Boerne* as unrelated to the Constitution are disingenuous. *See* United States v. Georgia, 546 U.S. 151, 158 (2006) (oversimplifying the issue in *Boerne* by parenthetically stating the holding in a vague manner: "church building permit denied under neutral law of general applicability"). Free exercise of religion is on all accounts considered to be one of the most fundamental constitutional rights. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993) (maintaining that the Fourteenth Amendment incorporated the First Amendment right to free exercise of religion against state legislation specifically targeting religious beliefs); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government."). RFRA is based on the premise that the free exercise of religion trumps state policies arising from laws of general applicability:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1(a), (b) (2006). Congress expressly adopted the strict scrutiny standard because RFRA was meant to protect a fundamental right. *See* Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1708 (2005) ("If free exercise is a fundamental right, which the Court decided for institutional reasons to underenforce in *Smith*, then RFRA was simply an instance of Congress legislating to the full extent of the operative proposition, something the earlier cases had suggested was plainly within its power."). With the protection of free exercise being its central purpose, RFRA was meant to protect the First Amendment right as it was incorporated through the Fourteenth Amendment.

Even more conspicuously misleading is how Justice Scalia, writing for the majority in *United States v. Georgia*, characterized the opinion in *Lane* as also unrelated to any constitutional right. *See* 546 U.S. at 157. This was a clumsy misstatement because in *Lane*, where Scalia dissented, the Court explicitly stated that the constitutional right of access to courts was involved and protected in state courts through the Due Process Clause of the Fourteenth Amendment. *Lane*, 541 U.S. at 522–23 ("[C]onstitutional guarantees . . . include some [rights], like the right of access to the courts at issue in this case, that are protected by the Due Process Clause of the Fourteenth Amendment."). The case involved both the liberty interest of access to courts and the equality interest against discriminatory state conduct. *See* Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 13 (2007) (explaining that a case involving Title II of the ADA was among a set of cases that aim to promote equality of suspect or quasi-suspect classes); Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After* Gonzales v. Raich, 2005 SUP. CT. REV. 1, 27 ("The Americans with Disability Act is generally considered an equality statute, enforcing the Equal Protection Clause. . . . But in *Lane*, an additional constitutional right was at stake: the right, grounded in the Due Process Clause, of access to courts."). Indeed, it would seem to me that, in protecting the right of the handicapped to courtroom access, the Supreme Court permitted Congress to exercise its Section 5 authority when it is in conflict with a state's interest. But *Boerne*'s abandonment of the ratchet thesis of *Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966), rejects the defer-

tive self-government,[167] which the *Boerne* progeny of cases significantly hampers. As I explain in Part III, the Court acts legitimately in preventing legislative encroachment on judicially created rights, but not in blocking the people from effective representation.

Congress passed the ADA in response to a popular effort to protect disabled people's dignity against state apathy and intransigence.[168] The right to petition lawmakers for such a provision derives from the Declaration of Independence. President George H.W. Bush recognized this point when he signed the ADA into law. Expressing support for the statute, he compared it to the Declaration of Independence, stating that he hoped it would be a beacon for equality and a model for civil behavior.[169] Representative Silvio O. Conte spoke even more expositively to this point. He believed the ADA to be "a declaration of independence for 43 million disabled Americans."[170] He was not alone. Representative Steny H. Hoyer described the disparate treatment of the disabled and likened the statutory effort to combat it to other antidiscrimination movements—like those against racial, gender, age, and ethnic inequality—that had based their demands for justice on the Declaration of Independence.[171] Representative Major R.O. Owens likewise believed that the ADA would allow millions of disempowered Americans to pursue happiness and enjoy the inaliena-

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ence due to legislators expanding Equal Protection and Due Process guarantees. *See* City of Boerne v. Flores, 521 U.S. 507, 527–29 (1997).

167 *See* THE DECLARATION OF INDEPENDENCE paras. 4–10, 15, 22, 24, 30.

168 *See* Helen L. v. DiDario, 46 F.3d 325, 335 (3d Cir. 1995) ("The ADA is intended to insure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner which shunts them aside, hides, and ignores them."); Martin v. Metro. Atlanta Rapid Transit Auth., 225 F. Supp. 2d 1362, 1376 (N.D. Ga. 2002) (discussing a provision of the ADA meant to protect the dignity of the disabled against state apathy, indifference, and intentional discrimination).

169 *See* Statement on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1070 (July 26, 1990) ("The Americans with Disabilities Act presents us all with an historic opportunity. It signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life. As the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world.").

170 136 CONG. REC. H2430 (daily ed. May 17, 1990). Congressman Conte's perspective was not idiosyncratic. Like President Bush, other Congressman joined Conte's description. *See id.* at H17,351 (daily ed. July 13, 1990) (statement of Sen. Paul M. Simon) (saying of the ADA, "[T]his 'declaration of independence' for the citizens with disabilities of this Nation has been a long time coming"); *id.* at H4376 (daily ed. June 29, 1990) (statement of Rep. Harry S. Bartlett) ("I would hope that right after the recess we would be able to . . . declare independence for those with disabilities in this country.").

171 *See id.* at H2426–27 (daily ed. May 17, 1990) (stating that the ADA will require businesses to act reasonably in regard to disabled workers); *see also* Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413, 417–31 (2006) (reviewing the uses of the Declaration of Independence in the writings of abolitionists, women's suffrage, civil rights, and antiabortion movements).

ble rights that the Declaration of Independence set out at the country's founding.[172]

These comments indicate that several public officials, including the President of the United States, regarded the ADA's antidiscrimination provisions to be necessary to secure disabled persons' inalienable rights. Indeed, there was notable consensus about this in Congress and the Executive Branch, but not even a mention of it by the Justices. In *Garrett*, the Court's unwillingness to seriously consider the antidiscrimination ethos behind the ADA was partly to blame for the greater weight the majority gave to states' rights than disabled employees' claims.[173] Unlike the Court, the other two branches of government interlinked the ADA with comparable civil rights causes—like the movements for racial and gender equality—that had also relied on the Declaration of Independence's statements of equality.[174] The Declaration's premise that government is created for the people's welfare places statutes protecting the people's life, liberty, and the pursuit of happiness ahead of states' sovereignty concerns.

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172 *See* 136 CONG. REC. H2428 (daily ed. May 17, 1990) ("For over 200 years, we in America have taken the ringing words of the declaration of independence as defining the inalienable rights of man; life, liberty, and the pursuit of happiness. . . . Today, we, in the House, have an opportunity to uphold our Nation's highest ideals and finest traditions of protecting the freedom of all individuals from arbitrary or unjust treatment, and of extending the opportunity to participate fully in American society to the previously dispossessed. . . . A 'yes' vote on the Americans with Disabilities Act of 1990 constitutes both an affirmation of our Nation's once and future commitment to full inclusion in the mainstream of our society for all of our citizens . . . .").

173 *See supra* text accompanying notes 137–40.

174 There is a long tradition in the United States of progressive movements relying on the Declaration of Independence. *See* Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1340 (1995) (describing the abolitionist, segregationist, and nineteenth century women's movement's reliance on "the Republican tradition in American law, the Declaration of Independence, and the jurisprudential concepts of natural law and natural justice"); Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 463 (2008) (mentioning President Franklin Delano Roosevelt's inclusion of the Declaration of Independence in his Four Freedom's speech); Cynthia Soohoo, *Close to Home: Social Justice Activism and Human Rights*, 40 COLUM. HUM. RTS. L. REV. 7, 9–10 (2008) (describing how after World War II organizations like the National Association for the Advancement of Colored People and the American Jewish Congress used inalienable rights ideas similar to the Declaration in their efforts to promote human rights); Strang, *supra* note 171, at 417–31 (reviewing the uses of the Declaration of Independence in the writings of abolitionists and the women's suffrage, civil rights, and antiabortion movements); Tsesis, *Furthering American Freedom*, *supra* note 80, at 322–25 (explaining how the Radical Republicans of the postbellum period incorporated certain abolitionist perspectives of the Declaration of Independence); Alexander Tsesis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679, 702 (2009) (providing examples of abolitionist uses of the Declaration of Independence); Rebecca E. Zietlow, *The Rights of Citizenship: Two Framers, Two Amendments*, 11 U. PA. J. CONST. L. 1269, 1273 (2009) (stating that abolitionists believed the Declaration to be legally enforceable).

