

Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History

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**RESTORING “LIFE, LIBERTY, AND THE PURSUIT OF
HAPPINESS” IN OUR CONSTITUTIONAL JURISPRUDENCE:
AN EXERCISE IN LEGAL HISTORY**

Patrick J. Charles*

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INTRODUCTION

On July 6, 1776, John Hancock sent letters to each of the colonial assemblies announcing the adoption of the Declaration of Independence.¹ In these letters, Hancock stated that the Declaration had two significant legal effects. The first was that “all connection between *Great Britain* and the *American Colonies*” had been dissolved, so as to “declare them free and independent States,” and that each colony should proclaim this “in the way [it] shall think most proper.”² The second effect was a structural alteration to the colonial governments, for each colony’s charter was expressly tied to England’s system of government. Therefore, Hancock requested that “the people . . . be universally informed” of this change, and that the Declaration be “considered as the *ground and foundation* of a future Government,” both at the State and national level.³

Hancock’s instructions are significant because they illustrate that the very essence of American government was the guarantees embodied in the Declaration of Independence. However, as insightful as Hancock’s instructions are, they do not end the historical inquiry. As to the constitutional importance of the Declaration, they leave many questions unanswered. Did the founding generation agree with Hancock’s assessment? Did the newly independent State governments have to embody the principles in the Declaration, or was this merely an exercise in political rhetoric?⁴ What effect, if any, did the subsequent Articles of Confederation and superceding Constitution have on the guarantees and grievances within the Declaration?

As a matter of history, answering these questions has proven difficult, with the Declaration gaining acceptance as part of our social and international identity. Nevertheless, working through these questions is essential if the United States Supreme Court is ever to truly acknowledge the Declaration’s preservation of “life, liberty, and the pursuit of happiness” in the pantheon of our constitutional jurisprudence.⁵ Perhaps providing the answer to these questions is difficult because the Declaration

¹ See Letter from John Hancock, President of Congress, to the New York Convention (July 6, 1776), in 1 AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE UNITED STATES OF AMERICA, 5th ser., 33 (Peter Force ed., 1846) [hereinafter 1 AMERICAN ARCHIVES, 5th ser.].

² *Id.* at 1398.

³ *Id.* (emphasis added).

⁴ See Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 361 (1993) (stating some scholars’ view that the Declaration is a purely symbolic document that “has nothing to do with constitutional law”).

⁵ During the last term, the Supreme Court cited to the Declaration of Independence twice to answer constitutional questions. See *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (citing to the Declaration’s grievance that the King “made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries”); *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011) (citing to the Declaration in support of the right to petition). To date, the Supreme Court has yet to incorporate the Declaration’s preamble into our constitutional jurisprudence.

is often mistaken as embodying actionable natural rights or some form of judicial presumption of liberty.⁶ For instance, many associate the Declaration’s reference to “life, liberty, and the pursuit of happiness” as the embodiment of a libertarian ideal.⁷ They view the phrase as embodying protections for economic liberties⁸ and supporting the political belief of limited governmental intrusion. At the same time, many people view “life, liberty, and the pursuit of happiness” as protecting broad natural rights in addition to the enumerated rights guaranteed by the Bill of Rights. Take, for example, an interview in which I took part, which predicted the outcome of the landmark Second Amendment case of *McDonald v. City of Chicago*.⁹ In response to my historical analysis, it was asserted that I was wrong because I did not understand the Declaration’s guarantee of natural rights; an ideal, no doubt, many Americans identify with the sacred text.¹⁰

It should not be surprising that the use of the Declaration as a vehicle to assert constitutional rights is not a modern invention.¹¹ During the ratification of the Constitution, the Declaration’s grievance related to the colonists’ deprivation of “the benefit of the Trial by Jury” was used by at least one anonymous editorial to assert the need for a

⁶ For some examples, see generally SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (1995); John P. Kaminski, *Restoring the Declaration of Independence: Natural Rights and the Ninth Amendment*, in *THE BILL OF RIGHTS: A LIVELY HERITAGE* 141 (Jon Kukla ed., 1987); Eric R. Claeys, *Essay, Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 *FORDHAM L. REV.* 731, 738–39 (2004); Michael Anthony Lawrence, *Government as Liberty’s Servant: The “Reasonable Time, Place, and Manner” Standard of Review for All Government Restrictions on Liberty Interests*, 68 *LA. L. REV.* 1, 35–37 (2007).

⁷ See Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty Over Law and the Court Over the Constitution*, 75 *U. CIN. L. REV.* 1499, 1501–02 (2007) (“As is often stated, America’s Declaration of Independence articulates the Lockean doctrine that the purpose of government is to secure rights. There is little question that the founding generation as a whole shared this general view.” (citations omitted)); William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 *MICH. L. REV.* 487, 512 (2007) (“The right to pursue happiness, in short, is the individual’s right to pursue *personal* happiness.”); *id.* at 513 (stating the New York Constitutional Convention’s recommendation of “the enjoyment of Life . . . and the Pursuit of Happiness” . . . was seeking protection of individual rights”).

⁸ See David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 *MERCER L. REV.* 563, 581–82 (2009).

⁹ 130 S. Ct. 3020 (2010).

¹⁰ Sofa, *Comment to 5 Questions for Patrick J. Charles (Britannica Contributor) on Gun Control and the Second Amendment*, *ENCYCLOPEDIA BRITANNICA BLOG* (June 3, 2010, 6:08 AM), <http://www.britannica.com/blogs/2010/06/5-questions-for-patrick-j-charles-britannica-contributor-on-gun-control-and-the-second-amendment.com>.

¹¹ On July 4th of every year, in commemoration of the Declaration of Independence, it has become common for law professors to clamor for the recognition of the Declaration of Independence in our constitutional jurisprudence. See Eric E. Johnson, *Happy Fourth of July*, *PRAWFS BLAWG* (July 4, 2011, 9:43 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/07/happy-fourth-of-july.html>.

protection of a right to a jury trial in a Bill of Rights.¹² Perhaps the greatest advancement of the Declaration as a vehicle to assert constitutional rights came during the events of the Civil War.¹³ From the time of South Carolina's secession, the Declaration was used as support for the South's separation from the Union.¹⁴ This view of the Declaration as embodying constitutional guarantees would continue through the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments. In fact, it is well documented that members of the Reconstruction Congress used the Declaration's language as the embodiment of the Founders' Constitution.¹⁵ Partially motivated by the Supreme Court's decision in *Dred Scott v. Sandford*,¹⁶ members of the Reconstruction Congress sought to ensure, once and for all, that the idea that "all men are created equal" was enshrined in law by removing the color barriers in the federalist system.¹⁷

However, before one can ever reconcile what the preservation of "life, liberty, and the pursuit of happiness" provides us as a working constitutional doctrine, the Declaration's contents and purpose must be reconciled within the constraints of historical context. Thus, Part I of this Article sets forth to examine the different views of the Declaration as a legal document from its adoption through the Early Republic. Part II addresses the historiography of interpreting "life, liberty, and the pursuit of happiness" from the turn of the twentieth century to the modern day. Part III then addresses the problems of the modern legal interpretation, and provides an originalist understanding of preserving "life, liberty, and the pursuit of happiness" within the constraints of eighteenth-century constitutionalism. Lastly, Part IV discusses the true legal purpose of preserving "life, liberty, and the pursuit of happiness," and whether this purpose is consistent with our modern constitutional jurisprudence.

¹² Algernon Sidney, *Miscellany*, NEW-YORK JOURNAL, AND DAILY PATRIOTIC REGISTER, Mar. 8, 1788, at 2 ("It is remarkable, if we attend to the declaration of independence, that the Congress alledge that the people of this country are justified in withdrawing their allegiance from . . . Great-Britain on account of various acts of oppression. Among other things, the king is accused 'of depriving us in many cases, of the benefits of the trial by jury.' Now it is most certain that the new constitution takes away the trial by jury in many cases . . .").

¹³ See Gerald F. Moran, *The Declaration of Independence: The Reality Behind the Myth*, 77 MICH. L. REV. 806, 807 (1979) (reviewing GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (1978)).

¹⁴ DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION (S.C. 1860) ("A struggle for the right of self government ensued, which resulted on the Fourth day of July One thousand Seven hundred and Seventy Six, in a declaration by the Colonies 'that they are and of right ought to be Free and Independent States; and that as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do.'").

¹⁵ See, e.g., CONG. GLOBE, 40TH CONG., 2D SESS. app. 115 (1868) ("Is there any race or color in the Declaration of Independence?"); *id.* at 1067 (1868) ("[W]hite men for white men's State governments made the Declaration of Independence.").

¹⁶ 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹⁷ See *supra* note 15.

I. PLACING THE DECLARATION IN LEGAL AND HISTORICAL CONTEXT

As a legal document, it is universally agreed that the Declaration was the constitutional means by which the Founding Fathers declared independence to the world. Independence was sought for many reasons, as is detailed throughout the Declaration’s grievances.¹⁸ These grievances were more nominal than real, with the actual impetus being the need to enlist foreign support for the war.¹⁹ In addition to these well-established historical facts, much of the Declaration’s preamble was also publicly defined as providing an important legal proposition in the late eighteenth century—this proposition being that, on equitable principles, “life, liberty, and the pursuit of happiness” were the constitutional bases on which state and federal governments were to be based.²⁰

Naturally, this proposition is a bit more complex and requires further explanation, for many questions are raised. What historical evidence is available that supports this proposition? What form of government does the preservation of “life, liberty, and the pursuit of happiness” guarantee? Is this government consistent with eighteenth-century state constitutions and with the form established by the federal Constitution? Did the federal Constitution supersede or override these guarantees set forth in the Declaration? If these guarantees were not superseded, and are still part of our constitutional system, are they actionable in a court of law?

To begin answering these difficult, yet feasible questions, one must start from the Declaration itself, which guarantees:

That these United Colonies are, and of Right ought to be FREE AND INDEPENDENT STATES; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances,

¹⁸ See generally PATRICK J. CHARLES, *IRRECONCILABLE GRIEVANCES: THE EVENTS THAT SHAPED THE DECLARATION OF INDEPENDENCE* (2008) (discussing historical events leading to the call for independence); PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 105–23 (1997).

¹⁹ CHARLES, *supra* note 18, at 299–324; David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 39, 46–47 (2002); William Pencak, *The Declaration of Independence: Changing Interpretations and a New Hypothesis*, 57 PA. HIST. 225, 225 (1990); see also Letter from Samuel Cooper to John Adams (July 15, 1776), in THE ADAMS PAPERS DIGITAL EDITION (C. James Taylor ed., 2008), <http://rotunda.upress.virginia.edu/founders/ADMS-06-04-02-0164> (“I congratulate you on the Declaration of Independence with so much Unanimity. The Declaration is admir’d, diffuses Joy, and will have great Effect. It will be follow’d I trust with Alliances &c. France must make a Deversion in our Favour.”).

²⁰ CARL L. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 17–18, 22 (Vintage Books 1959); Pencak, *supra* note 19, at 228, 232–33.

establish Commerce, and to do all other Acts and Things which Independent States may of right do.²¹

The Declaration's guarantee is plain and clear that the British colonies were now American States independent of the Crown and Parliament.²² However, on its face, the Declaration is less clear as to whether each state was an independent nation.²³ While one may assert that the Declaration vested each state with the "full power to levy war, conclude peace, contract alliances, establish commerce," etc., the reality was that these powers were vested with the United States,²⁴ which at that time was the Continental

²¹ THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

²² BECKER, *supra* note 20, at 5–6.

²³ Some commentators were of the view that the Declaration created thirteen distinct, independent sovereigns until the ratification of the Articles of Confederation. *Talbot v. Commanders & Owners of Three Brigs*, 1 U.S. (1 Dall.) 95, 99 (Pa. 1784) ("This State has all the powers of Independent Sovereignty by the Declaration of *Independence* on the 4th of *July*, 1776, except what were resigned by the subsequent *Confederation* dated the 9th of *July*, 1778, but not completed by final ratification until the *first of March*, 1781."); SAMUEL STILLMAN, AN ORATION, DELIVERED JULY 4TH, 1789 AT THE REQUEST OF THE INHABITANTS OF THE TOWN OF BOSTON, IN CELEBRATION OF THE ANNIVERSARY OF AMERICAN INDEPENDENCE 11, 13 (Bos., B. Edes & Son 1789) ("The declaration of Independence at once annihilated the diminutive term *Colonies* as applied to us, raised us to our equal station among the nations of the world, and opened to us a source of great advantages. . . . The articles of Confederation arose out of the circumstances of the times . . ."); ELISHA LEE, AN ORATION DELIVERED AT LENOX, THE 4TH OF JULY, 1793, THE ANNIVERSARY OF AMERICAN INDEPENDENCE 9, 13 (Stockbridge, Loring Andrews 1793) ("THE GENERAL CONGRESS . . . solemnly published and declared that the United Colonies were, and of right ought to be, *free* and INDEPENDENT STATES The dissolution of the Colonial governments, at the time of the declaration of Independence, was followed by the establishment of Constitutions chosen by the citizens of the respective Colonies—Each Colony became an independent republic—To combine these in one general union, articles of *confederation* were adopted . . ."). These accounts, however, fail to take into account that the Declaration created an *ipso facto* Union to negotiate treaties, continue the Continental Army, and exercise other powers incidental to sovereignty adherent to the law of nations. For an example of this purpose of the Declaration, see PENNSYLVANIA EVENING POST (Phila.), June 29, 1776, at 326 ("I shall rejoice to hear the title of UNITED STATES OF AMERICA, in order that we may be on a proper footing to negotiate a peace. . . . Some foreign powers might interpose for us . . . but they cannot . . . because the law of all nations is against us. Besides, the foreign European powers will not be long neutral, and unless we declare an independ[e]nce, and send embassies to seek their friendship, Britain will be beforehand with us . . .").

²⁴ Although the Articles of Confederation were not yet in place at the adoption of the Declaration of Independence, the creation of the Articles was agreed upon in conjunction with the Declaration. *See* MAIER, *supra* note 18, at 101–02; WILLS, *supra* note 13, at 326–29; 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 425–26 (Worthington Chauncey Ford ed., 1906). The fact of the matter was that the Declaration needed to be published as soon as possible to obtain a foreign alliance. Otherwise, it was feared, the union would fail. *See* CHARLES, *supra* note 18, at 299–324; Armitage, *supra* note 19, at 46–50; *see also* EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC 1763–89, at 103–04 (3d ed., 1992) (stating that the term "Independent States" conveyed both a singular as well as plural meaning because the Congress took immediate steps to prepare the Articles of Confederation).