Although *Hibbs* and *Lane* upheld provisions of federal civil rights statutes,[175] neither of them regarded the popular will as relevant in identifying rights and protecting them. Instead, the Court found that the people's legislative representatives cannot stamp out discrimination without the Justices' prior definition of constitutionally recognized rights.[176] That approach substantially impairs Congress's ability to respond to constituents' demands for justice. Preventing the people from effectively influencing civil rights policies runs counter to the Declaration of Independence's consent clauses.[177] The Declaration envisions the people as deeply involved in advancing safeguards for inalienable rights. The Court's narrow conception of Section 5 authority not only conflicts with reconstructed federalism, which the Fourteenth Amendment established,[178] but also with the representative structure of governance envisioned by the Declaration of Independence. Therefore, while *Hibbs* and *Lane* upheld federal

175 *See* Tennessee v. Lane, 541 U.S. 509, 533 (2004) (finding the statute in question was remedial and "a reasonable prophylactic measure, reasonably targeted to a legitimate end"); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 737–40 (2003) (stating that the statute in question was lawful and proportional to its targeted goal).

176 *See Lane*, 541 U.S. at 520 ("Congress' § 5 power is not, however, unlimited. While Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a 'substantive change in the governing law.'" (quoting City of Boerne v. Flores, 521 U.S. 507, 519 (1997))); *Hibbs*, 538 U.S. at 727–28 ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct . . . [However, such legislation must not be] 'an attempt to substantively redefine the States' legal obligations.'" (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000))).

177 *See* THE DECLARATION OF INDEPENDENCE paras. 2, 13, 19 (U.S. 1776).

178 *See* Julie A. Greenberg & Marybeth Herald, *You Can't Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 857 (2005) (discussing how the primacy of national citizenship of the Fourteenth Amendment overruled Dred Scott); Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 263 (2005) ("[T]he framers of the Fourteenth Amendment . . . understood the Fourteenth Amendment, at a minimum, as a delegation to Congress of the plenary power to define and enforce in the federal courts the substantive rights of U.S. citizens that they had just exercised in enacting the Civil Rights Act of 1866."); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 353 & n.92 (2006) (arguing that under the Fourteenth Amendment "fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State" (quoting The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 95 (1872) (Field, J., dissenting))); Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 363 (1993) (relating how the Fourteenth Amendment "united [the Declaration of Independence] with the Constitution in the enactment of the Fourteenth Amendment. . . . Section 1 of the Fourteenth Amendment is the Declaration of Independence" (emphasis omitted)); Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CALIF. L. REV. 1465, 1478 n.40 (2006) (asserting that "the U.S. Congress has an obligation under Section Five of the Fourteenth Amendment to ensure states uphold" the "duty to protect all citizens' natural rights"). For a divergent perspective, claiming that the Fourteenth Amendment was not a radical break from traditional federalism, see EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 30 (1990).

protections against state abuses, they did not recognize Congress's obligation to follow the people's demands to protect rights beyond those already established by the Court.

Lest I be misunderstood, it is important to qualify my argument. I am not contending that the Court has no power of judicial review. Rather, my point is along the lines of Professor Mark Tushnet's insistence that self-government is incompatible with the premise that the judiciary can thwart reasonable congressional efforts.[179] I do not, however, share Tushnet's view that judicial review should be entirely eliminated by constitutional amendment.[180] I think the Supreme Court's decisions demonstrate that as much as it has sometimes overstepped its authority throughout its history,[181] in the post–*Brown v. Board of Education* era, the Court has functioned as a countermajoritarian institution with a positive impact on social norms.[182]

Pointing to great judicial achievements, on the other hand, does not gainsay the authority of the people, as it is recognized by the Declaration of Independence, to engage in self-governance through their elected representatives. Ordinary voters can petition congressmen to provide greater protections of rights, such as the free exercise of relig-

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179 *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 22–23 (2008). This weak form of judicial review, according to Tushnet, differs from the strong form which "insists that courts' reasonable constitutional interpretations prevail over the legislatures' reasonable ones." *Id.* at 21. The strong form of review leaves "[t]he people [with] little recourse when the courts interpret the Constitution reasonably but, in the reasonable alternative view of a majority, mistakenly." *Id.* at 22.

180 *See* TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, *supra* note 13, at 154–76 (arguing for the ratification of a constitutional amendment to eliminate supreme judicial review by providing legislators with a supermajority override of judicial interpretations). For a critique of the book, see Erwin Chemerinsky, *Losing Faith: America Without Judicial Review?*, 98 MICH. L. REV. 1416, 1421 (2000) (book review).

181 *See* Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 154 (1995) ("The claim that the judiciary is the exclusive or even dominant protector of our liberties is a very recent and mistaken idea, one that has arisen principally in the civil liberties community in the last generation. This view of constitutional structure comes from the experience of *Brown v. Board of Education* and the moral authority of that decision." (footnote omitted)).

182 *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 770–94 (2008) (holding that Congress lacked the authority to strip federal courts of jurisdiction to hear habeas corpus petitions from Guantanamo Bay detainees); Tennessee v. Lane, 541 U.S. 509, 522–23 (2004) (holding that Congress had the power to prohibit disability discrimination in court proceedings); EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (ruling that Congress acted constitutionally by applying the Age Discrimination in Employment Act to state and local governments); Runyon v. McCrary, 427 U.S. 160, 172–73 (1976) (finding that a congressional act prohibiting private, contractual discrimination applied to private school segregation); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443–44 (1968) (holding that Section 2 of the Thirteenth Amendment grants Congress the power to prohibit private contract discrimination in real estate transactions); Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (ruling that a state statute prohibiting whites and blacks from marrying violated the Equal Protection and Due Process Clauses); Brown v. Bd. of Educ., 347 U.S. 483, 493–96 (1954) (holding that public school segregation is incompatible with the Equal Protection Clause).

ion, than the Court has been willing to recognize. It is, after all, the "Right of the People," according to the Declaration of Independence, to create a structure of government on the basis of "such principles" as seem best to bolster "Safety and Happiness."[183] If I am correct that the judiciary and Congress can identify core rights, then neither can interfere or undermine the other's efforts as long as they are both acting to expand safeguards for fundamental American interests. Both the courts and the legislature are obligated to uphold the abstract concepts in the Declaration of Independence of protecting inalienable rights, equal treatment, and the ability to pursue happiness.[184]

As an institution composed of the people's representatives, Congress can protect their interests in equality, the pursuit of happiness, life, and liberty. Its power, however, is not absolute and requires judicial review to avoid political corruption and majoritarian oppression.[185] Self-governance favors the people's involvement in the legislative process because the Declaration of Independence identifies the people as the fountainhead of government.[186] But without some judicial oversight, the legislative process itself can become captive to special interest politics.[187]

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183 I am extrapolating this interpretation from the assertion that "it is the Right of the People to alter or to abolish" existing governance "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." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

184 *Id.* ("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 . . . .").

185 For a discussion about the evolution of judicial review that includes an assessment of legislative motive, see Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1799–1800, 1850–51 (2008). *See generally* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 12–13, 15 (1988) (discussing interpretations about judicial review); Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 664 (2010) (stating that judicial review, bills of rights, and separation of powers are all countermajoritarian aspects of governance). Jeremy Waldron has faulted judicial review for having a potentially negative impact precisely because it is countermajoritarian. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348, 1380–82 (2006).

186 *See* THE DECLARATION OF INDEPENDENCE para. 2 ("Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .").

187 *See* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022–23, 1030 (1984) ("When normal representatives respond to special interests in ways that jeopardize the fundamental principles for which the Revolutionaries fought and died, the judge's duty is to expose them for what they are: merely 'stand-ins' for the People themselves."). *But see* Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 450 (arguing that judicial review empowers "those special interests with the capacity to use the courts to achieve judicially what they could not obtain politically").

The key is for all three branches of government to abide by the principles of the Declaration of Independence. In the balance between judicial review and legislative enactment, Congress and the Court should avoid placing restraints on each other's authority to protect and balance essential rights. Indeed, they are powerless to place such barriers on each other because at their core the rights belong to the people. Neither Congress nor the Court grants those interests; instead the Declaration of Independence asserts that life, liberty, and the pursuit of happiness are intrinsic to humanity.[188] It is rather the people who grant Congress and the Court the power to create positive laws for the preservation of human rights.[189] The Court lacks the authority to prevent the people from engaging in the legislative process to pass antidiscrimination measures like Title VII of the Civil Rights Act of 1964.[190] Likewise, when the Court has identified protected rights, like privacy,[191] it is not within Congress's province to constrict them.

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188 In *The Federalist Papers*, the renowned revolutionary Alexander Hamilton distinguished between monarchy and American democracy because a king grants rights to subjects while the people in the United States "surrender[ed] nothing" of their inalienable rights. THE FEDERALIST NO. 84, at 259, 262 (Roy P. Fairfield ed., 2d ed. 1981). Another of the founders, James Wilson, likewise boasted that while British citizens needed the king to declare rights, United States citizens retained their natural liberties against government interference. James Wilson, The Pennsylvania Convention (Nov. 28, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES—PENNSYLVANIA 382, 383–84 (Merrill Jensen ed., 1976).

189 The founding generation regarded it within the people's power to enact laws that limited liberties but improved general welfare. In a convention of Massachusetts delegates considering ratification of the Constitution, a speaker asserted that people limit their liberties by joining organized societies "only when the good of the whole requires it." RESULT OF THE CONVENTION OF DELEGATES HOLDEN AT IPSWICH 14 (Newburyport, Mass., John Mycall 1778) (emphasis omitted). At another state's convention, a speaker further qualified this commonly accepted perspective by making clear that while the people delegated power to government, "whatever portion of those natural rights we did not transfer to the government was still reserved and retained by the people." Thomas Hartley, The Pennsylvania Convention (Nov. 30, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 188, at 429, 430.

190 Title VII of the Civil Rights Act of 1964 prohibits employment discrimination:

> (a) Employer Practices.
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (2006).

191 The Supreme Court has identified a variety of privacy rights in a series of cases. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (finding that the Due Process Clause encompasses a right to sexual privacy); Roe v. Wade, 410 U.S. 113, 164 (1973) (recognizing

Section 5 of the Fourteenth Amendment granted Congress the power to protect inalienable rights that were first asserted in the Declaration of Independence.[192] In accordance with the judicio-centric rule from *Boerne*, Supreme Court cases prohibiting Congress from expanding rights prevent people from meaningfully petitioning elected representatives to protect their interests against state intrusions.[193] The Court's stated justification of guarding state sovereign rights against federal encroachment obfuscates the reality that federal antidiscrimination laws created by consent of the people formed the heart of these cases.[194] As such, the Court sets a doctrine that prefers the protection of state sovereignty to safeguards against governmental abuses, and this interpretational methodology prevents Congress from responding to the petitions of constituents. Such a result is incongruous with the Declaration of Independence's obligation to respond to the people's demands for legal reforms that adequately and equally protect fundamental rights. In that document, the colonists complained how at "every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."[195] The Supreme Court's new jurisprudence prevents Congress from acting upon petitions for the better protection of essential liberties without awaiting judicial guidance. The Court's claim of exclusivity for interpreting the Fourteenth Amendment, then, is out of step with the founding purpose of national sovereignty: the creation of a government beholden to the people's determinations of what laws best serve to safeguard their safety, happiness, and liberty. Without being able to modify govern-

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reproductive privacy); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding it unconstitutional for a state to intrude into the privacy of marital contraceptive decisions).

192 *See supra* notes 156–57 and accompanying text.

193 For a discussion of *Boerne* and other cases restricting Congress's Section 5 Fourteenth Amendment authority, see *supra* Part II.B.

194 Professor Robert L. Burgdorf gave the following assessment of the ADA to the House Committee on the Judiciary Subcommittee on the Constitution during its review of the statute:

> In enacting the ADA and in seeking its vigorous enforcement, the elected branches of the Federal Government—the Congress and the President—have carried out the will of the American people. A large majority of the public reports that it favors the ADA. A 2002 Harris Poll found that, of the 77 percent of Americans who said they were aware of the ADA, an overwhelming percentage (93 percent) reported that they "approve of and support it." The ADA is supported by most of the business sector. A Harris Poll of business executives in 1995, for example, showed that 90 percent of the executives surveyed said that they supported the ADA.

Americans with Disabilities Act: Sixteen Years Later: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 34–35 (2006) (prepared statement of Robert L. Burgdorf, Professor of Law, University of the District of Columbia David A. Clarke School of Law), *available at* 2006 WLNR 15953889.

195 THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

ment as seems "the most wholesome and necessary for the public good,"[196] the people lose a necessary aspect of self-rule.

Congress can expand rights beyond those formerly identified by the Court. The people can meaningfully communicate preferences to their representatives through public hearings, private letters, and professional lobbying. Senators and representatives, in turn, can set policies and draft antidiscrimination bills. They can then exercise their Section 5 Fourteenth Amendment authority to define the nature of needed antidiscrimination measures and enact them by federal legislation. If the electorate then disagrees with representatives' concept of protectable interests, it can vote them out of office or pass a constitutional amendment. By denying the people's ability to petition representatives to pass rights-protecting legislation,[197] the Court prohibits Congress from reacting to legitimate petitions. Such a judicially created bar is likely to result in friction between the people and the government as it did at the time of independence, when the Crown failed to react to the colonists' petitions.[198]

A foreseeable objection to my framework for self-government is that it might result in congressional abuses of discretionary power, favoring special interests instead of ordinary constituents.[199] To guard against corrupt politics, judicial review would remain available on a case-by-case basis but without the sweeping rejection of popular sovereignty adopted in the *Boerne* line of cases. Congress's ability to codify expanded understandings of civil rights does not preclude the

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196 I am drawing this concept of self-governance from a Declaration of Independence accusation against the king: "He has refused his Assent to Laws, the most wholesome and necessary for the public good." *See id.* at para. 3. While this denunciation is directed at the monarch's misconduct, it seems to me to be equally applicable to any legislative or judicial policy usurping the people's preeminent place in governance.

197 *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368–72 (2001) (invalidating a provision of the Americans with Disabilities Act that applied to state employers); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82, 89 (2000) (finding that a provision of the Age Discrimination in Employment Act that applied to state employers was an unconstitutional intrusion into a state's sovereignty); City of Boerne v. Flores, 521 U.S. 507, 520, 529 (1997) (striking a statute that expanded First Amendment protections beyond limits set by the Court).

198 *See* THE DECLARATION OF INDEPENDENCE para. 30 ("In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.").

199 Judicial checks on the abuse of legislative power is an ancient concept going back at least to the late eighteenth century. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1027 (2001); *see also* Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 74 (1992) (stating that the judiciary's ability to award appropriate damages safeguards its independence and prevents "abuses of legislative and executive power"); Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1191 (3d Cir. 1986) (en banc) (dissenting opinion) ("The need for careful scrutiny of the activities of the executive and legislative branches is heightened by the fact that they possess far more power than the judiciary, and thus far more capacity to abuse power.").

judiciary from overturning any law that bears no rational relation to a legitimate state purpose.[200] Arbitrary legislative favoritisms that harm historically disfavored groups or arbitrary judicial favoritism of the same type would be contrary to principles of the Declaration of Independence. Moreover, the *Boerne* doctrine of Section 5 review, which allows merely five Justices of the Supreme Court to overturn rights-protecting laws—like the ADA and the ADEA[201]—is itself open to politicization. While states may praise the Supreme Court for protecting their sovereign interests in *Kimel* and *Garrett*, those cases make it impossible for disabled and elderly workers to receive federal monetary damages against abusive state employers. Judicial supremacy in the interpretation of Section 5 of the Fourteenth Amendment unreasonably restricts the congressional prerogative to protect the Declaration of Independence's assurances of safety and happiness.