Congress. Pennsylvania Judge Alexander Addison would later describe the legal status quo as follows:

Incidental powers, without being expressed, result from every civil organization: for it is the will of those concerned that it should be effectual for its purposes. Thus, before the [Articles of] confederation, which gave the power, Congress formed treaties; by a sort of common law, which gave to Congress, as the only general organ, the authority usually annexed to such a government.²⁵

Addison was not the only late eighteenth-century legal mind to come to this conclusion. In 1795, Justice John Blair, Jr. argued that the pre-Declaration Continental Congress maintained incidental powers in compliance with the law of nations, including “every authority for preventing injuries to neutral powers, and their subjects, and even cruelty to the enemy.”²⁶ Blair could not see how the text of the Declaration changed the status quo, for Congress “had a right to extend their authority to a desired point” even “if it was not given.”²⁷ This did not mean that Congress had free reign to ignore the directions given by the new “Free and Independent States.” As Blair astutely pointed out, until the Articles of Confederation were put in place, Congress generally gave the States “an opportunity . . . to express their disapprobation, if they conceived Congress to have usurped power, or by their co-operation to confirm the construction of Congress; which would be as legitimate a source of authority, as if it had been given at first.”²⁸

Perhaps the most prominent jurist to affirm that the Declaration of Independence appropriated a government of “the whole people” was the first Chief Justice of the Supreme Court, John Jay. In 1793, Jay, who had negotiated the 1783 Treaty of Paris,²⁹ conveyed the following:

The Revolution, or rather the Declaration of Independence, found the people *already* united for general purposes, and at the same time providing for their more domestic concerns by State conventions, and other temporary arrangements. From the crown of *Great Britain*, the sovereignty of their country passed to the people

²⁵ ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY 31 (Raleigh, Hodge & Boylan 1800). For the importance of the work of Alexander Addison in American constitutional jurisprudence, see generally Patrick J. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause: Resurrecting the Jurisprudence of Alexander Addison*, 58 CLEV. ST. L. REV. 529 (2010).

²⁶ Penhallow v. Doane’s Adm’r, 3 U.S. (3 Dall.) 54, 110 (1795).

²⁷ *Id.* at 111.

²⁸ *Id.*

²⁹ See JACK RAKOVE, REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA 274–88 (2010).

of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed not to the people of the Colony or States within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations; the people nevertheless continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly; afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the States, the basis of a general Government.³⁰

Indeed, Jay did not state that the Declaration granted Congress any express powers, but as Addison and Blair's interpretation astutely points out, the law of nations prescribed that all compacts contain incidental powers that are inherent in sovereignty.³¹ On July 16, 1776, Continental Major Joseph Hawley was of a similar mindset, for after receiving news of the Declaration he advocated that Congress should use its new found independence to enact a "high treason" bill, applicable "in all the *United States*, saving to the Legislature of each Colony or State the right of attaining individuals by act or bill of attainder."³² Of course, any room for debate on the constitutional limits of congressional power was short lived once the Articles of Confederation were ratified. The Articles delegated to Congress defined legislative powers³³ with the "consent of nine States,"³⁴ leaving to the respective states their "sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States."³⁵

At the same time, however, there is nothing which indicates that the Articles of Confederation nullified the Declaration's guarantee that republican "Governments are instituted among Men, deriving their just powers from the consent of the governed" to secure "Life, Liberty, and the pursuit of Happiness."³⁶ The Declaration's preamble was more than just empty rhetoric.³⁷ As John Hancock, President of the Continental

³⁰ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419.

³¹ *Penhallow*, 3 U.S. (3 Dall.) at 110–11; ADDISON, *supra* note 25, at 31.

³² Letter from Major Joseph Hawley to Elbridge Gerry (July 17, 1776), in 1 AMERICAN ARCHIVES, 5th ser., *supra* note 1, at 403.

³³ ARTICLES OF CONFEDERATION of 1781, art. IX.

³⁴ *Id.* at art. X.

³⁵ *Id.* at art. II.

³⁶ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³⁷ BECKER, *supra* note 20, at 17–18 (denoting the interrelation between the preamble and the grievances as a theory of government); see also Pencak, *supra* note 19, at 228, 232–33.

Congress, wrote to the different state conventions, the Declaration was the “ground and foundation of a future Government.”³⁸

The South Carolina Assembly took Hancock’s written speech to heart, replying:

It is with the most unspeakable pleasure we embrace this opportunity of expressing our joy and satisfaction in the declaration of the Continental Congress declaring the *United Colonies* free and independent States . . . [and] equally rejoice in [the Declaration] as the only effectual security against injuries and oppressions, and the most promising source of future liberty and safety.³⁹

Colonel Jedediah Huntington did not receive a letter from Hancock, yet viewed the Declaration of Independence in a similar light—as the foundation of future government. Huntington conveyed to Governor John Trumbull of Connecticut his hope that no pains would be spared “to have the foundations of the great Continental government well laid, and as well that of [the] particular States” in accordance with the Declaration.⁴⁰ These governments should espouse “publick virtue and liberty, which make the publick happiness.”⁴¹ Thus, according to Huntington, the Declaration’s preservation of “life, liberty, and the pursuit of happiness” was a guarantee upon which democratic republics became constituted.

Huntington was not alone in viewing the Declaration as providing constitutional guidance. Tench Coxe, under the pen name of “An American Citizen,” wrote that the Declaration “led to the adoption of the republican form [of government] among which was the predilection of the people.”⁴² Meanwhile, a 1784 editor wrote under the pen name “Honestus” that the “end and design” of the Declaration was “to secure our real rights,” including the principle “that all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, among which are the rights of acquiring, possessing, and protecting property.”⁴³

Perhaps the most forthright speech advocating that the idea the Declaration was a living constitutional document came from Samuel Adams. Having worked intimately

³⁸ Letter from John Hancock, President of Congress, to the New York Convention, *supra* note 1, at 33.

³⁹ PROCEEDINGS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH-CAROLINA, in 3 AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE UNITED STATES OF AMERICA, 5th ser., 7–8 (Peter Force ed., 1848).

⁴⁰ Letter from Jedediah Huntington to John Trumbull, Governor of Connecticut (July 22, 1776), in 1 AMERICAN ARCHIVES, 5th ser., *supra* note 1, at 510.

⁴¹ *Id.*

⁴² Tench Coxe, *On Federal Government. No. 1*, HAMPSHIRE CHRONICLE (Springfield, Mass.), Oct. 16, 1787, at 4.

⁴³ Honestus, *To the Inhabitants of Vermont*, VT. GAZETTE OR FREEMANS DEPOSITORY (Bennington, Vt.), Feb. 7, 1784, at 4.

with Hancock even before the outbreak of the Revolutionary War, Adams's January 17, 1794 speech agreed with Hancock that the Declaration was the "ground and foundation of a future Government"⁴⁴:

[A]fter the memorable declaration of their Independence was by solemn treaty agreed to and ratified by the British King, the only power that could have any pretence to dispute it, they considered themselves decidedly free and independent of all other people. Having taken rank among nations, it was judged that their great affairs could no[t] well be conducted under the direction of a number of distinct sovereignties [under the Articles of Confederation]. They therefore formed and adopted a Federal Constitution All powers not vested in Congress, remain in the separate States, to be exercised according to their respective Constitutions

. . . .

Before the formation of this Constitution, it had been affirmed as a self-evident truth, in the declaration of Independence, very deliberately made by the Representatives of the United States of *America*, in Congress assembled, "that all men are created equal, and are endowed by their Creator with certain unalienable rights." This declaration of Independence was received and ratified by all the States in the Union, and *has never been disannulled*. May we not from hence conclude, that the doctrine of Liberty and Equality is an article in the political creed of the United States.⁴⁵

Given the Constitution's implicit acquiescence to slavery,⁴⁶ it is well documented that Adams's references to legal equality, in the modern sense of the term, were not a living reality throughout the United States. However, it is worth noting that Massachusetts was the exception to the rule. In 1783, the Massachusetts Superior

⁴⁴ Letter from John Hancock, President of Congress, to the New York Convention, *supra* note 1, at 33.

⁴⁵ John Adams, Lieutenant Governor of Massachusetts, Speech Before the Massachusetts Legislature (Jan. 17, 1794), in *RESOLVES OF THE GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 33–34* (Bos., Adams & Larkin 1794) (emphasis added).

⁴⁶ See U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."); *id.* at art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year [1808], but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

Court held that the institution of slavery was unconstitutional under the 1780 Massachusetts Constitution.⁴⁷ Future Associate Supreme Court Justice William Cushing presided over the case. Explaining the decision to Governor John Hancock, Cushing wrote that the court was “unable to conceive” how the “determination [was] an attack upon the State freedom, dignity, independence & Sovereignty, of South Carolina,” and noted that the court was “sincerely sorry to do anything inconsistent with the union of the states, which is & must continue to be the basis of our liberties & independence.”⁴⁸ If anything were to come of the decision, Cushing hoped the union might “be strengthened, confirmed & endure forever.”⁴⁹

This Article does not set forth to rehash the rich historical scholarship concerning eighteenth-century equality and slavery⁵⁰ or the mid-nineteenth-century holding in *Dred Scott v. Sandford*,⁵¹ other than to opine that the phrase “all men are created equal” came with the caveat that those referred to were in fact *legally free* in eighteenth-century society. What this Article will take from Adams’s speech is that the phrase “all men are created equal” was interrelated with the constitutional principle embodied in preserving “life, liberty, and the pursuit of happiness.”⁵² Moreover, this Article will draw upon Adams’s acknowledgment that the text of the Declaration was intended to be the basis of republican government. Having been part of the ratification of the 1780 Massachusetts Constitution,⁵³ Adams knew that it was “calculated to promote the happiness of th[e] State” and its constituents.⁵⁴ The representatives of the Massachusetts Constitutional Convention were not just adopting any government. They had been “appointed, authorized and instructed . . . in one body, with the Council, to form such a constitution of government as they shall judge best calculated to promote the happiness of th[e] State.”⁵⁵ This understanding of the preservation of “life, liberty,

⁴⁷ See Letter from William Cushing to John Hancock, Governor of Massachusetts (Dec. 20, 1783) (on file with the Library of Congress Manuscripts Division, Washington, D.C.); *accord* CONSTITUTION OR FORM OF GOVERNMENT FOR THE COMMONWEALTH OF MASSACHUSETTS, pt. I, art. I (1780), in 3 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1888–90 (Francis Newton Thorpe ed., 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS].

⁴⁸ Letter from William Cushing to John Hancock, Governor of Massachusetts, *supra* note 47.

⁴⁹ *Id.*

⁵⁰ For a great summary of this issue, see MAIER, *supra* note 18, at 146, 197–207. See also BENJAMIN QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION 42–43 (1961). The irony did not go unnoticed by the English. See BERNARD BAILYN, THE ORDEAL OF THOMAS HUTCHINSON 357–58 (1974).

⁵¹ 60 U.S. (19 How.) 393 (1857).

⁵² See MORGAN, *supra* note 24, at 139.

⁵³ See JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY 7–8 (Bos., Dutton & Wentworth 1832).

⁵⁴ *A Constitution and Form of Government for the State of Massachusetts-Bay*, in CONTINENTAL J. AND WEEKLY ADVERTISER (Bos.), Mar. 19, 1778, at 2.

⁵⁵ *Id.*

and the pursuit of happiness” was even embodied in the Massachusetts Declaration of Rights:

Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestible[,] unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it.⁵⁶

As a matter of constitutional interpretation, it should not matter that the Declaration itself was rarely celebrated circa 1776,⁵⁷ and if it was celebrated, it was because it “proclaimed that ‘these united colonies are and of right ought to be free and independent states.’”⁵⁸ It also should not matter that the Declaration was the pronouncement of an insular minority.⁵⁹ Sir Henry Clinton correctly classified the Declaration as being “carried from one voice only” within the margins of his personal volume of Charles Stedman’s *The History of the Origin, Progress, and Termination*

⁵⁶ CONSTITUTION OR FORM OF GOVERNMENT FOR THE COMMONWEALTH OF MASSACHUSETTS, pt. I, art. VII (1780), in *THE FEDERAL & STATE CONSTITUTIONS*, *supra* note 47, at 1889.

⁵⁷ For some instances of celebration, see DECLARATION OF INDEPENDENCE PROCLAIMED AT BRIDGETOWN, CUMBERLAND CNTY., NEW-JERSEY (1776), in 1 *AMERICAN ARCHIVES*, 5th ser., *supra* note 1, at 811; DECLARATION OF INDEPENDENCY READ AT THE STATE-HOUSE IN PHILA. (1776), in 1 *AMERICAN ARCHIVES*, 5th ser., *supra* note 1, at 119; DECLARATION OF INDEPENDENCY PROCLAIMED IN EASTON, N.J. (1776), in 1 *AMERICAN ARCHIVES*, 5th ser., *supra* note 1, at 119; DECLARATION OF INDEPENDENCE WITH THE NEW CONSTITUTION OF N.J. PROCLAIMED IN TRENTON (1776), in 1 *AMERICAN ARCHIVES*, 5th ser., *supra* note 1, at 119–20.

⁵⁸ Pauline Maier, *The Strange History of “All Men Are Created Equal,”* 56 *WASH. & LEE L. REV.* 873, 877 (1999) (quoting THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776)).

⁵⁹ Historical estimates have varied as to how many colonists supported the patriot cause and the Declaration of Independence. If the writings of John Adams are the historical benchmark, it is estimated that one-third supported the Revolution, one-third were loyalists, and one-third were neutral. See 10 *THE WORKS OF JOHN ADAMS* 193 (Charles Francis Adams ed., Bos., Little, Brown & Co. 1856). However, this calculation proves problematic as a matter of reliable statistics. See Paul H. Smith, *The American Loyalists: Notes on Their Organization and Numerical Strength*, 25 *WM. & MARY Q.* 259, 259–60 (1968). For instance, taking into account loyalist enrollment in the Provincial Service and other social statistics, Smith asserts Adams’s numbers are an overestimate and that loyalists comprised “19.8 per cent of . . . white Americans.” *Id.* at 269. This formulation is problematic too, however, in that it fails to take into account the lack of organization by the loyalists, their inability to express their opinions in the press, and other social factors. See also CHARLES, *supra* note 18, at 187–90; CHRISTOPHER HIBBERT, *REDCOATS AND REBELS: THE AMERICAN REVOLUTION THROUGH BRITISH EYES* 78–79 (1990); RAY RAPHAEL, *A PEOPLE’S HISTORY OF THE AMERICAN REVOLUTION: HOW COMMON PEOPLE SHAPED THE FIGHT FOR INDEPENDENCE* 187–233 (2001) (discussing British and Patriot attempts to mobilize Native American tribes).

of the American War.⁶⁰ At the same time, Clinton’s view is moot in terms of constitutional interpretation, for independence was eventually affirmed. Most importantly, as a matter of law, the historical fact remains that the Declaration was acknowledged as the official instrument of independence by England in the 1783 Treaty of Paris,⁶¹ it remained the basis of state constitutions,⁶² and was viewed by many as the foundation of American government itself.⁶³ The historical reality is that the founding generation was already immersed in and living the government prescribed by the Declaration of Independence—a government built upon equitable principles and on the actual consent of the governed. In the words of Reverend Elijah Waterman, a historian of his time,⁶⁴ commemorating the Declaration on July 4, 1794:

AMERICANS should ever watch the causes which produced their revolution, which produced the declaration of independence. That this truth may be practically inculcated upon their minds—to preserve their rights and liberties, they must tenaciously adhere to the same principles, by which they were originated and perfected. Whatever has been the foundation of their independence, must

⁶⁰ 1 CHARLES STEDMAN, THE HISTORY OF THE ORIGIN, PROGRESS, AND TERMINATION OF THE AMERICAN WAR 189 (Sir Henry Clinton ed., London, J. Murray 1794) (on file with the Society of the Cincinnati Library, Washington, D.C.).