A low threshold of review for equal-rights-based statutes that are passed pursuant to the Declaration's principles will likely suffice to keep Congress's Section 5 enforcement powers in check. Ideals of the nation's founding document can best be achieved by adhering to the consent theory of governance that is central to the Declaration. Rational basis review will allow the Court to overturn whimsical or downright discriminatory laws while preserving the people's ability to mold the meaning of the Constitution.

Professor Jack Balkin has pointed out that the people's ability to democratically convince fellow citizens of the significance of the Constitution helps to legitimate statutes and regulations.[202] By extension, a social group's ability to influence the political process is intrinsic to the Declaration of Independence's system of self-governance. Partici-

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200 My premise is that Section 5 of the Fourteenth Amendment grants Congress the authority to pass non-arbitrary legislation. Unlike the current high level of statutory invalidation, the rational basis test is more likely to result in greater judicial deference to congressional policies, expanding rights in accordance with Declaration of Independence principles.

201 *Kimel* and *Garrett* were both decided by the same five-person majority, consisting of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. Even though Justice Thomas, joined by Justice Kennedy, partly concurred and dissented in *Kimel*, he was unwilling to uphold the state employer provision of the ADEA. Thomas concluded that Congress provided no clear intent of wanting the ADEA to abrogate state sovereign immunity. *See Kimel*, 528 U.S. at 99–109. In Kennedy's concurrence to *Garrett*, which Justice O'Connor joined, he claimed that the rareness with which cases had been filed under the ADA against state actors indicated a lack of congruence and proportionality between the law and the wrong Congress sought to regulate. *See Garrett*, 531 U.S. at 375–76.

202 *See* BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 13, at 9 ("What makes a constitution legitimate is not that it settles everything in advance in a way that is currently fair and just to the people who live under it. . . . Rather, what makes an imperfect constitutional system democratically legitimate is that people have the ability to persuade their fellow citizens about the right way to interpret the Constitution and to continue the constitutional project.").

pation in lawmaking is essential to the legitimation of governance. Laws passed under Section 5 of the Fourteenth Amendment warrant rational basis of review because they stem from the people's involvement in decision making. Rights-based laws demand judicial deference because they reflect the people's effort to enhance liberties, equality, and the pursuit of happiness, all mentioned in the Declaration of Independence, against states' concerns. The Supreme Court's congruence and proportionality test leaves too much possibility of judicial subjectivity,[203] which can thwart popular sovereignty.

My proposal would further empower ordinary citizens to petition members of Congress, in accordance with the representative model of government laid out in the Declaration of Independence, to enact new avenues of redress against state actors.[204] Where the people expand rights through their elected representatives, the Court's role is to examine whether the statutes are reasonably related to the equal protection of liberties.[205]

Instead of deferring to Congress, the Court in *Kimel* used a questionable interpretation of the Eleventh Amendment to prohibit older workers from filing antiageism lawsuits against states.[206] The Court

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203 In a dissent, Justice Scalia recognized the malleability of the congruent and proportional standard. *See* Tennessee v. Lane, 541 U.S. 509, 556–58 (2004) (Scalia, J., dissenting) (stating, while joining the majority in *Boerne*, "I have generally rejected tests based on such malleable standards as 'proportionality,' because they have a way of turning into vehicles for the implementation of individual judges' policy preferences. . . . The 'congruence and proportionality' standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking").

204 The initial recognition of this judicial scrutiny derives from footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). At the core of Justice Harlan F. Stone's famous footnote lay the American tradition, often breached by self-interest though it was, of protecting minorities against the whims of powerful majorities: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* That statement was the fulcrum for future elevated scrutiny cases that probed into whether individuals were unfairly treated for being members of an identifiable group. For extensive discussions about the development of scrutiny standards, see BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 13, at 163–73, and Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1285–1302 (2007).

205 The strict scrutiny standard of review, on the other hand, should apply where Congress seeks to limit Court-recognized rights, and I will discuss those situations in Part III of this Article.

206 The Court's interpretation of the Eleventh Amendment is textually suspect. *See Kimel*, 528 U.S. at 72–73 ("Although today's cases concern suits brought by citizens against their own States, this Court has long understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." (internal quotations and citations omitted)). A variety of academic criticisms have been leveled at the Supreme Court's interpretation of the Eleventh Amendment. *See* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1213 (2001) ("Sovereign immunity allows the government to violate the Constitution or laws of the United States without accountability."); Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 701 (2000) ("Not only does the Court revert to an

was more concerned with states' interests than individual rights of elderly state employees, even though the Declaration of Independence makes clear that human equality—rather than governmental administration—is elemental to national identity.[207] Nowhere in the *Kimel* or *Garrett* decisions did the Court reflect on how the Fourteenth Amendment augmented Congress's authority to protect rights that the country had espoused, but failed to put into practice, since the nation's founding. As we saw in Part I, the framers of the Fourteenth Amendment had looked at the matters quite differently, conceiving the amendment to incorporate the principles of the Declaration of Independence.

Had the Court instead employed rational basis review, it might have found that the ADEA's prohibition against age discrimination and the ADA's prohibition against disability discrimination accord with the Declaration's mandate for government to safeguard the pursuit of happiness.[208] From the standpoint of qualified older Americans who want to continue working, there seems to be nothing illegitimate with a policy promoting the "employment of older persons based on their ability rather than age."[209] The Court's analysis in

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unjustifiably heroic mode of insisting on sovereign immunity as a first principle of government, the Court also has mythologized and tried to unify the doctrines of sovereign immunity in a way that is false to their more complex history."); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 820 (1999) (agreeing that there is a constitutional form of state sovereign immunity, but asserting that "the texts of the Tenth and Eleventh Amendments simply do not provide for such immunities and constitutional structure, while a useful aid to interpretation, is not itself text"); William J. Rich, *Privileges or Immunities: The Missing Link in Establishing Congressional Power to Abrogate State Eleventh Amendment Immunity*, 28 HASTINGS CONST. L.Q. 235, 238 (2001) ("[T]he Privileges or Immunities Clause authorizes Congress to abrogate states' sovereign immunity under the Eleventh Amendment when acting to enforce individual rights that Congress has been otherwise authorized to protect.").

207 *See Kimel*, 528 U.S. at 86 (noting that the ADEA, "through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard").

208 A variety of studies demonstrate a connection between work and happiness. *See* Prashanth Ak, *Toward an Economy of Well-Being*, 329 SCIENCE 630, 630 (2010) (mentioning economist Carol Graham's perspective that employment is among the "correlates of happiness"); Felicia Huppert, *Happiness Breeds Prosperity*, 464 NATURE 1275, 1275 (2010) (reviewing DEREK BOK, THE POLITICS OF HAPPINESS: WHAT GOVERNMENT CAN LEARN FROM THE NEW RESEARCH ON WELL-BEING (2010) (presenting his study of demographic findings linking happiness to employment)); Peter A. Lawrence, *Retiring Retirement*, 453 NATURE 588, 590 (2008) ("Americans . . . allow the pursuit of happiness to those proficient older citizens who wish to seek or hold employment"); Richard Layard, *Measuring Subjective Well-Being*, 327 SCIENCE 534, 534 (2010) (discussing the multilayered nature of happiness to include factors like employment, income, and age).

209 29 U.S.C. § 621(b) (2006) ("It is . . . the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.").

Kimel, to the contrary, applied the rational basis standard to state rather than federal action. The majority focused on a state's right to "discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."[210] *Garrett* likewise accorded greater weight to states' sovereignty interests[211] than to the ADA's nationwide mandate against workplace discrimination.

Nowhere in these cases did the Court reflect on the Declaration of Independence's statements about the government's primary mission to safeguard the people's liberties against government discrimination,[212] nor did it consider that manifesto's role in the American constitutional ethos. The Court's oversight—an oversight dating back to the nation's founding—in failing to give adequate substantive weight to the Declaration of Independence's statements about the purposes for creating a national government rather than a confederacy of states, belies an essential facet of United States government: that it is the creation of the people, not the states. The states'-rights frameworks of *Kimel*, *Garrett*, and *Boerne* should have been balanced against the people's right to pass legislation through their representatives for the protection of vulnerable groups. Rights-protecting laws are also the prerogative of states, but principles of public sovereignty in the Declaration coupled with civil rights authority in the Fourteenth Amendment allow Congress to enact national standards of civil decency.