⁶¹ For a contemporaneous legal analysis of the Declaration in the context of defining citizenship, see GEORGE CHALMERS, OPINIONS ON INTERESTING SUBJECTS OF PUBLIC LAW AND COMMERCIAL POLICY; ARISING FROM AMERICAN INDEPENDENCE 1–25 (London, J. Debrett 1785). For a debate over the definition of when United States citizenship began, compare Patrick J. Charles, *When Did United States Citizenship Start?*, THE CHARLES LAW & HISTORY BLOG (Dec. 7, 2010), <http://www.patrickjcharles.wordpress.com/2010/12/07/when-did-united-states-citizenship-start/> (arguing the difficulty of identifying the Declaration as the actual starting point of United States citizenship), with Josh Blackman, Essay, *Original Citizenship*, 159 U. PA. L. REV. PENUMBRA 95 (2010) (arguing that the Declaration is the logical starting part of “original” citizenship).

⁶² See BECKER, *supra* note 20, at 238–40 (discussing the Declaration’s impact on early state constitutions); William F. Dana, *The Declaration of Independence*, 13 HARV. L. REV. 319, 323–28 (1900) (comparing and contrasting the Virginia Declaration of Rights with the Declaration of Independence).

⁶³ See ELIJAH WATERMAN, AN ORATION DELIVERED BEFORE THE SOCIETY OF CINCINNATI, HARTFORD, JULY 4, 1794, at 16 (Hartford, Hudson & Goodwin 1794); Dana, *supra* note 62, at 342–43.

⁶⁴ Elijah Waterman provided one of the first histories of Windham, Connecticut following the American Revolution. See ELIJAH WATERMAN, A CENTURY SERMON, PREACHED BEFORE THE FIRST CHURCH IN WINDHAM, DECEMBER 10, 1800 (Windham, John Byrne 1801). Waterman believed that “town records and recent tradition” made the compiling and writing of history easier “than it is possible they should be many years hence.” FARMER’S MUSEUM, OR LITERARY GAZETTE (Walpole, N.H.), Nov. 3, 1800, at 3. Waterman also wrote a history on the life and memoirs of John Calvin. See ELIJAH WATERMAN, MEMOIRS OF THE LIFE AND WRITINGS OF JOHN CALVIN (Hartford, Hale & Mosner 1813).

still be preserved as the permanent basis of their security and future happiness. The mind, when it reflects that former nations have uniformly travelled in the road to ruin, is anxious to know, if there is not some way through which we may walk in safety, and continue our existence as a happy people till time shall be no longer.⁶⁵

II. A BRIEF HISTORIOGRAPHY OF “LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS” AS A MATTER OF LEGAL THOUGHT, WITH A FOCUS ON “HAPPINESS”

Waterman’s oration highlights that many viewed the “foundation” of the Republic as being associated with the principles embodied in the Declaration.⁶⁶ In particular, the securing or preservation of “life, liberty, and the pursuit of happiness” did not constitute a novel concept created by Thomas Jefferson or the founding generation.⁶⁷ The concept was intimately connected with the ideological purpose of republican governments, and, coupled with the Declaration’s grievances, provides insight into the theory of government embodied in the preservation of “life, liberty, and the pursuit of happiness.”⁶⁸ Writing on the subject nearly forty years later, Jefferson demonstrated this very understanding of the Declaration:

Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, [the Declaration of Independence] was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, &c.⁶⁹

⁶⁵ WATERMAN, *supra* note 63, at 16.

⁶⁶ *Id.*

⁶⁷ CHARLES, *supra* note 18, at 53–82 (tracing the Declaration’s principles back to the 1688–89 Glorious Revolution); DANA, *supra* note 62, at 337–41 (tracing the Declaration’s principles to John Locke and the 1688–89 Glorious Revolution); RONALD HAMOWY, *Jefferson and the Scottish Enlightenment: A Critique of Garry Wills’s Inventing America: Jefferson’s Declaration of Independence*, 36 WM. & MARY Q. 503 (1979) (tracing the Declaration’s principles to the Scottish Enlightenment). For an alternative viewpoint, see BARRY BELL, *Reading and “Misreading,” the Declaration of Independence*, 18 EARLY AM. LITERATURE 71, 72 (1983) (arguing that historians still have not come any “closer to a final, sufficient paraphrase of the Declaration’s implicit philosophy, for historians have not in fact discovered the *source* of Jefferson’s ideas but rather their myriad *sources*”).

⁶⁸ BECKER, *supra* note 20, at 16–18, 22; PENCAR, *supra* note 19, at 228, 232–34.

⁶⁹ 10 THE WRITINGS OF THOMAS JEFFERSON 343 (Paul Leicester Ford ed., New York & London, G.P. Putnam’s Sons 1899).

While it is difficult to claim this reflection is contemporaneous with Jefferson’s sentiments in 1776, it is a statement that finds support in the historical record.⁷⁰ As those before them, American writers throughout the United States wrote often on what constituted the preservation of “life, liberty, and the pursuit of happiness” without ever crediting the Declaration itself. These writings convey that the phrase was a well-established political, constitutional, and legal idea that government is established for the *public* or *common good*.⁷¹ This interpretation held especially true for late eighteenth-century American jurists. Their writings, in particular, espouse the belief that “liberty” and “happiness” were intimately linked to the function of a republican government.⁷² It was a principle that formed with society in a state of nature, required government to institute laws for the good of the whole, and has been explicit within American government since 1776, and perhaps earlier.⁷³

Historians and legal minds have disputed what Jefferson and the founding generation meant by the preservation of “life, liberty, and the pursuit of happiness” for over a century. Indeed, well before the Declaration was transformed by the Thirty-Ninth Reconstruction Congress, debate surfaced over the meaning of its text. However, there was no serious academic attempt to find its true original meaning or purpose until 1922,⁷⁴ when Carl Becker published *The Declaration of Independence: A Study in the History of Political Ideas*. Principally attributing “happiness” to the writings of John Locke,⁷⁵ Becker summed up pre-Declaration thought on the subject as follows: “Thus the power of sovereignty, being limited by the superior law of nature, which affirms that the happiness of the governed is the ultimate end of all government, must be subject to control by the governed in order that that ultimate end may be attained.”⁷⁶

⁷⁰ See generally DARRIN M. MCMAHON, *THE PURSUIT OF HAPPINESS: A HISTORY FROM THE GREEKS TO THE PRESENT* 314–31 (2006); Wilbur Samuel Howell, *The Declaration of Independence and Eighteenth-Century Logic*, 18 WM. & MARY Q. 463 (1961).

⁷¹ See MCMAHON, *supra* note 70, at 314–31.

⁷² See *infra* Part III.A–C.

⁷³ For a historical summary of the legislative liberties afforded the colonial legislatures and their relationship with Parliament and the Crown, see JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* 19–66 (2011).

⁷⁴ In 1900, William F. Dana did publish a Harvard Law Review article titled: *The Declaration of Independence*. Dana, *supra* note 62. However, his method was to trace the origins of the Declaration through the Virginia Declaration of Rights, and he ultimately determined that the Declaration was merely a “justification of the Revolution,—the right of a people to revolt against oppression,” and nothing more. *Id.* at 342. Dana does properly raise the question of whether “life, liberty, and the pursuit of happiness” are “‘self-evident truths,’ or . . . ‘glittering and sounding generalities.’” *Id.* at 328 (quoting Rufus Choate to the Maine Whig State Central Committee (Aug. 9, 1856), in 1 *THE WORKS OF RUFUS CHOATE* 212, 215 (Samuel Gilman Brown, ed., Bos., Little, Brown & Co. 1862)). However, he utterly fails to examine the political, philosophical, and constitutional theories it embodies. For another early attempt to find the Declaration’s origins, see Archibald Henderson, *The Mecklenburg Declaration of Independence*, 5 MISS. VALLEY HIST. REV. 207, 207–15 (1918).

⁷⁵ BECKER, *supra* note 20, at 24–79 (discussing Locke’s theory on natural rights).

⁷⁶ *Id.* at 110.

Becker correctly identified that “happiness” is the constitutional end of government, but neglected to detail how this is embodied in American constitutionalism. Much later in the work, Becker did identify “the consent of the governed . . . in the form of the right of the majority to rule” as an “article of faith” upon which our modern democracy is based,⁷⁷ yet failed ever to connect the principle to the Declaration’s embodiment of “life, liberty, and the pursuit of happiness.”

In 1935, Charles Maurice Wiltse attempted to answer this narrower question, admitting that “the happiness principle is less easy to trace.”⁷⁸ Tracing the origins of “happiness” through Locke, Francis Hutcheson, Joseph Priestly, Cesare Beccaria, Jeremy Bentham, and others, Wiltse concluded:

The happiness principle is undoubtedly the most significant feature of Jefferson’s theory of rights, for it raises government above the mere negative function of securing the individual against the encroachments of others. By recognizing a right to the pursuit of happiness, the state is committed to aid its citizens in the constructive task of obtaining their desires, whatever they may be. It should also be noted that this principle is universal, and therein is distinct from the hedonistic maxim of Bentham. The state is to secure, not merely the greatest happiness of the greatest number, but so far as possible the greatest happiness of all its citizens whatever their condition. It may well mean, therefore, that many will be restrained from achieving the maximum of happiness, that others less fortunate may obtain more than the minimum. No one will get all he wants, perhaps, but so far as the power of the state can go, everyone will get something.⁷⁹

There, Wiltse noted that the “happiness principle” is not only the “most significant feature” of the Declaration, but that it also embodies a theory of government. This Article agrees with Wiltse’s assessment and seeks to focus on “happiness” and its relationship with the preservation of “life” and “liberty.” Unfortunately, while Wiltse’s work considerably expanded historians’ understanding of what Jefferson and the founding generation intended by including the preservation of “life, liberty, and the pursuit of happiness” in the Declaration’s preamble, it faltered in that Wiltse dismissed Bentham’s understanding of “happiness” without credible reason. Certainly, Bentham opposed the Declaration of Independence, and even wrote *Short Review of the Declaration*, which was highly critical of the

⁷⁷ *Id.* at 234.

⁷⁸ CHARLES MAURICE WILTSE, *THE JEFFERSONIAN TRADITION IN AMERICAN DEMOCRACY* 70 (1935).

⁷⁹ *Id.* at 70–71.

“self-evident truths” espoused.⁸⁰ However, as will be explored further in Part III,⁸¹ this dissenting critique was not published until after the Declaration itself, meaning that Jefferson and the founding generation’s views on happiness were not necessarily that different.⁸²

A year later, in 1936, a literary debate over the “pursuit of happiness” again surfaced, centering this time on whether authority for the philosophy should be derived from Jefferson’s *Commonplace Book* or other eighteenth-century writings.⁸³ The debate provided no definitive answer, except that the concept was well-known and developed at the time of the Declaration.⁸⁴ This thesis would later be picked up by Wilbur Samuel Howell. His article, *The Declaration of Independence and Eighteenth-Century Logic*, sought to embrace Jefferson’s 1825 letter to Richard Henry Lee and argues that the Declaration embodies what modern legal scholars dub *public* or *popular* understanding.⁸⁵ However, Howell examined the Declaration only as an exercise in logical rhetoric, and not as a political, philosophical, or constitutional system of government. Howell ultimately concluded:

Those who approach the Declaration in the belief that the principles of rhetoric are timeless and unchanging, and that the Declaration, or any other major persuasive work of any period or place, should of course conform to those unchanging principles, or else be judged inartistic, are at once confronted by a paradox. For the Declaration is obviously persuasive in purpose and effect; but it does not conform to what would have been called [in the late eighteenth century] the principles of traditional rhetorical theory. . . . [R]hetoric is not fixed and changeless. It changes as the culture around it does. Thus the Declaration is an expression, not of traditional eighteenth-century rhetoric . . . but of a newly emerging rhetoric that was influenced by Locke and by Duncan and that would be fully expressed later in the century by Priestly and above all by Campbell.⁸⁶

⁸⁰ Armitage, *supra* note 19, at 53–54; see also Jeremy Bentham, *Short Review of the Declaration*, in JOHN LIND & JEREMY BENTHAM, AN ANSWER TO THE DECLARATION OF THE AMERICAN CONGRESS 119–32 (London, T. Cadell, T. Sewell, & J. Walter 1776).

⁸¹ See *infra* Part III.

⁸² See *infra* Part III.B.

⁸³ Compare GILBERT CHINARD, THE COMMONPLACE BOOK OF THOMAS JEFFERSON 1–65 (1926), with Herbert Lawrence Ganter, *Jefferson’s “Pursuit of Happiness” and Some Forgotten Men (First Installment)*, 16 WM. & MARY Q. 422, 429–34 (1936) and Herbert Lawrence Ganter, *Jefferson’s “Pursuit of Happiness” and Some Forgotten Men (Concluding Installment)*, 16 WM. & MARY Q. 558 (1936).

⁸⁴ See Ganter, *supra* note 83, at 584–85.

⁸⁵ Howell, *supra* note 70, at 463.

⁸⁶ *Id.* at 482–83.

Given that Howell restrained the Declaration in the paradigm of eighteenth-century *public* or *popular* rhetoric, his conclusion is understandable. Rhetoric is not “fixed or changeless,” and this holds especially true with the text of the Declaration over the last century.⁸⁷ Its literary qualities are so intoxicating that every individual takes his or her own interpretation or belief. As early as 1900, William F. Dana observed that the Declaration’s rhetoric was used by “the Confederacy, Utah polygamists, and woman suffragists,” all of whom carried “the doctrines of the Declaration to an absurdity.”⁸⁸ Today, members of the Christian faith seek refuge in the Declaration’s reference to “nature’s god” and “Creator,” arguing that it provides proof that American independence is linked to Christianity.⁸⁹ Others view it as acknowledging a governmental duty to ensure economic prosperity, or their own concept of what constitutes the “American way” of life.⁹⁰ During the 2011 telecast of the National Football League’s Super Bowl, the text of the Declaration was read,⁹¹ as if to remind Americans, and perhaps the world, of its guarantees. Yet, at the same time, I am certain individuals watching the telecast took different meanings from the Declaration as it was read line by line. In other words, Declaration revisionism is not a modern concept, though it continues to this day, as our modern perceptions and viewpoints are often outside any realm of historical context, and we all transpose our own personal meaning onto its sacred text.

In 1978, Garry Wills sought to fix such modern misconceptions with *Inventing America: Jefferson’s Declaration of Independence*.⁹² Wills’s approach was to break down the text of the Declaration line by line, phrase by phrase, word by word, and assemble the whole; what modern legal scholars dub *textualism*.⁹³ In doing so, Wills followed the work of Wiltse and corrected the assertion that Locke was the primary inspiration for the Declaration’s infamous “life, liberty, and the pursuit of happiness” language. Instead, Wills argued it was the works of Francis Hutcheson and Cesare

⁸⁷ See Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413, 415–31 (2006) (tracing the interpretation of the Declaration through different eras and civil rights movements).

⁸⁸ Dana, *supra* note 62, at 329.

⁸⁹ See generally ALAN M. DERSHOWITZ, *AMERICA DECLARES INDEPENDENCE 9–17, 75–77* (2003) (disputing the claim that the Declaration shows that the United States was intended to be a Christian nation).

⁹⁰ See GERBER, *supra* note 6, at 191–93 (arguing that the Declaration and the Constitution protect economic and non-economic rights alike).

⁹¹ Ryan Berenz, *Super Bowl XLV Schedule on Fox*, CHANNEL GUIDE MAGAZINE (Feb. 3, 2011), <http://channelguidemagblog.com/index.php/2011/02/03/super-bowl-XLV-schedule-on-fox>.

⁹² See WILLS, *supra* note 13. It is worth noting that Arthur M. Schlesinger attempted to restore the “lost meaning” of the “pursuit of happiness” in 1964. See Arthur M. Schlesinger, *The Lost Meaning of “The Pursuit of Happiness,”* 21 WM. & MARY Q. 325, 326 (1964). However, Schlesinger incorrectly equates “pursuit” with the *practicing* of happiness. *Id.* at 327.

⁹³ See generally Caleb Nelson, *What is Textualism*, 91 VA. L. REV. 347 (2005) (examining the rhetoric that has been used to describe textualism).

Beccaria that were the Declaration’s true origins, especially when trying to understand the legal principle of happiness.⁹⁴ The proposition being that in law one must “give the multiplicity of human acts a single center, and consider them in this single light: the greatest happiness distributed among the greatest number.”⁹⁵ In other words, *happiness* was a basis for social organization and compacts or constitutionalism.⁹⁶

Given Wills’s separation of the Declaration from Locke’s philosophy, it is not surprising that his work received mixed reviews in the historical community. Acclaimed historian Jack P. Greene opined, “while it is highly probable that earlier historians have attributed far too much influence to Locke . . . we will not know” the Declaration’s true influences “until somebody makes the attempt” to delve further.⁹⁷ Paul H. Smith made a similar observation by applauding Wills for forcing historians “to take a closer look at one of the fundamental ‘testaments’ of the American Revolution,” but felt Wills sometimes “overreache[d] himself” when placing the Declaration in historical context.⁹⁸

Other historians embraced most of Wills’s findings, yet disagreed with his argument as to the “pursuit of happiness.” For instance, Robert Ginsberg felt Wills made “a solid case that pursuit of happiness was not intended as a vague Platonic quest for an ideal unrealizable on earth.”⁹⁹ However, Ginsberg was not convinced that the “pursuit of happiness” was “a technical term univocally defined within any exact philosophical position[,]” and instead felt it to be “an enriching ambiguity—hence appropriate for a political document.”¹⁰⁰ Ronald Hamowy also embraced Wills’s thesis argument as to Scottish influences,¹⁰¹ but deviated somewhat from Wills’s analysis of the “pursuit of happiness.”¹⁰² “The Declaration does not proclaim that the end of government is the maximization of happiness,” wrote Hamowy, “nor does it predicate the legitimacy of government on whether its citizens are happy but rather, on whether the rights of its

⁹⁴ WILLS, *supra* note 13, at 150–58, 248–55.

⁹⁵ *Id.* at 154–55 (citing CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENT 2 (London, J. Almon, 1764)); *see also* FRANCIS HUTCHESON, AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE IN TWO TREATISES 177 (Wolfgang Leidhold ed., Liberty Fund 2004) (1726) (“In the same manner, the moral Evil, or Vice, is as the Degree of Misery, and Number of Sufferers; so that, that Action is best, which procures the greatest Happiness for the greatest Numbers . . .”).

⁹⁶ WILLS, *supra* note 13, at 252–55.

⁹⁷ Jack P. Greene, Book Review, 93 COMP. LITERATURE 1065, 1067 (1978) (reviewing GARRY WILLS, INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE (1978)).

⁹⁸ Paul H. Smith, Book Review, 103 THE PA. MAG. OF HIST. AND BIOGRAPHY 262, 263–64 (1979) (reviewing GARRY WILLS, INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE (1978)).

⁹⁹ Robert Ginsberg, Book Review, 12 EIGHTEENTH-CENTURY STUD. 562, 563 (1979) (reviewing GARRY WILLS, INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE (1978)).

¹⁰⁰ *Id.*

¹⁰¹ *See* Hamowy, *supra* note 67, at 505.

¹⁰² *Id.* at 519–20.

citizens are respected.”¹⁰³ Meanwhile, writing nearly two decades later, Pauline Maier would come to the conclusion that the meaning of the “pursuit of happiness” was too difficult for historians to pinpoint or realize:

[R]eferences to happiness as a political goal are everywhere in American political writings as well, as anyone can see who bothers to look. What did Jefferson mean? The obvious answer is that he meant to say more economically and movingly what Mason stated with some awkwardness and at considerably greater length. . . . The inherent right to pursue happiness probably also included “the means of acquiring and possessing property,” but not the ownership of specific things since property can be sold and is therefore alienable. In this case, Jefferson perhaps sacrificed clarity of meaning for grace of language.¹⁰⁴

Ginsberg, Hamowy, and Maier’s point that “life, liberty, and the pursuit of happiness” was not intended to be a statement of precision is understandable. The term *happiness* appeared in voluminous writings in the late eighteenth century and Darrin McMahon’s work, titled *The Pursuit of Happiness*, traces the principle to Greek and Roman times.¹⁰⁵ Most recently Jack Rakove has concluded it “was one of those broad concepts that had both private and public meanings, a subject for philosophical inquiry rather than psychological babbling.”¹⁰⁶ These historical analyses, however, detract from the fact that *happiness*, as a legal and political proposition in late eighteenth-century thought, had an overarching definition and intended application in American constitutionalism. In the words of Gerald F. Moran, Wills was correct in noting that the “free pursuit of public happiness was . . . the backbone of any free society, state, or government.”¹⁰⁷ Wills had shown that *happiness* was intimately linked with “benevolence as the highest good,”¹⁰⁸ but somehow Wills failed to apply and fully appreciate the concept as a constitutional doctrine, and its interrelation to the federal and state constitutions. Thus, as a matter of constitutional and legal interpretation, Wills’s work is lacking.

In 1990, William Pencak sought to fix this deficiency. He concluded that the “revolutionary generation . . . clearly intended the rights of life, liberty, and the pursuit of happiness to be more than either mere rhetoric or the minimal . . . right of self-government as other nations” had claimed.¹⁰⁹ Indeed, Carl Becker had written on

¹⁰³ *Id.* at 519 (citation omitted).

¹⁰⁴ MAIER, *supra* note 18, at 134 (footnote omitted).

¹⁰⁵ See generally MCMAHON, *supra* note 70.

¹⁰⁶ RAKOVE, *supra* note 29, at 300.

¹⁰⁷ Moran, *supra* note 13, at 811.

¹⁰⁸ *Id.*

¹⁰⁹ Pencak, *supra* note 19, at 228 (emphasis added).

the Declaration as a theory of government,¹¹⁰ but Pencak differentiated himself from Becker and other historical analyses in that he expressly linked the Declaration’s grievances with the constraints of “life, liberty, and the pursuit of happiness,” concluding:

The Declaration therefore implies there are four conditions any government must fulfill to guarantee to the populace their equal rights to life, liberty, and the pursuit of happiness: a) pass laws necessary for the public good . . . b) no group of people within a polity ought to be denied adequate representation of its collective interest . . . c) justice must be administered impartially . . . and d) people should not be robbed, murdered, or harassed by their government.¹¹¹

This Article agrees with Pencak’s conclusion that the Declaration embodies a theory of government, but is separate in asserting that this theory is already explicit in American constitutionalism. Its recognition does not require any noticeable alteration of constitutional jurisprudence. Instead, the true embodiment of preserving “life, liberty, and the pursuit of happiness” is rather a simple concept—the greatest happiness of the greatest number of people. Certainly, this concept has caveats that need further explanation. Furthermore, it is imperative as this interpretation is fleshed out that one takes into account the Declaration’s international overtones and principles. As David Armitage informs us, much of the Declaration’s “context can be found in what was called at the time ‘the law of nature and of nations’ and that was just coming to be called ‘international law.’”¹¹²

III. PLACING THE INTERRELATIONSHIP OF “LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS” IN THE CONTEXT OF AMERICAN CONSTITUTIONALISM

Today, many Americans interpret the phrase “life, liberty, and the pursuit of happiness” as embodying inalienable natural rights and promises of broad liberties. Perhaps the most prominent legal academic supporting a caveat to this interpretational approach is Georgetown Law Professor Randy Barnett.¹¹³ Viewing the “pursuit of happiness” through a libertarian lens, Barnett asserts there is a *presumption of liberty* when examining the constitutionality of legislative acts. For instance, in the context of property rights, Barnett opines:

[I]f the purpose of recognizing property rights is to permit people to put their personal and local knowledge into action in pursuit

¹¹⁰ BECKER, *supra* note 20, at 17–18.

¹¹¹ Pencak, *supra* note 19, at 232.

¹¹² Armitage, *supra* note 19, at 42.

¹¹³ See RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 41–43 (1998) (referencing the “pursuit of happiness” as a natural right).

of happiness, peace, and prosperity, then they should be able to use their rightfully owned resources in any manner they wish. Only in this way will they be able to put their knowledge into action; and no third party will usually know better than they how to do this. At a minimum, this suggests that freedom of action is to be presumed rightful and that any constraints on this freedom require justification.¹¹⁴

As a matter of modern individual political virtue, there are no problems with Barnett's presumption. However, as a matter of eighteenth-century constitutionalism and political thought, the presumption is void of historical import, for Barnett's thesis is almost solely reliant on a modern libertarian perception of Locke's writings. Take for instance this passage from Barnett's work, titled *Restoring the Lost Constitution*:

Locke . . . claimed that whatever liberty or powers are given up when one enters society are given up . . . “the power of the Society, or *Legislative* constituted by them, *can never be suppos'd to extend farther than the common good . . .*” Locke distinguished the two powers that were given up, either entirely (the executive power) or to be regulated by law (the power of self-preservation), from a third species of natural rights that he does not claim a person surrenders upon entering civil society or upon forming a government. This third species is “the liberty he has of innocent Delights.” We might also call this the right to the *pursuit of happiness*. Provided that such pursuits do not unjustly interfere with the rights of others, the civil authority has no role in the prohibition or even the regulation of “innocent Delights.”¹¹⁵

Indeed, Locke was highly influential for the founding generation, but, as was discussed in Part II, historians have long understood that Locke's writings do not provide the sole or primary answer in tracing the legal origins and meaning of the Declaration's “life, liberty, and the pursuit of happiness” language.¹¹⁶ Locke was just one of infinite sources read by the founding generation, and often too much weight is placed on Locke's work as the wellspring of American constitutionalism. This does not mean that Locke's understanding of *happiness* is without some constitutional merit in decoding the Declaration of Independence. As historian Darrin M. McMahon shows us, happiness in both the Lockean liberal and classical republican forms “most likely

¹¹⁴ *Id.* at 73.

¹¹⁵ RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 72 (2004) (citing Locke's *Two Treatises on Government* to define “liberty” or “the pursuit of happiness”) (emphasis added) (citation omitted).

¹¹⁶ See discussion *supra* Part II.

coexisted in [Jefferson’s] mind and even overlapped.”¹¹⁷ In terms of eighteenth-century American constitutionalism, Lockean liberalism is reflected in constitutional rights, or what McMahon refers to as “barrier[s] . . . against the governments, institutions, and individuals that invariably [seek] to impede our natural due.”¹¹⁸ Meanwhile, the classical republican view of happiness, this being a society based upon the consent of the governed, is reflected in the democratic structure of American constitutionalism. This model links civic virtue and the advancement of the public good to the happiness of society.¹¹⁹

Barnett’s analysis falters in that it misapplies Lockean liberalism, and also mischaracterizes what constituted the *common* or *public good* in eighteenth-century constitutionalism.¹²⁰ Barnett claims that the *common* or *public good* embodied a legal presumption of liberty.¹²¹ Thus, “like the Constitution itself,” Barnett writes, “[t]he [p]resumption of [l]iberty . . . is a means to the end of achieving justice—which itself is a means to facilitating the pursuit of happiness by each person living in society with others.”¹²² This interpretation is unsupported by the historical evidence. It is revisionism in its basic form, in that Barnett’s interpretation views the ancient constitution with the impairment of modern influences. As will be discussed throughout Parts II and III, the phrases “common good,” “public good” and “good of the whole” were all synonyms for the classical republican principle embodied by the “pursuit of happiness” and its interrelationship with “liberty.”¹²³

Naturally, Barnett was not the first, nor the only one, to seek to interpret the Constitution as protecting natural rights in some interpretive form. In 1995, Scott Douglas Gerber published a controversial work titled: *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation*.¹²⁴ In it, Gerber asserts that prominent historians such as Gordon Wood, Bernard Bailyn, and J.G.A. Pocock

¹¹⁷ MCMAHON, *supra* note 70, at 325.

¹¹⁸ *Id.* at 324.

¹¹⁹ *Id.*

¹²⁰ This concept will be explored in more detail in Part III.B–D, but for current purposes, William Blackstone defined the “public good” as being “in nothing more essentially interested, than in the protection of every individual’s private rights, as modelled by the municipal law.” 1 WILLIAM BLACKSTONE, COMMENTARIES *139. There was no presumption of liberty except those restraints as imposed by the social compact or constitution. As Blackstone wrote, “the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce.” *Id.*; see also JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT 199 (David Lieberman ed., Liberty Fund 2007) (1771) (“As the proposed end of Legislation is not . . . to have the particular intentions of individuals, upon every case, known and complied with, but solely to have what is most conducive to the public good on the occasions that arise . . .”).

¹²¹ BARNETT, *supra* note 115, at 326–27.

¹²² *Id.* at 346.

¹²³ See *infra* Parts II, III; see also HUTCHESON, *supra* note 95, at 177 (interchangeably referring to “virtue,” “happiness,” “quantity of good,” etc. as the same principle).

¹²⁴ See GERBER, *supra* note 6.

revised the historical record by denying “that the principles upon which there was a [founding] consensus were the liberal principles of Locke.”¹²⁵ Gerber describes the concept as “republican revisionism,” for historians have stressed the founding generation’s “commitment to sacrificing private interest for the public good,”¹²⁶ all the while ignoring the natural rights embodied by “life, liberty, and the pursuit of happiness.”¹²⁷

Gerber goes to great lengths to assert that almost every piece of historical evidence supports the conclusion that the Declaration¹²⁸ and Constitution¹²⁹ were drafted to protect individualized natural rights. He even goes so far as to claim that the Constitution was not so much the result of the failure of the Articles of Confederation¹³⁰ as it was of “the desire to secure the natural rights of the American people in a more effective way than the Articles . . . were proving capable of doing.”¹³¹ It is a point of emphasis that the Constitution does not once incorporate the phrase “natural rights.” Nevertheless, Gerber reads portions, such as “[t]he preamble’s pledge to ‘establish justice,’” as “a reflection of the Framers’ underlying premise that the fundamental purpose of the Constitution is to secure natural rights.”¹³²

As a matter of eighteenth-century constitutional thought, Gerber’s claims falter, like Barnett’s, in that they misconstrue the concepts of the *public* or *common good* and the true importance of virtue in republican constitutionalism. Perhaps Gerber’s greatest shortfall is his mis-characterization of the “first principle” of government. Gerber reads it as embodying “the institutional means to secure the natural-rights philosophical ends [in] the Declaration.”¹³³ However, as will be shown below, this ignores that the first principle of government is the consent of the governed, or what the founding generation referred to as the *good of the whole*.¹³⁴

Whether it is Gerber’s thesis that the Declaration requires the protection of unalienable natural rights or Barnett’s view that the “pursuit of happiness” requires a presumption of liberty, these viewpoints have ushered in a new breed of libertarian legal scholars, all seeking a standard of review whereby constitutional rights are adjudicated within some natural-rights viewpoint. For instance, in a work titled *The Potentially Expansive Reach of McDonald v. Chicago: Enabling the Privileges or Immunities Clause*, Michael Anthony Lawrence hoped the Supreme Court would expand its interpretation of the Fourteenth Amendment’s Privileges and Immunities

¹²⁵ *Id.* at 24.