In the framework of the Declaration of Independence, the people established the national government "on such principles" as to organize "powers in such form, as to them shall seem most likely to effect their Safety and Happiness."[213] It makes little sense when the judiciary acts like the defender of states' rights and does not permit state employees to seek monetary redress against state employers engaged in age and disability discrimination. Instead, staying true to the Declaration of Independence's principles of self-governance requires

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210 *Kimel*, 528 U.S. at 83.

211 Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) ("The legislative record of the ADA . . . simply fail[ed] to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.").

212 *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("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."). Independence from Britain was justified, in part, on the colonial government's unwillingness to respond to the people's demands for greater protection of their interests. *See id.* ("[W]hen a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.").

213 *See id.*

judicial deference to the legislative expansion of laws protecting vulnerable groups. However, the Court's obligation to safeguard the people's rights to life, liberty, and the pursuit of happiness provides it with the authority to closely scrutinize laws where intentional discrimination is alleged.

III
Judicially Recognized Rights and Narrow Tailoring

In Part II, I explained why the Court should rely on rational basis scrutiny to analyze statutes that expand federally cognizable rights. In this Part, I reflect on the applicability of the Declaration of Independence in circumstances where Congress seeks to regulate a right that the Court identified in a prior decision.

Judicial review is historically linked to the colonists' protests against the Crown's repeated encroachments on judicial authority. The Supreme Court has recognized that even before Article III of the Constitution established an independent branch of government, the Declaration of Independence had already concluded that the judiciary must function free of governmental encroachments.[214] Where Congress seeks to limit judicially recognized rights, I believe that only a narrowly tailored basis of review will suffice to protect the Declaration's promise to safeguard inalienable interests. For example, any statutory restraint on political speech is so closely related to the purposes of American independence as to warrant strict scrutiny.

A recent case dealing with political speech involved a federal voting statute that restricted corporate expenditures on campaigns. Congress passed a bipartisan law to prevent companies from having a disproportionate impact on elections. In *Citizens United*, the Court struck down the Bipartisan Campaign Reform Act of 2002 (BCRA) as facially unconstitutional.[215] The case arose when a nonprofit corporation, Citizens United, produced a movie that aimed to dissuade voters

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214 Stern v. Marshall, 131 S. Ct. 2594, 2609 (2011) ("Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain 'made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.'" (quoting The Declaration of Independence para. 11)).

215 *See* Bipartisan Campaign Reform Act of 2002 § 203, Pub. L. No. 107-155, 116 Stat. 81, 91 (codified at 2 U.S.C. § 441b (2006)); Citizens United v. FEC, 130 S. Ct. 876, 889–90, 913 (2010). The Court refused to decide the case solely on an as-applied basis. *See id.* at 892 ("We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject. . . . As the foregoing analysis confirms, the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment."). Even before it issued the opinion in *Citizens United*, the Court had already

from selecting Senator Hillary Clinton in the 2008 Democratic presidential primary. Citizens United sought to enjoin the Federal Election Commission (FEC) from enforcing Section 203's restriction against running the spot within a statutorily proscribed period of time.[216] The Court decided that electioneering speech must receive First Amendment protection irrespective of the speaker's corporate identity.[217]

As Professor Ashutosh Bhagwat points out, both the majority and dissent in the case failed to examine whether Citizens United engaged in advocacy for self-governance that deserves First Amendment protections.[218] This insight would have been important because it could have helped the Court determine whether legitimate political speech or corporate advertisement was at play in the documentary against Hillary Clinton. Examining whether speech contributes to self-governance would have been in line with the Court's own jurisprudence, which regards "[s]peech on matters of public concern" to be "at the heart of the First Amendment's protection."[219]

I agree with Bhagwat that Citizens United was in fact an association committed to self-governance seeking to advance a conservative

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limited the applicability of Section 203 to cases of express advocacy "to vote for or against a specific candidate." FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469–70 (2007).

216 *See Citizens United*, 130 S. Ct. at 887–88. The District Court described the vitriol of the film directed at Senator Clinton as being "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." Citizens United v. FEC, 530 F. Supp. 2d 274, 279 (D.D.C. 2008). The relevant portion of the statute prohibited corporations from using their general treasury funds to make expenditures for electioneering communication within thirty days of a primary election. 2 U.S.C. § 434(f)(3)(A)(bb); *id.* § 441b, *invalidated by Citizens United*, 130 S. Ct. 876.

217 *See Citizens United*, 130 S. Ct. at 900 ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'").

218 Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1024 (2011) ("The key issue is not the corporate form of the speaker but what kind of collective entity—that is to say, association—the speaker is. If the speaker is a form of association protected by the First Amendment, because it is an association that contributes to self-governance, then the association's speech explicating its views constitutes associational speech, entitled to the highest level of constitutional protection." (emphasis omitted)). Bhagwat thinks Citizens United could have proved that the statute unconstitutionally restricted its right to associational speech—therefore agreeing with the judgment—but disagrees that corporations with no associational interest in self-government should also be treated as First Amendment players. *Id.* at 1024–25.

219 Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985)) (internal quotation marks omitted); *see also* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 483 (2011) ("The value of democratic self-governance theorizes First Amendment protections in terms of the importance of participating in the formation of public opinion, which is understood as a form of communicative action.").

political agenda.[220] But, unlike him, I do not think it was an association similar enough to natural persons to enjoy First Amendment protections. Moreover, Citizens United became a voice for for-profit corporations, which contributed to its funding, not merely a mouthpiece for individuals.[221] The distinction between natural persons and corporations has been nicely brought out by Chief Justice William H. Rehnquist, who said that "[t]o ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality."[222] I do not wish to engage in all the First Amendment implications of the case, which would be too far removed from the central concept of this Article. Rather, I will focus on how the Declaration of Independence's principles of consent and self-government inform the issue.

The Declaration of Independence was the country's initial statement of principles for government, including interlinked states and protection of the people's vital interests.[223] A government created by consent of the people, as it is set out in that document, was meant to secure individuals' inalienable rights,[224] but neither nonprofit nor for-profit corporations have any inalienable rights. For instance, while a rhetorical legalism attributes "perpetual life" to a corporation,[225] it is certainly not the sort of life that is mentioned in the second paragraph of the Declaration.[226] The surrounding language states, "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life." A corporation, however, is the creation of the state, and it is by no means endowed with the natural rights that informed the framers of the

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220 While Citizens United was a nonprofit corporation, a portion of its funding did come from for-profit corporations with most contributions coming from individuals. *See Citizens United*, 130 S. Ct. at 886–87.

221 *See id.*

222 Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting).

223 *See supra* text accompanying notes 44–46.

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

225 *Citizens United*, 130 S. Ct. at 956 (Stevens, J., dissenting) (discussing how corporate privileges, such as perpetual life and special treatment for accumulating and distributing assets, enable corporations to spend large sums of money on campaign messages that can be disconnected from the interests of real people).

226 There is no dispute in the literature that the right to life, which is listed in the Declaration of Independence among the inalienable human interests, is a natural right. *See, e.g.*, Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 258 n.26 (2010); Kaczorowski, *supra* note 178, at 203; Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1516 (2011).

Declaration of Independence.[227] Thus, corporations are entitled to fewer constitutional protections. Free speech, as the founding generation believed, is a natural right.[228] Having no natural rights—but only positive regulations on creation, operation, and dissolution—corporations' communications can be restricted differently than the speech of ordinary people.

Indeed, as the foregoing suggests, the principles set out in the Declaration of Independence appear to be directly linked only to natural persons; the notion that inalienable rights apply to corporations would likely not have crossed even one of the framers' minds.[229] The

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227 *Citizens United*, 130 S. Ct. at 948–50 (Stevens, J., dissenting) (discussing the framers' "very different views about the nature of the First Amendment right and the role of corporations in society" and arguing that, because of their conceptualization of corporations as "quasi-public entities" created to serve the state, the framers "took it as a given that corporations could be comprehensively regulated in the service of the public welfare").

228 *Compare* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 922 (1993) (discussing the framers' commonly accepted view that speech is a natural right), *with* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 151 (1988) (stating that the founding generation regarded speech and conscience to be natural rights, but believed free press rights were the creation of the state). Justice Hugo Black has taken the absolutist view that since speech is an unalienable right, it cannot at all be abridged by states. *See* Konigsberg v. State Bar of Cal., 366 U.S. 36, 67 (1961) (Black, J., dissenting) ("The Court, by stating unequivocally that there are no 'absolutes' under the First Amendment, necessarily takes the position that even speech that is admittedly protected by the First Amendment is subject to the 'balancing test' . . . . In my judgment, such a sweeping denial of the existence of any inalienable right to speak undermines the very foundation upon which the First Amendment, the Bill of Rights, and, indeed, our entire structure of government rest.") In contrast, as Professor Kurt Lash has pointed out, framers like Thomas Jefferson and James Madison believed that speech could be regulated, but only by states rather than the federal government. *See* Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 402 (2004).

229 My position on the contrasting relevance of the Declaration of Independence to natural persons as opposed to corporations is similar to other critics of the Court's application of the Fourteenth Amendment to corporations. *See, e.g.*, Wheeling Steel Corp. v. Glander, 337 U.S. 562, 578 (1949) (Douglas, J., dissenting) (asserting that the people ratified the Fourteenth Amendment because "it protected human beings," not corporations); Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85–91 (1938) (Black, J., dissenting) (contending that neither the history nor wording of the Fourteenth Amendment indicates that it applies to corporations). As Justice Black, writing in dissent, put sardonically: "Certainly, when the Fourteenth Amendment was submitted for approval, the people were not told that the states of the South were to be denied their normal relationship with the Federal Government unless they ratified an amendment granting new and revolutionary rights to corporations." *Id.* at 86; *see also* Arthur Twining Hadley, *The Constitutional Position of Property in America*, 64 INDEPENDENT 834, 836 (1908) ("The Fourteenth Amendment was framed to protect the negroes from oppression by the whites, not to protect corporations from oppression by the legislature. It is doubtful whether a single one of the members of Congress who voted for it had any idea that it would touch the question of corporate regulation at all."); Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 101 (2005) (stating unequivocally that neither the text nor history of the Fourteenth Amendment indicates that it applies to corporations); Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 877 (1986) ("The fiction that a corporation is a person for certain constitutional purposes . . . has spread . . . in the century since the Supreme Court first propounded it."). The Court first

consent of the people to govern their affairs, set out by the Declaration as an essential facet of representative governance,[230] applied only to people, not corporate entities. Corporations are legally created persons that cannot vote in general elections, can be governed by foreign directors, and enjoy the privileges of limited liability.[231] The limits on campaign expenditures set by section 203 of the BCRA on using corporations' general treasury funds for campaign electioneering did not offend the Declaration of Independence's protections of natural persons because the statute's brief time limit on primary contributions applied to businesses with no natural right to speech.[232]

Without any consideration of the historical predicates of how inalienable rights came to be protected in the United States, the Court voiced its ahistorical opinion that First Amendment protection of political speech extends to all domestic corporations.[233] The majority in *Citizens United* found that limiting speech "based on a speaker's

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declared that corporations are persons within the meaning of the Fourteenth Amendment in *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 394 (1886).

230 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("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.*" (emphasis added)).

231 *Citizens United*, 130 S. Ct. at 971 (Stevens, J., concurring in part and dissenting in part) ("Unlike voters in U.S. elections, corporations may be foreign controlled."); Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 563 (1987) ("Corporations cannot hold public office, vote in elections, or spend the night in jail."); Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 658–59 (1990), *overruled by Citizens United*, 130 S. Ct. 876 (unlike ordinary people, "[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments"); Reuven S. Avi-Yonah, Citizens United *and the Corporate Form*, 2010 WIS. L. REV. 999, 1001 (observing that, throughout the historical evolution of the corporation, one finds the same three theories of viewing a corporation: "the aggregate theory, which views the corporation as an aggregate of its members or shareholders; the artificial entity theory, which views the corporation as a creature of the State; and the real entity theory, which views the corporation as neither the sum of its owners nor an extension of the state, but as a separate entity controlled by its managers"); Martha T. McCluskey, *The Substantive Politics of Formal Corporate Power*, 53 BUFF. L. REV. 1453, 1494 (2006) ("Unlike the natural person in another state, the large nationwide corporation may have as much of a voice in a foreign jurisdiction as in its resident jurisdiction, since it cannot vote as an artificial person, since its residence is nominal, and since its governing owners and managers may live anywhere."); Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95, 124 (1995) (explaining that if corporations are viewed as people, then "corporate speech is produced by artificial legal entities, and therefore should not be accorded the same First Amendment protection as speech by individuals").

232 *See* 2 U.S.C.A. § 434(f)(3)(A)(bb) (2006); 2 U.S.C. § 441b (2006), *invalidated by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

233 *See Citizens United*, 130 S. Ct. at 899–900.

wealth" was constitutionally indefensible.[234] "By suppressing the speech of manifold corporations," the Court found, "both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."[235] In holding as it did, the Court denied Congress the power to set differing restrictions on natural humans and artificial corporations within the context of political speech.[236]

The traditional judicial neglect of the Declaration of Independence excluded the document's statement of inalienable rights from any serious consideration. During oral argument, Justice Ruth Bader Ginsburg touched on the connection between the Constitution and Declaration of Independence. She asked the attorney for Citizens United whether he was arguing that corporations and individuals had the same rights under the First Amendment. Then she observed that "[a] corporation, after all, is not endowed by its creator with inalienable rights," and asked rhetorically whether "Congress could draw [a distinction] between corporations and natural human beings for purposes of campaign finance."[237]

Neither the majority nor the dissent picked up on this strand of thought. This is unfortunate because the Declaration's statement about government's obligation to safeguard safety and to enable people to pursue happiness was undeniably concerned with natural persons, not corporate entities.[238] The existence of an intrinsic right of citizens to pick leaders is presumed in the Declaration of Independence,[239] but as creations of the state, corporate entities have no in-

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234 *Id.* at 905 ("The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity.").

235 *Id.* at 907.

236 *Citizens United* raises multiple questions about the future direction of litigation seeking to equate corporate and individual rights. For instance, it raises the question of whether the ruling alters the lower constitutional protection on commercial speech, which currently does not enjoy full First Amendment protections. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) (holding that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression"); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (holding that, while commercial speech is afforded some protection under the First Amendment, it can certainly be regulated). Furthermore, the opinion might open other difficult questions about corporate voting in general elections.

237 Transcript of Oral Argument at 4, Citizens United v. FEC, 130 S. Ct. 876 (2009) (No. 08-205), 2009 WL 6325467.

238 *See supra* notes 219–28 and accompanying text.

239 For an analogous line of thought, see JOHN DIJOSEPH, JACQUES MARITAIN AND THE MORAL FOUNDATION OF DEMOCRACY 75 (1996) ("The right to vote is part of the more general right of self-determination. Just as each person controls his own spiritual destiny by freely choosing whether to live a moral life, so also, each person has the innate right to choose the political leaders . . . ."), and ADOLPH E. KROEGER, OUR FORM OF GOVERNMENT

nate rights. Moreover, a key political doctrine of the Declaration of Independence reverberates with the language of human self-governance.[240] Nothing in the document connects the inalienable right to speech with state-made entities like corporations. Even if analysis of the Declaration would not have changed the majority's opinion, assessment of the document might have provided a unique perspective on the historical rationale for protecting natural people's speech.