¹²⁶ *Id.*

¹²⁷ *Id.* at 24–28.

¹²⁸ *Id.* at 48–56.

¹²⁹ *Id.* at 57–92.

¹³⁰ *See supra* note 24 and accompanying text (discussing the failure of the Articles of Confederation).

¹³¹ GERBER, *supra* note 6, at 58.

¹³² *Id.* at 61.

¹³³ *Id.* at 59.

¹³⁴ *See infra* notes 238–43 and accompanying text.

Clause as a means of ushering in an all-new presumption of liberty.¹³⁵ Most recently, Josh Blackman has sought to examine the Second Amendment through what he calls “social costs.”¹³⁶ Similar to Barnett’s line of constitutional interpretation, Blackman argues that all constitutional rights should be interpreted equally, with the caveat that the judiciary should presume that impediments on the “right to keep and bear arms” are unconstitutional.¹³⁷

Unfortunately, constitutional paradigms such as these are built on false assumptions about what constitutes the Declaration’s “pursuit of happiness” and its interrelationship with “liberty.” It is the textual crux that continues to hinder modern legal scholarship related to the theory of government embodied by the Declaration.¹³⁸ To correct this misconception, one must keep the Declaration’s text and meaning within the constraints of eighteenth-century legal thought, and remove all modern biases and political leanings. Perhaps the easiest argument by which one may dismiss the viewpoint that “life, liberty, and the pursuit of happiness” guarantees individualized natural rights or offers a presumption of liberty is to point out that the Declaration was an international document concerned with nations, not individuals. As David Armitage details, the “natural rights interpretation . . . has become unavoidable” in modern scholarship, yet in the eighteenth century the Declaration stood as a “prescription[] for the rights of states as international actors,” a fact that has been “almost entirely forgotten.”¹³⁹ However, as correct and insightful as Armitage’s comments are, they do not provide us with an answer to help us fully appreciate the Founders’ understanding of the preservation of “life, liberty, and the pursuit of happiness” in constitutional terms.

A. Restoring the True Meaning of the Preservation of “Life, Liberty, and the Pursuit of Happiness” in Constitutional Thought

To begin, the Declaration’s use of the terms “laws of nature,” “Nature’s God,” and “endowed by their creator” were intended to reference the interrelationship between

¹³⁵ Michael Anthony Lawrence, *The Potentially Expansive Reach of McDonald v. Chicago: Enabling the Privileges or Immunities Clause*, 2010 CARDOZO L. REV. DE NOVO 139, 150–59 (2010). This article followed an earlier work in which Lawrence took a similar approach. See Lawrence, *supra* note 6, at 35–38.

¹³⁶ Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J. L. & PUB. POL’Y 951 (2011).

¹³⁷ To be more precise, Blackman is for putting the burden on the government to show the constitutionality of legislation. *Id.* at 984, 1031. This line of thinking is consistent with Barnett’s thesis. See BARNETT, *supra* note 113, at 73 (“At a minimum, this suggests that freedom of action is to be presumed rightful and that any constraints on this freedom require justification.”).

¹³⁸ For an example, see Andrew E. Taslitz, *The Happy Fourth Amendment: History and the People’s Quest for Constitutional Meaning*, 43 TEX. TECH L. REV. 137, 152–57 (2010) (applying a combination of history and social science to rectify the “pursuit of happiness” with the constraints of the Fourth Amendment).

¹³⁹ Armitage, *supra* note 19, at 62.

natural law, common law, and the law of nations. These terms were used to illuminate the prominent political theory that constituted all civil governments and social compacts, including the international foundation by which the right of self-preservation and resistance could be exercised to reform them.¹⁴⁰ As prominent Boston attorney Josiah Quincy Junior wrote in his *Law Commonplace Book*: “The Law of Nations, properly so called, [and] consider’d as a law proceeding from a superior, is nothing else, but the Law of Nature itself, not applied to Men consider’d simply as such; but to Nations or States.”¹⁴¹

It is within these constraints that the Declaration’s preamble is to be understood, for it embodies the belief and ideal that a Republic, based solely on the equitable consent of the people, will best preserve “life, liberty, and the pursuit of happiness.” It is a belief and ideal that became a reality in the text of the United States Constitution. The debates of the New York and Pennsylvania Constitution Conventions convey this very fact. Beginning with the New York Convention, on September 17, 1787, the following was communicated to Congress: “That all power is originally vested in, and consequently derived from, the people, and that government is instituted by them for their common interest, protection, and security. That the enjoyment of life, liberty, and the pursuit of happiness, are essential rights, which every government ought to respect and preserve.”¹⁴²

¹⁴⁰ See *id.* at 42–43, 45–46, 61–62 (discussing natural rights within the context of state actors and the law of nations); Patrick J. Charles, *The Constitutional Significance of a “Well-Regulated Militia” Asserted and Proven With Commentary on the Future of Second Amendment Jurisprudence*, 3 NORTHEASTERN U. L.J. 1, 34, 47 (2011) (discussing the right of self-preservation and resistance as an international right); Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO 18, 24–60 (2010) (discussing the right of self-preservation and resistance in Anglo-American thought); see also DAVID HUME, *ESSAYS: MORAL, POLITICAL, AND LITERARY* 490–92 (Eugene F. Miller ed., 1987) (1777) (differentiating the right of self-preservation from the law of nations and the English Constitution).

¹⁴¹ Josiah Quincy Junior, *Law Commonplace Book*, in 2 PORTRAIT OF A PATRIOT: THE MAJOR POLITICAL AND LEGAL PAPERS OF JOSIAH QUINCY JUNIOR 181 (Daniel R. Coquillette & Neil Longley York eds., 2007); see also 1 BLACKSTONE, *supra* note 120, at *43 (discussing the interrelation of the law of nature, municipal law, and the law of nations); 4 WILLIAM BLACKSTONE, *COMMENTARIES* *66–67 (same); EMER DE Vattel, *THE LAW OF NATIONS* 68 (Béla Kapossy & Richard Whatmore eds., 2008) (discussing how the “*law of nations* is originally no other than the *law of nature applied* to nations”); *id.* at 69–72; James Wilson, Charge to the Grand Jury of the Circuit Court of the United States, for the District of Pennsylvania (July 22, 1793), in NORTH-CAROLINA J. (Halifax, N.C.), Aug. 21, 1793, at 1 (“The LAW OF NATURE when applied to states or political societies receives a new name—that of the Law of NATIONS. . . . The law of *Nations* as well as the law of *Nature* is of *obligation indispensable*: The law of *nations* as well as the law of *nature* is of *origin divine*.”).

¹⁴² NEW YORK CONSTITUTIONAL CONVENTION, RATIFICATION, in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 327 (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1907) (1836) [hereinafter 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS].

The New York Convention’s reference to “life, liberty, and the pursuit of happiness” as *essential rights* could be construed as supporting a natural-rights or libertarian presumption of liberty approach,¹⁴³ but it is the *enjoyment* of these rights for the “common interest” that the Constitution was to protect.¹⁴⁴ No reference was made to “life, liberty, and the pursuit of happiness” being purely individualized, as was the freedom of religion.¹⁴⁵ Instead, they were guided by “the powers of government,” which “may be reassumed by the people whensoever it shall become necessary to their happiness.”¹⁴⁶ In other words, the Constitution provided internal mechanisms to amend the compact or to elect new officials who would maintain the peoples’ expected “happiness.”

The debates at the Pennsylvania Convention convey a similar understanding of how the Declaration’s reference to “life, liberty, and the pursuit of happiness” was explicit within the republican government itself. In particular, it was James Wilson who conveyed that the Constitution’s purpose was to establish a “system of government which would be best, to promote [the people’s] freedom and happiness.”¹⁴⁷ The problem with previous governments, Wilson argued, including that prescribed by the English Constitution, was that the “principle of representation [was] confined.”¹⁴⁸ Indeed, England could “boast” of the “admission of representation” in its system of government.¹⁴⁹ However, Wilson knew England’s government still relied on a monarchy that the courts could not effectively restrain, for the “judicial authority . . . does not depend upon representation, even in its most remote degree.”¹⁵⁰

The “American states,” stated Wilson, differentiated themselves in that the “vital principle” of representation was diffused “throughout the constituent parts of government” to effectuate “the glory and the happiness” of the people.¹⁵¹ Thus, as a matter of basic mathematics, American constitutionalism consisted of a governmental “pyramid . . . laid on the broad basis of the people; its powers gradually rise, while they are confined, in proportion as they ascend, until they end in that most permanent of all forms.”¹⁵² Happiness was infused within this representational system and the Constitution’s internal checks and balances. It was not a constitutionally protected natural right. Happiness was facilitated by the social compact and laws, for

¹⁴³ BARNETT, *supra* note 115, at 346.

¹⁴⁴ NEW YORK CONSTITUTIONAL CONVENTION, *supra* note 142, at 327.

¹⁴⁵ *Id.* at 328 (“That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion . . .”).

¹⁴⁶ *Id.* at 327.

¹⁴⁷ James Wilson, Debate, in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 420 (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1907) (1836) [hereinafter 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS].

¹⁴⁸ *Id.* at 424.

¹⁴⁹ *Id.* at 423.

¹⁵⁰ *Id.* at 424.

¹⁵¹ *Id.*

¹⁵² *Id.* at 524.

“each member, in such a natural state, would enjoy less liberty, and suffer more interruption,” than they would enjoy “in a regulated society.”¹⁵³ To paraphrase Wilson, the common belief was that, in a state of nature, only a small minority of people can truly enjoy happiness. This general unhappiness is different from the “introduction of governments of some kind or other into the social state,”¹⁵⁴ for societies and governments distribute liberty in equity:

The liberty of every member is increased by this introduction; for each gains more by the limitation of the freedom of every other member, than he loses by the limitation of his own. The result is, that civil government is necessary to the perfection and happiness of man. In forming this government, and carrying it into execution, it is *essential* that the *interest* and *authority* of the whole community should be binding in every part of it.¹⁵⁵

To Wilson, these principles were not only “just and sound with regard to the nature and formation of single governments”¹⁵⁶ such as the respective states, but also with regard to the formation of a national Constitution.¹⁵⁷ The Constitution’s intended purpose was to “produce the advantages of good, and prevent the inconveniences of bad government . . . whose beneficence and energy would pervade the whole Union,” and “would insure peace, freedom, and *happiness*, to the states and people of America.”¹⁵⁸ Wilson knew that the Declaration of Independence embodied the principle “to form either a general government, or state governments, in what manner they please, or to accommodate them to one another, and by this means preserve them all.”¹⁵⁹

Restating the Declaration’s preamble, Wilson confirmed that it stood for the basis of American government:

This is the broad basis on which our independence was placed: on the same certain and solid foundation this [Constitution] is erected.

State sovereignty, as it is called, is far from being able to support its weight. Nothing less than the authority of the people [of the United States] could either support it or give it efficacy.¹⁶⁰

¹⁵³ *Id.* at 426.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 427–34.

¹⁵⁸ *Id.* at 431 (emphasis added).

¹⁵⁹ *Id.* at 456–57.

¹⁶⁰ *Id.* at 457.

Thus, similar to John Hancock and Samuel Adams,¹⁶¹ Wilson viewed the Declaration as the basic embodiment of American government, and the ideal upon which constitutionalism should be based. Wilson did not care “whether it [was] called a *consolidation*, *confederation*, or *national government*, or by what other name” so long as it was “a good government, and calculated to promote the blessings of liberty, tranquillity, and happiness.”¹⁶²

The Pennsylvania Constitutional Convention was not the first nor only time Wilson articulated the preservation of “life, liberty, and pursuit of happiness” as being the framework of republican government. Two years before the penning of the Declaration of Independence, in the tract, titled *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament, 1774*, Wilson disputed the idea that Parliament was promoting the “ultimate end of all government”—happiness.¹⁶³ A popular political theory of government at the time, Wilson knew that “all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent . . . state of nature.”¹⁶⁴ The problem the colonies faced, unfortunately, was that Parliament did not effectuate this happiness, for the respective colonies’ legislatures and charters neither checked nor balanced laws that impeded the republican concept of happiness—the greatest happiness of the greatest number of people.¹⁶⁵ Wilson posed the following queries to articulate the political problem facing the colonies:

Let me now be permitted to ask—Will it ensure and increase the happiness of the American colonies, that the parliament of Great Britain should possess a supreme, irresistible, uncontrolled authority over them? Is such an authority consistent with their

¹⁶¹ See Letter from John Hancock, President of Cong., to the New York Convention, *supra* note 1, at 33, 1398; Adams, *supra* note 45, at 33.

¹⁶² Wilson, *supra* note 147, at 541; see also *id.* at 543 (“That a federal government, only, can preserve the liberties and secure the happiness of the inhabitants of a country so extensive as these United States; and experience having taught us that the ties of our union, under the Articles of Confederation, were so weak as to deprive us of some of the greatest advantages we had a right to expect from it, we are fully convinced that a more efficient government is . . . necessary.”).

¹⁶³ 1 JAMES WILSON, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament, 1774*, in COLLECTED WORKS OF JAMES WILSON 4 (Kermit L. Hall & Mark David Hall eds., 2007).

¹⁶⁴ *Id.* at 4–5.

¹⁶⁵ For a brief and concise history on the eighteenth-century political tension between colonial legislatures, Parliament, and the Crown, including the evolution of political thought to effectuate the happiness of the colonies, see generally GREENE, *supra* note 73.

liberty? Have they any security that it will be employed only for their good?¹⁶⁶

The Constitution's representative principles and frequent elections fixed these disparities in the people's happiness. In Wilson's words, "The constitution is thus frequently renewed, and drawn back, as it were, to its first principles; which is the most effectual method of perpetuating the liberties of a state."¹⁶⁷ By establishing a government built on the consent of all who are governed, every representative is daily "reminded whose creature[] they are; and to whom they are accountable for the use of that power, which is delegated [to] them."¹⁶⁸ Meanwhile, the frequent elections ensured the "first maxims of jurisprudence are ever kept in view—that all power is derived from the people—that their happiness is the end of government."¹⁶⁹

In an April 14, 1790 charge to a grand jury, Wilson elaborated on the constitutional importance of the representative and electoral processes:

In a well constituted government, the great movements of the state receive their first force and direction immediately from the people, at elections. The influence of that force and that direction ought to pervade all the subsequent progress and stages of the public business. The will and genius of the citizens should diffuse their tints and colourings over every part of the web of government, however finely spun, or intricately woven. In this manner will one inestimable property of a constitution be preserved and secured. It will be *always* accommodated to the dispositions, manners, and habits of those for whom it is intended.¹⁷⁰

Naturally, Wilson did not invent the preservation of "life, liberty, and the pursuit of happiness" as a political theory, nor was he the only eighteenth-century legal mind to understand it as implicit in the framework of republican constitutionalism. For instance, as the colonies were seeking reconciliation, Morris County, New Jersey petitioned to retain their "greatest Happiness and Security" in being "governed by the Laws of Great Britain," with the caveat that it "can be done consistently with the constitutional Liberties and Privileges of free-born Englishmen."¹⁷¹ At a May 18, 1774

¹⁶⁶ WILSON, *supra* note 163, at 5.