A. Compelling Interest

If we were to accept the Court's premise in *Citizens United* that corporate electioneering implicates the First Amendment, only a narrowly tailored restriction on corporations' political messages will survive judicial scrutiny.[241] This mode of analysis is more rigorous than the congruence and proportionality test adopted in *Boerne*.[242] In an important way, these two cases dealt with opposite problems: in the former, the Court expanded a right—the right of corporate politicking—while in the latter, the Court struck Congress's attempt to expand a right—the right to freedom of religion.[243] Consequently, the rational basis method of scrutiny I advocated in Part II, which is meant to displace the congruence and proportionality test for examining congressionally expanded rights, is inapplicable to the judicial expansion of constitutional protections.

In *Citizens United*, the Court in fact subjected section 203 of the BCRA to strict scrutiny.[244] To begin, the Court refused to analyze

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AND THE PROBLEMS OF THE FUTURE (1863), *reprinted in* 2 THE ST. LOUIS HEGELIANS 77, 78 (Michael H. DeArmey & James A. Good eds., 2001) ("Our own Declaration of Independence expresses this absolute freedom or self-determination of each rational being . . . .").

240 *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776) ("He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only."); *id.* at para. 7 ("He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.").

241 *See Citizens United*, 130 S. Ct. at 898 ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007))).

242 521 U.S. 507, 519–20 (1997) (holding that Section 5 legislation must have "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

243 *Compare Citizens United*, 130 S. Ct. at 913 (granting corporations the right to spend general treasury funds in independent expenditures that expressly support the election or defeat of a candidate), *with Boerne*, 521 U.S. at 536 (holding that Congress exceeded its Section 5 power in passing the Religious Freedom Restoration Act).

244 *Citizens United*, 130 S. Ct. at 887, 898. Interestingly, the Court did not think the strict scrutiny test applied to the BCRA's disclosure and disclaimer requirements. *See id.* at 913–15. Instead, the Court required the statute to meet exacting scrutiny, which it passed by not stifling speech. *See id.* The strict scrutiny test is composed of two parts. *See* Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002) ("Under the strict-scrutiny test,

whether Congress might have had a compelling interest in passing the law to prevent foreign corporate electioneering.[245] It left that issue for another day because the BCRA was not limited to corporations that were predominantly financed or controlled by foreign interests.[246] Even if Congress could have regulated foreign corporate speech, the statute was not narrowly tailored to that purpose. Next, the Court held that Congress lacked any compelling interest to prevent potential distortions of elections through domestic corporate politicking.[247] The majority explicitly reversed the Court's earlier holding in *Austin v. Michigan State Chamber of Commerce*, which had found that the state has a compelling interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."[248] Taking an about-face in *Citizens United*, the Court found that no compelling reason exists for preventing corporations and unions from presenting their political facts and opinions to the public.[249]

Nowhere did the Court reflect on whether placing restraints on campaign contributions accorded with the Declaration of Independence's principles of self-governance.[250] The document would have been a logical source for assessing whether Congress had a compelling interest in preventing undue influence of corporate wealth on elections; after all, it was the Declaration that created the basic principles for United States representative government.[251] The BCRA was a federal attempt to prevent corporations and unions from financially

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respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest."); *see also* Reno v. Flores, 507 U.S. 292, 301–02 (1993) (asserting that due process "forbids the government to infringe certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest").

245 *See Citizens United*, 130 S. Ct. at 911.

246 *Id.*

247 *Id.* at 913 (overruling Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990)).

248 *Id.* at 903 (quoting *Austin*, 494 U.S. at 660). In two previous cases, the Court had upheld restrictions on corporate uses of general funds for campaign spending. *See* McConnell v. FEC, 540 U.S. 93, 204, 209 (2003); *Austin*, 494 U.S. at 654–55.

249 *Citizens United*, 130 S. Ct. at 907, 913.

250 Silence on this point is unsurprising given the paucity of precedents reflecting on the relevance of the Declaration of Independence to constitutional interpretation. *See supra* text accompanying notes 25–27.

251 The Declaration of Independence refers to the people as the source of representative governance. *See* GRETCHEN RITTER, THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER 36 (2006) (referring to the Declaration of Independence as the source for believing that government is created to protect of the rights of the people). The concept that the legitimacy of authority derived from consent of constituents appears in the writings of numerous ancient philosophers including Hugo Grotius, Jean-Jacques Rousseau, Thomas Hobbes, Samuel Freiherr von Pufendorf, and John Locke. *See* BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 84 (1997).

influencing politics[252] away from the principal purpose of inalienable-rights protection.

The effort to prevent disproportionate financial influence on national representatives is arguably a compelling government interest because it is closely linked with the Declaration of Independence's condemnation of political privilege.[253] The Court's strict scrutiny analysis might have coupled its earlier finding that Congress can restrain the use of "resources amassed in the economic marketplace" to gain "an unfair advantage in the political marketplace"[254] with the Declaration's prohibition against special political privileges. As I discussed in Part I, the Declaration of Independence's significance to political equality was not lessened by the founding generation's failure to grant voting rights to anyone other than property-owning white males,[255] a practice that certainly went against the Declaration's statement of human equality but did not detract from its aspirational purposes. What is important, in our day and age, is preserving a level playing field for the people to influence members of Congress. The *Citizens United* decision places an almost insurmountable obstacle on the regulation of corporate campaign speech.

The BCRA did not prevent private citizens, who are potential voters, from contributing to candidates in the days leading up to an election or primary. Instead, the law was meant to prevent entities with no electoral status from manipulating the political process to further business interests and thereby dilute natural persons' choice of candidates.[256] Congress had concentrated its effort on protecting the

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252 *See McConnell*, 540 U.S. at 115 ("BCRA is the most recent federal enactment designed to purge national politics of what was conceived to be the pernicious influence of big money campaign contributions." (quoting United States v. Auto. Workers, 352 U.S. 567, 572 (1957)) (internal quotation marks omitted)).

253 Within the context of the eighteenth century, the Declaration of Independence's statement that "all men are created equal" was meant to eliminate aristocracy. *See* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2316 (1997) ("The egalitarian urge of the American Revolution is enshrined in the Declaration of Independence and forms the underlying spirit of our constitutional tradition."); Steve D. Shadowen, *Personal Dignity, Equal Opportunity, and the Elimination of Legacy Preferences*, 21 GEO. MASON U. CIV. RTS. L.J. 31, 53–54 (2010) (discussing how the assertions of the Declaration against hereditary privilege translated into constitutional clauses against the practice). Professor Elizabeth Garrett, a prominent election law specialist, points out that Justice Thurgood Marshall would have viewed the BCRA differently than the majority in *Citizens United*. As she puts it, he believed "that differences in wealth should not affect the ability to participate in politics" because he conceived of the "country's democratic framework" as rooted in the "Declaration of Independence's 'self-evident truth' that all people are created equal." *See* Elizabeth Garrett, *New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics*, 52 HOW. L.J. 655, 666 (2009).

254 FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986).

255 *See supra* Part I.A.

256 *See* L. PAIGE WHITAKER, CONG. RESEARCH SERV., IB98025, CAMPAIGN FINANCE: CONSTITUTIONAL AND LEGAL ISSUES OF SOFT MONEY 1–2 (2004).

political rights of natural people against the excessive influence of corporate interests.[257] The Court might have found that because self-government is at the core of national identity, as it is defined by the Declaration of Independence, Congress's effort to preserve the representative process through section 203 of the BCRA was indeed compelling.

B. Narrow Tailoring

I now turn to the question of whether the BCRA was narrowly tailored. If I was correct to assert at the beginning of Part III that the Declaration of Independence's model of self-governance indicates that First Amendment protection of political speech is limited to natural persons,[258] then Congress was wholly within its power to pass section 203 of the Act. However, assuming that the majority in *Citizens United* was correct to extend political speech protection to corporations, I turn to the question of whether principles of the Declaration of Independence can inform the inquiry into whether section 203 of the BCRA was narrowly tailored. Indeed, the principle of stare decisis suggests that *Citizens United* will be the ruling precedent on corporate political speech for years to come. Future campaign finance reform will need to incorporate this holding into any new effort to prevent undue corporate influence on politics.