¹⁶⁷ *Id.* at 9.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ James Wilson, Charge to the Grand Jury for the Circuit Court for the District of Pennsylvania (Apr. 14, 1790), in NEW-YORK DAILY GAZETTE, Apr. 17, 1790, at 2.

¹⁷¹ RESOLUTION, MEETING OF A RESPECTABLE BODY OF THE FREEHOLDERS AND INHABITANTS OF THE COUNTY OF MORRIS, IN THE PROVINCE OF EAST NEW-JERSEY, in NEW-YORK GAZETTE: & THE WKLY. MERCURY, July 4, 1774, at 2.

meeting in Chestertown, Maryland, the inhabitants petitioned Parliament, writing “the political happiness of a free people, consists in their being governed by laws of their own making, or to which their consent is given by Delegates of their own choice and nomination.”¹⁷² The Chestertown inhabitants viewed this “maxim” to be “founded on the genius of the *British Constitution*—the most perfect under Heaven.”¹⁷³ A year later, an anonymous editorial exuded a more rebellious tone, yet similarly understood “happiness” as explicit in the social compact.¹⁷⁴ The author did not write that the “pursuit of happiness” embodied an individual natural right. Instead, happiness was why government was “designed by God for his own glory and the good of man: Or the greatest happiness of the greatest number.”¹⁷⁵ Thus, according to the author, constitutional happiness rested on the rules of equity: “And the essence of English liberty seems to consist in being directed and limited, in pursuing our own good, by the laws of God, and our own making only, conformable to the rules of equity. For, ‘Law that shocks *equity* is reason’s murder.’”¹⁷⁶

This utilitarian principle was reminiscent of Francis Hutcheson, “a proponent of the principle of utility [when] assessing the [means] and ends of government.”¹⁷⁷ Utility is the very principle embodied within the Declaration’s text, “all men are created equal.” Contrary to the claim of Scott Douglas Gerber, “all men are created equal” did not embody the idea that all are entitled to “an equal chance” at natural freedom.¹⁷⁸ It means that democratic constitutions divest each member of the polity of an equal share in the preservation of “life, liberty, and the pursuit of happiness.”¹⁷⁹

¹⁷² MEETING OF THE INHABITANTS OF CHESTERTOWN, MD., in 1 AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA, 4th ser., 334 (Peter Force ed., 1837) [hereinafter 1 AMERICAN ARCHIVES, 4th ser.].

¹⁷³ *Id.*

¹⁷⁴ Epaminondas, *A Friendly Address to the Freemen*, CONN. COURANT, & HARTFORD WKLY. INTELLIGENCER, Mar. 27, 1775, at 4.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* For an interesting take on the Declaration of Independence as a “bill of equity,” see PETER CHARLES HOFFER, *THE LAW’S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* 71–79 (1990).

¹⁷⁷ Hamowy, *supra* note 67, at 509.

¹⁷⁸ GERBER, *supra* note 6, at 50.

¹⁷⁹ See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 316–18 (1967) (discussing the radical nature of this idea in late eighteenth-century political discourse); MAIER, *supra* note 18, at 191–208 (placing the phrase “all men are created equal” in historical context); MORGAN, *supra* note 24, at 137–39 (discussing the Founders’ belief in equality in republican constitutions); Pencak, *supra* note 19, at 232 (“The Declaration therefore implies there are four conditions any government must fulfill to guarantee to the populace their equal rights to life, liberty, and the pursuit of happiness . . .”); see also Quincy, *supra* note 141, at 138 (“Governments formed on principles which promise the equal distribution of power and liberty, attach to their service every generous inclination which subsists in the human character . . . partial benefit is exploded, and the generous plan of universal happiness adopted, and the common good becomes [our] common care.”); Samuel Hitchcock, *A Charge, Delivered to the Grand Jury*, in SPOONER’S VT. J. (Windsor, Vt.), Feb. 15, 1796, at 1 (“America has

The English hierarchal chain of being no longer existed in American government.¹⁸⁰ In the words of Montesquieu, “Love of the republic in a democracy, is a love of the democracy; love of the democracy is that of equality.”¹⁸¹

It was a utilitarian-based theory that attracted both opponents and proponents of American independence. Take, for instance, Jeremy Bentham, who, throughout his life, was an opponent of the Declaration of Independence.¹⁸² Bentham understood that the “fundamental axiom” of government is “*the greatest happiness of the greatest number that is the measure of right and wrong.*”¹⁸³ He even wrote an entire book on the subject, titled, *A Fragment on Government*.¹⁸⁴ It served to correct portions of William Blackstone’s *Commentaries*, such as by providing a differentiation between the legal terms “Society,” “State of nature,” and “original contract.”¹⁸⁵

The book’s most significant attribute for the purpose of this Article is its relation to the tenets of revolution and the right of self-preservation embodied in the Declaration of Independence.¹⁸⁶ Bentham understood that revolution stemmed from the unhappiness of the subjects. The social compact required the “*general obedience*” of the people on the condition that the Crown “promised to *govern* the people in such a *particular* manner always, as should be *subservient* to their happiness.”¹⁸⁷ This begets the question, “What did Bentham include within the tenets of happiness?” In the context of government, *happiness* was not measured by the accumulation of individual preferences or determined by what we would refer to as opinion polls. Instead, a society’s happiness was based on the structure of government—the social compact—and in a limited monarchy, the only way that this happiness was usurped was when the Crown had governed in direct “opposition to [the] Law . . . if not actually to destroy, at least to threaten [the] destruction, [of] all those rights and privileges that are founded on it: rights and privileges on the enjoyment of which that happiness depends.”¹⁸⁸

Indeed, Bentham did not discount that there were times when the “King may, to a great degree, impair the happiness of his people without violating the letter of

furnished the most illustrious example of a government, founded upon those genuine principles [of uniformity]—*Reason, & the security of the equal Rights of Man*, are the predominant features that distinguish the system of American Jurisprudence . . .”).

¹⁸⁰ See J. R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 5–6 (1978). For a detailed history on the chain of being, see generally ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA* (1936).

¹⁸¹ 1 MONTESQUIEU, *THE SPIRIT OF LAWS* 50 (Dublin, G. & A. Ewing & G. Faulkner 1751).

¹⁸² Armitage, *supra* note 19, at 53–58.

¹⁸³ JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT* ii (London, T. Payne, P. Elmely, & E. Brooke 1776).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 11–20.

¹⁸⁶ For a detailed analysis of the right of “self-preservation,” or what William Blackstone dubbed “the *fifth auxiliary right*,” see Charles, *The Right of Self-Preservation and Resistance*, *supra* note 140, at 24–60.

¹⁸⁷ BENTHAM, *supra* note 183, at 52.

¹⁸⁸ *Id.* at 54.

any single Law,”¹⁸⁹ but this could not breach the social compact so as to “release[] the people from the obligation of performing their[]” obedience and allegiance to government.¹⁹⁰ Bentham’s point was a simple one that would be reiterated in American court rooms throughout the tumultuous Early Republic¹⁹¹: “If every single instance whatever of such a violation were to be deemed an entire dissolution of the contract, a man who reflects at all would scarce find any-where . . . under the sun, that Government which he could allow to subsist for twenty years together.”¹⁹²

For Bentham it all boiled down to *utility*.¹⁹³ Revolution could not be based on personal or general happiness. If this were the standard by which societies may lawfully revolt and reform themselves, Bentham knew there would be a constant state of nature. In the words of Bentham, the utility principle meant that “*subjects should obey Kings . . . so long as the probable mischiefs of obedience are less than the probably mischiefs of resistance.*”¹⁹⁴

It is under this philosophical paradigm that Bentham disagreed with the tenets of the Declaration of Independence. Just as Sir Henry Clinton observed the calls for American independence were “carried from one voice only,”¹⁹⁵ Bentham objected to the Declaration on the grounds the “dispute is *clearly between one part of his subjects and another.*”¹⁹⁶ In other words, Bentham knew the American Revolution was the working of a subset of the colonists, not the collective whole.¹⁹⁷ It violated the political maxim that “[g]overnments, long established, should not be changed for light or transient reasons.”¹⁹⁸

It is in this philosophical context that one must read Bentham’s passionate dissent, titled: *Short Review of the Declaration*—for he viewed the “opinions of the modern Americans on Government” as “too ridiculous to deserve any notice” in that they lead “to the most serious evils.”¹⁹⁹ To Bentham, the preamble was troubling as a “*theory of Government*” in that it was “as absurd and visionary, as the system of conduct in

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 55; *see also id.* at 56 (“But, after all, for what *reason* is it, that men *ought* to keep their promises? The moment any intelligible reason is given, it is this: that it is for the *advantage* of society they should keep them; and if they do not, that, as far as *punishment* will go, they should be *made* to keep them. It is for the advantage of the whole number that the promises of each individual should be kept: and, rather than they should not be kept, that such individuals as fail to keep them should be punished.”).

¹⁹¹ *See infra* Part IV.

¹⁹² BENTHAM, *supra* note 183, at 55.

¹⁹³ Bentham defined utility as “the standard to which [the people] refer a Law or institution in judging of its title to approbation or disapprobation.” *Id.* at xlix.

¹⁹⁴ *Id.* at 58.

¹⁹⁵ STEDMAN, *supra* note 60, at 189.

¹⁹⁶ LIND & BENTHAM, *supra* note 80, at 7.

¹⁹⁷ *See supra* note 59 and accompanying text.

¹⁹⁸ LIND & BENTHAM, *supra* note 80, at 122.

¹⁹⁹ *Id.* at 119.

defence of which it [was] established”—rebellion.²⁰⁰ He elaborated on the Declaration’s reference to preservation of “life, liberty, and the pursuit of happiness” as follows:

The rights of “*life, liberty, and the pursuit of happiness*”—by which, if they mean any thing, they must mean the right to *enjoy* life, to *enjoy* liberty, and to *pursue* happiness—they “*hold to be unalienable.*” This they “*hold to be among truths self-evident.*” At the same time, to secure these rights, they are content that Governments should be instituted. They perceive not, or will not seem to perceive, that nothing which can be called Government ever was, or ever could be, in any instance, exercised, but at the expence of one or other of those rights.—That, consequently, in as many instances as Government is ever exercised, some one or other of these rights, pretended to be unalienable, is actually alienated.²⁰¹

One can read Bentham’s dissent in one of two ways. Those that are unfamiliar with Bentham’s work may assert that the analysis of “life, liberty, and the pursuit of happiness” supports individual natural rights or a presumption of liberty. If one is to take anything from this dissent, however, it is that Bentham could not perceive how the social compact had been violated. To Bentham, the Declaration’s grievances were legally insufficient to support independence.²⁰² In other words, Bentham viewed the Declaration as having taken the principle of preserving “life, liberty, and the pursuit of happiness” too far. Bentham felt that the Declaration’s use of the phrase “life, liberty, and the pursuit of happiness” could not guarantee individualized preferences, each distinct or separate from the social compact, for this would mean that all “*penal laws . . . which affect life or liberty*” would be unconstitutional or lawfully violated by “*thieves,*” “*murderers,*” and “*rebels.*”²⁰³

B. “Life, Liberty, and the Pursuit of Happiness” and the Embodiment of the Representative Government

Any disagreement as to what Thomas Jefferson and the Continental Congress meant by including “life, liberty, and the pursuit of happiness” is clarified by the textual edits to the Declaration itself. Jefferson’s rough draft, sent to Benjamin Franklin and John Adams, included the following:

We hold these truths to be sacred and undeniable; that all men are created equal & independent; that from that equal creation they derive in rights inherent & inalienable, among *which are the*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 120.

²⁰² *See generally id.*

²⁰³ *Id.* at 122.

*preservation of life, & liberty, & the pursuit of happiness; that to secure these ends, governments are instituted among men, deriving their just powers from the consent of the governed . . .*²⁰⁴

Thus, as originally constituted, the Declaration conveyed that “governments are instituted” to *preserve* “life, liberty, and the pursuit of happiness” in equal and equitable principles.²⁰⁵ This preservation was not embodied in some form of doctrinal presumption of liberty, but rather in checks and balances within the compact itself. Indeed, the phrase “which are the preservation” was later removed by either Jefferson or another member of the Committee of Five,²⁰⁶ for the version submitted to Congress had been edited to read “among these are life, liberty, and the pursuit of happiness.”²⁰⁷ However, this edit takes nothing away from Jefferson’s original draft if one places the relationship between “life, liberty, and the pursuit of happiness” and republican governments in the context of eighteenth-century public discourse. This is because the Declaration’s reference to instituting governments “from the consent of the governed” already spoke to the equitable principle that “life, liberty and the pursuit of happiness” were the “ends” for which compacts were formed.²⁰⁸ It would be redundant to retain the “preservation” language, especially given the political theory of “life, liberty, and the pursuit of happiness” was deeply embedded within eighteenth-century legal thought.

Let us not forget that the Declaration’s grievances detail that the English Constitution and colonial charters, i.e., social compacts, were destroyed by the Crown’s “repeated injuries and usurpations.”²⁰⁹ It is for this reason that a new compact—the Articles of Confederation²¹⁰—was drafted in conjunction with the Declaration, and why Hancock advised each colony to establish a republican form of government consistent with the Declaration’s principles.²¹¹ The general theme expressed by the grievances was Parliament’s ability to override colonial laws with the Crown’s assent, so as to usurp or mitigate the colonies’ ability to maintain their representative forms of government:

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

²⁰⁴ BECKER, *supra* note 20, at 142 (emphasis added) (citation omitted).

²⁰⁵ Elijah Waterman’s oration conveys that the principle was to preserve life, liberty, and the pursuit of happiness. See WATERMAN, *supra* note 63, at 16; see also Duncan Ivison, *The Nature of Rights and the History of Empire*, in BRITISH POLITICAL THOUGHT IN HISTORY, LITERATURE AND THEORY: 1500–1800, at 203 (David Armitage ed., 2006) (discussing how “non-arbitrary interferences” are necessary to ensure liberty on equitable principles).

²⁰⁶ BECKER, *supra* note 20 at 160–61.

²⁰⁷ See MAIER, *supra* note 18, at 236.

²⁰⁸ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²⁰⁹ *Id.*

²¹⁰ See *supra* note 24 and accompanying text.

²¹¹ Letter from John Hancock, President of Cong., to the New York Constitutional Convention, *supra* note 1, at 33.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

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.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the meantime exposed to all the dangers of invasions from without, and convulsions within.

. . . .

For abolishing the free System of English laws in a neighboring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule in these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with Power to legislate for us in all cases whatsoever.²¹²

Other grievances detailed constitutional violations and legislation to which the colonies did not consent as “most likely to effect their safety and happiness”:

He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

²¹² THE DECLARATION OF INDEPENDENCE paras. 3–8, 23–24 (U.S. 1776).

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our People, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our Legislatures.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation:

. . . .

For protecting them, by a mock trial, from Punishment for any Murders which they should commit on the Inhabitants of these States;

For cutting off our Trade with all parts of the world:

For imposing taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury;

For transporting us beyond Seas, to be tried for pretended offenses²¹³

Meanwhile, the remaining grievances²¹⁴ claimed the Crown had outright violated the social compact by waging war and imposing other international atrocities on the colonists:

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworth the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high seas to bear Arms against their Country, to become the

²¹³ *Id.* at paras. 9–15, 17–21.

²¹⁴ These grievances were mostly fabricated or based upon propaganda. See CHARLES, *supra* note 18, at 85–327.

executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections among us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.²¹⁵

Lastly, the colonies conveyed to the world that they had acted in accordance with the law by petitioning the Crown:

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. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People.²¹⁶

Excluding the “trial by jury” grievance,²¹⁷ none of the other grievances can be remotely classified as an individual right, and not one grievance fell under the individual natural rights category. Instead, the grievances outlined that the English form of government no longer preserved “life, liberty, and the pursuit of happiness” so as to best effectuate the American people’s happiness.²¹⁸ It was for this reason

²¹⁵ THE DECLARATION OF INDEPENDENCE paras. 25–29 (U.S. 1776).

²¹⁶ *Id.* at para. 30.

²¹⁷ At least one editorial contemporaneous with the adoption of the Constitution used this grievance to argue for a similar protection in a Bill of Rights. *See* Sidney, *supra* note 12, at 2 (“It is remarkable, if we attend to the declaration of independence, that the Congress alledge that the people of this country are justified in withdrawing their allegiance from . . . Great Britain on account of various acts of oppression. Among other things, the king is accused ‘of depriving us in many cases, of the benefits of the trial by jury.’—Now it is most certain that the new constitution takes away the trial by jury in many cases . . .”); *see also* MAIER, *supra* note 18, at 116, 118, 213 (detailing the origins of the “trial by jury” grievance).

²¹⁸ Leading up to the Declaration, the historical evidence reveals the English form of government was no longer effectuating the colonies’ “happiness.” *See* Letter from James Cannon, Clerk for the Comm. of Inspection & Observation for the City & Liberties of Phila., to the Justices of the Courts of Quarter Sessions and Common Pleas for the Cnty. Of Phila. (June 3, 1776), in 6 AMERICAN ARCHIVES: A DOCUMENTARY OF THE ENGLISH COLONIES IN NORTH AMERICA, 4th ser., 690 (Peter Force ed., 1846) [hereinafter 6 AMERICAN ARCHIVES, 4th ser.] (“Upon the whole, the Committee think it their duty to themselves, their constituents, and to the Congress, to request your Worships to postpone the business of the above-mentioned Courts until a new Government shall be formed, which they apprehend will be effected so speedily that the delay will be of small if any injury to the present suitors; and in the mean time the minds of men will be quieted from the apprehension of a disaffected Grand Jury or Court attempting to censure or condemn the virtuous measures now pursuing for the happiness and safety of the good people of this Province in particular, and *America* in general.”); Columbus, Address of Columbus to the electors of the City and Cnty. of N.Y. (June 12, 1776), in 6 AMERICAN ARCHIVES, 4th ser., at 826 (“If, without establishing a new mode of Government, we can

that Congress proclaimed that the “United Colonies are, and of right ought to be, FREE AND INDEPENDENT STATES.”²¹⁹

Although we do not know which member of the Declaration’s Committee of Five²²⁰ recommended that the phrase “which are the preservation” be removed, a 1776 writing of John Adams, a member of the Committee, illuminates that “pursuit of happiness” as a legal doctrine was imbedded within republican constitutions.²²¹ Happiness could never theoretically be violated should a constitution be based upon the consent of the people.²²² Adams wrote a “plan for the government” knowing that “the blessings of society depend entirely on the constitutions of government, which are generally institutions that last for many generations.”²²³ Adams, like others before him, knew that “the happiness of society is the end of government”; a fact that “all Divine [] and moral Philosophers . . . agree” with.²²⁴

The question Adams and the other Founders faced when establishing a plan of government was how to effectuate the “ease, comfort, security, or in one word happiness to the greatest number of persons, and in the greatest degree [as] is . . . best.”²²⁵ To Adams, the answer was a republican government, constituted by a “Representative Assembly,” which would comprise “an exact portrait of the people at large.”²²⁶ This required the deputing of the “power from the many, to a few of the most wise and good.”²²⁷ It also required an executive and judicial branch, with each having checks and balances, as a means of providing constitutional balance.²²⁸ In other words, the “principle and foundation” of the American republic was intended to rest on republican “virtue” to “promote the general happiness . . . better . . . than any other form” of government preceding.²²⁹

have no happiness or safety as a people; if this step be essentially necessary towards a future reconciliation or peace with *Britain*, consistent with liberty; and if our Representatives in Congress, on the most mature deliberation, have directed us to the measure, it is therefore become absolutely necessary, as it comes to us with every recommendation which can engage the attention and compliance of every good man.”)

²¹⁹ THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

²²⁰ The Committee consisted of Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert R. Livingston. MAIER, *supra* note 18, at 43.

²²¹ JOHN ADAMS, THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES 4–5, 7 (Phila., John Dunlap 1776).

²²² *See generally id.*

²²³ *Id.* at 3.

²²⁴ *Id.* at 4–5.

²²⁵ *Id.* at 5.

²²⁶ *Id.* at 9.

²²⁷ *Id.*

²²⁸ *Id.* at 13–28.

²²⁹ *Id.* at 5–6. Judge Alexander Addison detailed the interconnection between virtue, the public good, and republican government as follows:

[If] the people lose sight of public good, and suffer themselves to be corrupted by selfish passions, and base views; all the wretchedness of tyranny is united with the reflection, that they are, themselves, the authors

Writing five years later, on October 25, 1781, Adams would again affirm that constitutional “happiness” did not embody an individual natural right, but a democratic principle of representation.²³⁰ Serving on a diplomatic mission, he wrote to Thomas McKean, the President of Congress, that the democratic principles of the American Revolution had been “disseminated by the press through every part of the world”²³¹:

When I say democratical principles, I do not mean that the world is about adopting simple democracies, for these are impracticable; but multitudes are convinced that the people should have a voice, a share, and be made an integral part; and that the government should be such a mixture, and such a combination of the powers of one, the few, and the many, as is best calculated to check and control each other, and oblige all to co operate in this one democratical principle, that the end of all government is the happiness of the people; and in this other, that the greatest happiness of the greatest number is the point to be obtained.²³²

Writing seventeen years later on the anniversary of American independence, former New York Governor and future Vice President of the United States George Clinton reminisced about the impact of the Declaration of Independence in a similar light.²³³ Clinton described the Declaration as having three significant consequences:

- I. WE have thrown off a corrupt monarchical system, and acquired the right of self government.
- II. WE obtained the right of regulating our commerce, and control[ing] and directing our resources to our own emolument. And

of their own misery. . . . If virtue is extinguished, if the public force is not directed to the public good, if every individual, regardless of the common interest, pursues a selfish and separate end; and the exertions of all, instead of co-operating for general prosperity, contend for private and discordant gain, individual exertions mutually defeat each other . . . [and] the liberty of government exists only in theory and form

ALEXANDER ADDISON, REPORTS OF CASES IN THE COUNTY COURTS OF THE FIFTH CIRCUIT AND IN THE HIGH COURT OF ERRORS & APPEALS OF THE STATE OF PENNSYLVANIA 151 (Wash., John Colerick 1800).

²³⁰ Letter from John Adams to Thomas McKean, President of Cong. (Oct. 25, 1781), *in* 4 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 810–12 (Francis Wharton ed., Wash., Government Printing Office 1889).

²³¹ *Id.* at 812.

²³² *Id.*

²³³ See GEORGE CLINTON, AN ORATION, DELIVERED ON THE FOURTH OF JULY, 1798, at 6 (New York, M.L. & W.A. Davis 1798).

III. WE placed ourselves in a situation to avoid interference in European politics.²³⁴

Clinton elaborated that the “right of self government”—what the Declaration of Independence described as the “consent of the governed”—referenced a government “which confers the greatest happiness upon the greatest number,” and that this is an “undeniable position.”²³⁵ As so many of his contemporaries did, Clinton believed that a “government that combines virtue, wisdom and power in the most eminent manner, is the best calculated to confer the greatest happiness.”²³⁶

The founding generation’s incorporation of Hutcheson and Beccaria’s language of “the greatest happiness of the greatest number” was just one way of phrasing the representative political theory embodied by preserving liberty and ensuring the “pursuit of happiness.” Often the terms “public good,”²³⁷ “common good,” or “good of the whole” were alternative and interchangeable ways of phrasing the same principle.²³⁸ Take, for instance, a December 12, 1775 letter by Continental Brigadier General John Sullivan to Meshech Weare on the issue of New Hampshire’s establishment of a new government.²³⁹ Sullivan, a New Hampshire lawyer,²⁴⁰ thought it wise that he share a few “Ideas of Government.”²⁴¹

In particular, Sullivan was for instituting as many constitutional checks and balances²⁴² as were necessary to keep the “one Object” or first rule that any republican government should have in view, “namely the Good of the whole”²⁴³—the most important of these checks and balances being “the frequent Choice of the Rulers, by the people,” for it reminded members of government that “a new Election would

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ The text of the Declaration itself uses the phrase “public good” in this light. See THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776) (“He has refused his Assent to Laws, the most wholesome and necessary for the public good.”).

²³⁸ See Samuel Williams, *A Discourse on the Love of Our Country* (Dec. 15, 1774), in COLONIES TO NATION, 1763–1789: A DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION 376, 379 (Jack P. Greene ed., 1975) (“Love of our country then, we are to understand a regard and affection to the *common good*; to the interest and welfare of that community, or body politic, of which we are a part. . . . As society is combined together for the purposes of mutual benefit and advantage, *the common good* of the whole, greatly depends on individuals being subject to the laws of their country, and faithfully performing the business and duties of their station. This only makes them good members of society.”) (alteration in original).

²³⁹ Letter from John Sullivan to Meshech Weare (Dec. 12, 1775), in 1 LETTERS AND PAPERS OF MAJOR GENERAL JOHN SULLIVAN 141–48 (Otis G. Hammond ed., 1930).

²⁴⁰ See THOMAS C. AMORY, THE MILITARY SERVICES AND PUBLIC LIFE OF MAJOR-GENERAL JOHN SULLIVAN 9 (Kennikat Press 1968) (1868).

²⁴¹ Letter from John Sullivan to Meshech Weare, *supra* note 239, at 142.

²⁴² *Id.* at 143–47.

²⁴³ *Id.* at 144.

soon Honor them for their good Conduct, or Disgrace them for betraying the Trust reposed in them.”²⁴⁴ Thus, Sullivan was of the opinion that “no Danger can arise” to the social compact when the branches of government are based upon the consent of the people.²⁴⁵ This was because the people “can never suppose . . . to have any Thing but the true End of Government (viz their own Good) in View, unless we suppose them Idiots, or self-Murderers.”²⁴⁶

This republican principle remained prevalent among members of the Continental Congress.²⁴⁷ For instance, on October 26, 1774, Congress sent an address to the inhabitants of Quebec asserting “the first grand right is that of the People having a share in their own Government” and “of being ruled by laws which themselves approve; not by edicts of men, over whom they have no control.”²⁴⁸ Quoting the work of Beccaria, Congress viewed the actions of Parliament as “tending to confer [on a select minority] the height of power and happiness, and to reduce the other to the extreme of weakness and misery. The intent of good laws is to oppose this effort, and to diffuse their influence universally and equally.”²⁴⁹

The “happiness” to which Congress referred did not embody an individual right or presumption, but rather a reference to utilitarian principles of representation.²⁵⁰ Even looking at “happiness” as an economic or individual pursuit, acclaimed historian Jack P. Greene informs us that all “personal independence” gave way to “the social goal of improved societies that would both guarantee the independence” that governments “hoped to achieve and enable” the people “to enjoy its fruits.”²⁵¹ Indeed, the Founders’ understanding of happiness included rights not to be violated. However, this form of “happiness” remained embedded in the text of constitutions, and only required equal application of the law, not a presumption of liberty. As Congress

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 143.

²⁴⁶ *Id.* at 145.

²⁴⁷ Often too much focus is laid on Jefferson’s view of the Declaration’s text. *See* GERBER, *supra* note 6, at 32–35. Indeed, Jefferson drafted the document, but this ignores the public understanding of preserving “life, liberty, and the pursuit of happiness” among the founding generation. Furthermore, it neglects that Congress declared independence, not Jefferson.

²⁴⁸ THE CONTINENTAL CONGRESS, ADDRESS TO THE INHABITANTS OF THE PROVINCE OF QUEBEC (1774), in 1 AMERICAN ARCHIVES, 4th ser, *supra* note 172, at 931.

²⁴⁹ *Id.* at 930. The lasting impression of Beccaria on this point is evidenced by its notation in Josiah Quincy’s *Political Commonplace Book*. Josiah Quincy Junior, *Our Political Commonplace Book*, in 1 PORTRAIT OF A PATRIOT: THE MAJOR POLITICAL AND LEGAL PAPERS OF JOSIAH QUINCY JUNIOR 122–23 (Daniel R. Coquillette & Neil Longley York eds., 2005) (referencing Beccaria).

²⁵⁰ This was the essence of Beccaria’s treatise, wherein he wrote, “The sum of all these portions of the liberty of each individual constitut[e] the sovereignty of a nation.” BECCARIA, *supra* note 95, at 6. This too was in Josiah Quincy’s *Political Commonplace Book*. *See* QUINCY, *supra* note 249, at 127.

²⁵¹ JACK P. GREENE, PURSUITS OF HAPPINESS: THE SOCIAL DEVELOPMENT OF EARLY MODERN BRITISH COLONIES AND THE FORMATION OF AMERICAN CULTURE 197 (1988).

paraphrased the principle to Quebec, “the happiness of a people inevitably depends on their liberty, and their *spirit to assert it*.”²⁵²

Congress again reiterated this principle seven months prior to the Declaration’s adoption, recommending that New Hampshire “establish such a form of Government as, in their judgment, will best produce the *happiness of the people*, and most effectually secure peace and good order in the Province, during the continuance of the present dispute between *Great Britain* and the Colonies.”²⁵³ Similar instructions were sent to Virginia²⁵⁴ and South Carolina,²⁵⁵ with the Massachusetts Assembly declaring on its own:

As the happiness of the people is the sole end of Government, so the consent of the people is the only foundation of it, in reason, morality, and the natural fitness of things; and, therefore, every act of Government, every exercise of sovereignty against, or without the consent of the people, is injustice, usurpation, and tyranny.