The decision in *Citizens United* would have been less vulnerable to skepticism if the Court had struck the BCRA only on the basis of as-applied considerations. The Court did not even need to reach the facial challenge of the statute because Citizens United had eliminated it from its complaint, only retaining an as-applied challenge to the law.[259] Instead, the Court found that the law was facially unconstitutional.[260] The problem with the statute, as the Court saw it, was not merely the harm Citizens United experienced but the chilling effect it had on the political speech of all corporations.[261] The decision deprived Congress of the power to place limitations on the distorting effect of corporate, union, or other organizational spending on electioneering for the purpose of influencing politicians by bankrolling their campaigns.

A more reserved approach would have examined whether Citizens United was a domestic, collective entity that was incorporated to express political views. If that was indeed part of its corporate charter,

257 *See McConnell*, 540 U.S. at 115–16.

258 *See* supra text accompanying notes 229–31.

259 Citizens United v. FEC, 130 S. Ct. 876, 892 (2010).

260 *See id.* at 917.

261 The Court refused to solely evaluate the BCRA's application on a case-by-case basis because the majority regarded bans on the political speech of corporations to be constitutionally suspect. *See id.* at 892.

then the BCRA in fact suppressed that corporation's legitimate efforts to contribute to the sort of self-governance fostered by the Declaration of Independence. This is a conceptual approach to the Declaration because, as I demonstrated earlier, its principled statements only concern natural people.[262] But in light of the *Citizens United* holding, it is feasible that the Court might be less textualist and more open to a broad understanding of rights secured at the time of national independence.

Citizens United was incorporated under the Virginia Nonstock Corporation Act.[263] The company's express purpose was "to promote social welfare through informing and educating the public on conservative ideas and positions on issues, including national defense, the free enterprise system, belief in God, and the family as the basic unit of society."[264] Between 2004 and 2010, Citizens United "produced and distributed twelve documentary films" on conservative topics.[265] Virginia law does not prohibit nonstock corporations from producing movies like *Hillary: The Movie*.[266]

Congress, of course, must accept the Court's holding that corporations' campaign expenditures are protected by the First Amendment. In response, Congress can redraft Section 203 with a provision exempting corporations regularly engaged in political advocacy. Such entities differ from corporations whose activities and communications are primarily wealth maximizing. By exempting corporations like Citizens United from limitations on campaign spending prior to elections, Congress might eliminate inconsistency that the majority

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262 *Cf.* Darrell A.H. Miller, *Guns, Inc.*: Citizens United, McDonald, *and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 916–31 (2011) (distinguishing between the artificial, real, and aggregation concepts of corporate form).

263 *See* Corporate Data Inquiry for Citizens United, COMMONWEALTH VA. ST. CORP. COMMISSION, https://cisiweb.scc.virginia.gov/z_container.aspx (last visited Mar. 19, 2012) (follow "Corporate Inquiry Menu" hyperlink; then query "Citizens United" in "Corp Name" field; follow "Citizens United" hyperlink; then follow "Data Summary" hyperlink). The Virginia Nonstock Corporation Act states that "[u]pon becoming effective, the certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Act." VA. CODE ANN. § 13.1-820 (2009).

264 Letter from Theodore B. Olson, counsel, Citizens United, to Thomasenia P. Duncan, Gen. Counsel, FEC (Mar. 29, 2010), *available at* http://saos.nictusa.com/aodocs/1136515.pdf. The corporate identity of Citizens United was carefully defined to obtain tax-exempt status. *Cf.* 26 U.S.C. § 501(c)(4)(A) (2006) (exempting from taxation "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes").

265 Letter from Theodore B. Olson, *supra* note 264.

266 *See* Virginia Nonstock Corporation Act, VA. CODE ANN. § 13.1-820 (2009).

identified in the treatment of media corporations and other nonprofit corporations.[267]

A codified exemption for any nonprofit corporation regularly engaged in political speech will leave that nonprofit free to participate in public debates. A redrafted provision might differentiate a corporation organized to influence political dialogue from one that is chartered to maximize company earnings. The Declaration of Independence recognizes the people's primacy in governance.[268] A new campaign finance law that is narrowly tailored to only prevent for-profit businesses from expending general funds shortly before primaries or general elections might pass judicial review.[269] The compelling interest of effective government representation, which has been intrinsic to American ethos since the signing of the Declaration of Independence,[270] can justify limiting for-profit corporate spending on elections.

Any new campaign finance bill will need to take into account the Court's holding that the First Amendment protects corporations' political expressions.[271] Congressional efforts must conform to *Citizens United* while seeking to safeguard natural people's core place in American democracy. A narrowly tailored statute that only regulates the campaign spending of commercial corporations might succeed, especially if debates on the new bill and the preamble of the statute include substantive references to the Declaration of Independence's principles of popular sovereignty. The electioneering expenditures of those corporations primarily associated with expressive activities can be exempt from the statute, treating them as associations of individual

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267 *Citizens United*, 130 S. Ct. 876, 943 (2010) (Scalia, J., concurring) ("Like numerous statutes, [Section 203] exempts media companies' news stories, commentaries, and editorials from its electioneering restrictions, in recognition of the unique role played by the institutional press in sustaining public debate.").

268 *See* RITTER, *supra* note 251, at 36. The notion that the people can govern by pooling their resources does not, I believe, indicate that incorporated entities can do the same. *Contra* McConnell v. FEC, 540 U.S. 93, 255 (2003) (Scalia, J., concurring) (stating that the proposition that unions and corporations cannot spend money on speech "fits uncomfortably with the concluding words of our Declaration of Independence: 'And for the support of this Declaration, . . . we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.'" (omission in original) (emphasis omitted)).

269 The success of such a proposal is far from a foregone conclusion. Following *Citizens United*, any campaign contribution law distinguishing individuals from corporations and other associations is likely to run into strong opposition. *Citizens United* strengthened the Court's earlier conclusion in *First National Bank of Boston v. Bellotti* that statutes prohibiting corporate election expenditures in elections that only affect individual rights are suspect and at risk of being overturned. *See* 435 U.S. 765, 768, 790–92 (1978) (striking a state statute that prohibited business corporations from contributing or expending funds on referendums "solely concerning the taxation of the income, property or transactions of individuals").

270 *See supra* Part I.A.

271 *See Citizens United*, 130 S. Ct. at 913.

voters collectively seeking to voice their support for candidates or political perspectives, but the statute would apply to companies whose principal purpose is wealth maximization.

Conclusion

The Declaration of Independence established a representative government whose primary purpose is the protection of fundamental rights. The Declaration contains the American creed against which all constitutional and statutory conduct must be measured. The people remain the source of power, able to direct elected officials to enact laws that can best protect their safety and allow them to pursue individual visions of happiness. Throughout the nation's history, progressive social groups have relied on the document to advance idealistic visions for the increased protection of essential rights and political freedoms.[272] Although often regarded as a historic artifact, the document remains relevant to constitutional theory.

Its framework ensures citizens' right to participate in developing civil rights legislation. Despite this grant of popular power, recent Supreme Court decisions have limited Congress's Fourteenth Amendment authority to represent constituents' legitimate demands. The Court has overturned provisions of popular legislation, including the Americans with Disabilities Act and Age Discrimination in Employment Act.[273] Contrary to the Declaration of Independence's statements about the people's central role in self-government, these holdings augment the power of the judiciary at the expense of popular sovereignty. Similarly, by granting corporations equal First Amendment protections on campaign speech, the Court attenuated the people's unique place in electoral politics.

Rather than interfering with citizens' ability to expand legislative definitions of inalienable rights beyond those the Court has already recognized, only a rational basis standard of review should apply to facial challenges of Fourteenth Amendment Section 5 legislation. For its part, Congress must also be deferential to judicially recognized inalienable rights since judges are also bound by the principles of the Declaration. Therefore, any law regulating a judicially recognized fundamental right should receive strict scrutiny analysis. By requiring Congress to provide compelling and narrowly tailored reasons for restricting Court-identified rights, the judiciary can serve its important countermajoritarian function envisioned by the Declaration of Independence.

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272 *See supra* note 18.

273 *See supra* notes 126, 133.