It is a maxim, that, in every Government there must exist, some where, a supreme, sovereign, absolute, and uncontrollable power; but this power resides, always, in the body of the people,

²⁵² ADDRESS TO THE INHABITANTS OF THE PROVINCE OF QUEBEC, *supra* note 248, at 933 (emphasis added). On March 20, 1776, the Continental Congress again urged their Canadian brethren to join them, urging the people of Canada to “set up such a form of Government as w[ould] be most likely, in their judgment, to produce their happiness . . . and to secure the same general system of mild and equal laws for them and for [Americans].” THE CONTINENTAL CONGRESS, INSTRUCTIONS AND COMMISSION TO THE DEPUTIES OF COMMISSIONERS APPOINTED TO GO TO CANADA, in 5 AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE ORIGIN AND PROGRESS OF THE NORTH AMERICAN COLONIES, 4th ser., 1644 (Peter Force ed., 1844) [hereinafter 5 AMERICAN ARCHIVES, 4th ser.].

²⁵³ THE CONTINENTAL CONGRESS, COMMITTEE TO CONSIDER AND REPORT WHAT IS NECESSARY TO BE DONE RELATIVE TO N.H. (1775), in 3 AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA, 4th ser., 1905 (Peter Force ed., 1833) [hereinafter 3 AMERICAN ARCHIVES, 4th ser.] (emphasis added); *see also* Letter from John Adams to James Otis (Nov. 23, 1775), in 3 AMERICAN ARCHIVES, 4th ser., at 1653 (noting that Congress “ha[s] lately advised the Colonies of *New-Hampshire* and one more, if they think necessary, to establish such forms of Government as they shall judge best calculated to promote the happiness of the people”). The government was to be temporary because the colonies had not yet declared independence, and were working on reconciliation. For a history, see CHARLES, *supra* note 18, at 25–84.

²⁵⁴ THE CONTINENTAL CONGRESS, CONVENTION OF VIRGINIA RECOMMENDS TO TAKE PROPER MEASURES TO ESTABLISH A GOVERNMENT, in 3 AMERICAN ARCHIVES, 4th ser., *supra* note 253, at 1941 (first emphasis added); *see also* 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 404 (1905) (recommending that the Virginia Convention “call a full and free representation of the people, and that the said representatives, if they think it necessary, establish such form of government as in their judgment will best produce the happiness of the people, and most effectually secure peace and good order in the colony, during the continuance of the present dispute between Great Britain and these colonies”).

²⁵⁵ THE CONTINENTAL CONGRESS, RESOLUTIONS, in 3 AMERICAN ARCHIVES, 4th ser., *supra* note 253, at 1908.

and it never was, or can be delegated to one man or a few; the great Creator having never given to men a right to vest others with authority over them unlimited, either in duration or degree.²⁵⁶

It cannot be emphasized enough that, as the Revolution progressed, popular opinion steered away from the idea that a limited monarchy-based government effectuated political happiness.²⁵⁷ In the minds of the Founding Fathers, monarchy needed to be replaced by a representative government of the people.²⁵⁸ As historian Jack Richon Pole described it: “[I]n America, much more clearly than in the Old World, the fires of revolution could forge a link between a government’s success in promoting the happiness of the people, and its legitimacy.”²⁵⁹ Only then would happiness be secured for generations. One need look no further than Thomas Paine’s *Common Sense* to grasp this fact.²⁶⁰ Not only did Paine argue that happiness rests on a republican constitution, but even a literary adversary, under the pen name *Rationalis*, viewed the dispute as resting on this very issue:

1st. That the English form of Government has no wisdom in it, and that it is by no means so constructed as to produce the happiness of the people, which is the end of all good government.

²⁵⁶ GENERAL COURT OF THE COLONY OF MASSACHUSETTS-BAY, PROCLAMATION, in 4 AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE ORIGIN AND PROGRESS OF THE AMERICAN COLONIES, 4th ser., 833 (Peter Force ed., 1843).

²⁵⁷ For a summary of the evolution of the role of the colonial governments in the English Constitution to the American theory of government by the time of the Declaration of Independence, see generally GREENE, *supra* note 73.

²⁵⁸ See A Native, *Address to the Convention of the Colony and Ancient Dominion of Virginia* (1776), in 6 AMERICAN ARCHIVES, 4th ser., *supra* note 218, at 751–53 (outlining a republican form of government that would “preserve the principle of our Constitution, and secure the freedom and happiness of the people better than any other.”); ELECTIONS OF DEPUTIES TO A CONVENTION FOR FORMING GOVERNMENT, ORDERED (1776), in 6 AMERICAN ARCHIVES, 4th ser., *supra* note 218, at 1352 (“That it be recommended to the Electors in the several Counties of this Colony . . . that such new Government ought to be instituted and established, then to institute and establish such a Government as they shall deem best calculated to secure the rights, liberties, and happiness, of the good people of this Colony, and to continue in force until a future peace with *Great Britain* shall render the same unnecessary.”).

²⁵⁹ POLE, *supra* note 180, at 36.

²⁶⁰ See THOMAS PAINE, *COMMON SENSE* (London, H.D. Symonds 1772). For a brief history of *Common Sense*, see BAILY, *supra* note 179, at 285–91. In his autobiography, John Adams would confirm that many of Paine’s arguments for independence “had been repeat[ed] again and again in Congress for nine months [prior] . . . there is not a Fact nor Reason stated in it, which had not been frequently urged in Congress.” 3 JOHN ADAMS, *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 333 (L.H. Butterfield ed., Belknap Press 1961). However, Adams, and perhaps other Founders, differed as to Paine’s loose assertions of government. As Adams wrote in his autobiography, “[h]is plan was so democratical, without any restraint or even an Attempt at any Equilibrium or Counterpoise, that it must produce confusion and every Evil Work.” *Id.*; see also MAIER, *supra* note 18, at 32–33 (discussing that Paine’s views did not affect Congress’s viewpoint but were a loose reiteration of government principles).

2d. That monarchy is a form of Government inconsistent with the will of *God*.

3d. That now is the time to break off all connection with *Great Britain*, and to declare an independence of the Colonies.²⁶¹

Similar interpretations on the constitutional significance of “happiness” became common in the months leading up to the Declaration. Take, for instance, a pseudonymous tract titled *To the People of North-America on the Different Kinds of Government*, which reads, “Seeing the happiness of the people is the true end of Government; and it appearing by the definition, that the popular form is the only one which has this for its object.”²⁶² The author examined what in the past had “prevented its success in the world,” concluding that even the mention of “a Democracy constantly excites” the people to anarchy; thus, a less consensual government always resumes order.²⁶³ Despite the failure of the “[f]ew opportunities [that] have ever been offered to mankind of framing an entire Constitution of Government, upon equitable principles,”²⁶⁴ the author thought it plausible that the American colonies could defeat the odds should their “true and only interest” be that of “men as members of society.”²⁶⁵

Perhaps the greatest affirmation of the “happiness” principle came from an undated and unsigned note titled *Argumentative Part of the Preceding Instructions*.²⁶⁶ Its tenets clearly affirm that the “happiness of the people is the end, and, if the term is allowable, we would call it the body of the Constitution.”²⁶⁷ The note elaborated:

Freedom is the spirit or soul. As the soul, speaking of nature, has a right to prevent or relieve, if it can, any mischief to the body of the individual, and to keep it in the best health; so the soul, speaking of the Constitution, has a right to prevent or relieve, any mischief to the body of the society, and to keep that in the best health. The “evident consequence” mentioned, must mean a tendency to injure this health, that is, to diminish the happiness of the people—or it must mean nothing. If, therefore, the Constitution “declares by evident consequence;” that a tendency to diminish the happiness of the people, is a proof, that power exceeds a “boundary,” beyond which it ought not to “go;” the matter is brought to this

²⁶¹ See Rationalis, *To the Inhabitants of Pennsylvania* (Feb. 28, 1776), in 4 AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE UNITED STATES OF AMERICA, 4th ser., 1527 (Peter Force ed., 1846).

²⁶² Salus Populi, *To the People of North America on Different Kinds of Government* (1776), in 5 AMERICAN ARCHIVES, 4th ser., *supra* note 252, at 180.

²⁶³ *Id.* at 180–81.

²⁶⁴ *Id.* at 182.

²⁶⁵ *Id.* at 183.

²⁶⁶ 1 AMERICAN ARCHIVES, 5th ser., *supra* note 1, at 564.

²⁶⁷ *Id.* at 565.

single point, whether taking our money from us without our consent, depriving us of trial by jury, changing Constitutions of Government, and abolishing the privilege of the writ of *habeas corpus*, by seizing and carrying us to *England*, have not a greater tendency to diminish our happiness, than any enormities a King can commit under pretence of prerogative, can have to diminish the happiness of the subjects in *England*.²⁶⁸

C. Eighteenth-Century Legal Thought and the Constitutional Theory Behind Preservation of "Life, Liberty, and the Pursuit of Happiness"

As the preceding evidence in Subsections A and B show, it has seemingly gone unnoticed by legal scholars that the constitutional principle embodied by the preservation of "life, liberty, and the pursuit of happiness" is explicitly in the text of our state and federal constitutions. The preservation stems from a government of the people with checks, balances, and constitutional rights that can never be infringed.²⁶⁹ However, this still leaves unresolved how late eighteenth-century legal minds interpreted "happiness" in the context of republican constitutions. If we follow the scholarship of Randy Barnett, Scott Douglas Gerber, Michael Anthony Lawrence, and other natural-rights legal theorists, one could argue that the founding generation believed in a presumption of liberty. Thus, when interpreting the law, and its infringement on the happiness of the people, the eighteenth-century judiciary would have started with the presumption that "freedom of action is to be presumed rightful and that any constraints on this freedom require justification."²⁷⁰

Unfortunately, this interpretation of eighteenth-century legal thought and constitutionalism turns history on its head, for the evidence reveals that the presumption worked the other way. It would have generally been presumed that all laws were constitutional because they represented the interests of the majority in furtherance of the public good. Democratic constitutions by themselves were "calculated to produce the greatest possible good to the greatest number of the people" because the "good, or happiness of the people is acknowledged by all republicans to be the sole end of government."²⁷¹ This included laws that affected enumerated rights. Laws adopted by representative governments were generally presumed constitutional so long as the

²⁶⁸ *Id.* at 565–66.

²⁶⁹ See James Iredell, Charge to the Grand Jury for the Circuit Court of the United States for the New-Jersey District (April 2, 1796), in *GAZETTE OF THE U. S.* (Phila.), Apr. 8, 1796, at 2 ("The good sense of the Union at length formed a constitution of government for the whole, and the people willed it should be permanent—A constitution of Checks and Balances—A constitution which secures to every class of citizens their equal rights, and to every order of government its regulated powers . . .").

²⁷⁰ BARNETT, *supra* note 113, at 73.

²⁷¹ A.B., *To the Hon. E. Gerry, Esq.*, MASS. CENTINEL (Bos.), Nov. 14, 1787, at 2.

equitable principle of representation held true. As one anonymous editorial contemporaneous with the adoption of the Constitution stated:

The proper object of society and civil institution is the advancement of “*the greatest happiness of the greatest number.*” The people as a body, being never interested to injure themselves, and uniformly desirous of the general welfare, have ever made this *collective felicity* the object of their wishes and pursuit. . . .

. . . .

“*The greatest happiness of the greatest number,*” being the object and bond of Society, the establishment of truth and justice, ought to be the basis of civil policy, and jurisprudence.²⁷²

The best articulation of this principle was a 1786–87 editorial debate on the interpretation of constitutional rights between Scribble Scrabble and Senex.²⁷³ While historians know that Scribble Scrabble was George Thatcher, a judge and soon-to-be member of the First United States Congress,²⁷⁴ Senex’s identity remains unknown.²⁷⁵ To Thatcher, the list of enumerated rights was not the totality of the people’s rights, but rather a list of constitutional cores or bottoms that the government could never usurp to protect the minority.²⁷⁶ Enumerated rights were to be interpreted within the context of the public good each sought to assert. However, any laws not abridging this good or core were presumed constitutional so long as they were for the “good of the whole”²⁷⁷ or the “greatest happiness of the greatest number of people.”²⁷⁸

Thatcher elaborated on this principle, writing:

The right to institute government, and the right to alter and change a bad government, I call the same right: I see no difference between them. The end of this right is the *greatest happiness* of the greatest number of people; and the means or object made use of, is government. This right I understand to be a physical power, under the direction of reason, to bring about this *happiness*.

²⁷² *The Citizens of America*, FREEMAN’S J.; OR, THE NORTH-AMERICAN INTELLIGENCER (Phila.), July 16, 1788, at 1.

²⁷³ See Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 153 (2007).

²⁷⁴ *Id.* at 161 n.61.

²⁷⁵ See Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 NW. L. REV. COLLOQUY 227, 230 (2011). It is possible that George Thatcher was debating himself to illuminate the differing arguments. Unfortunately, historians cannot know for sure.

²⁷⁶ *Id.* at 231–32.

²⁷⁷ Scribble Scrabble, CUMBERLAND GAZETTE (Portland), Dec. 8, 1786, at 1.

²⁷⁸ Scribble Scrabble, CUMBERLAND GAZETTE (Portland), Mar. 23, 1787, at 4.

Therefore, when the people have agreed upon a certain set of rules, which they denominate government . . . they are binding, on the presumption that they will produce the degree of happiness before-mentioned²⁷⁹

Thatcher illustrated this constitutional interpretation of rights many times over in his debate with Senex. What the principle boiled down to was that the rights “prefixed to the constitution” could “never . . . be infringed.”²⁸⁰ Meanwhile, any activity separate from its core was only lawful so long as government did not regulate it.²⁸¹ Thatcher referred to any behavior outside the core as “alienable rights” that could be “abridged by the legislature as they may think for the general good.”²⁸² Such laws were presumed constitutional because they would produce the “greatest degree of happiness” for the people as a whole.²⁸³

It is a historical point of emphasis that the inclusion of the Bill of Rights in the Constitution was not to effectuate a presumption of liberty.²⁸⁴ Instead, it was included to check tyranny and ensure the interests of minorities were preserved by constitutional bottoms.²⁸⁵ The true republican basis of liberty and happiness embodied by the Constitution was that of representation, for the “citizens of the United States may always say, We reserve the right to do what we please.”²⁸⁶ In other words, laws in a

²⁷⁹ *Id.*

²⁸⁰ Scribble Scabble, *supra* note 277, at 1.

²⁸¹ Scribble Scabble, CUMBERLAND GAZETTE (Portland), Jan. 26, 1787, at 1 (“[W]hatever right the people had to use arms in a state of nature, they retain at the present time, notwithstanding the 17th article of the Bill of Rights.”).

²⁸² Scribble Scabble, *supra* note 277, at 1.

²⁸³ *See* Scribble Scabble, *supra* note 278, at 4.

²⁸⁴ Scott Douglas Gerber insufficiently supports the proposition that the Constitution and Bill of Rights were adopted to protect natural rights. *See* GERBER, *supra* note 6, at 57–92.

²⁸⁵ Associate Supreme Court Justice James Iredell described the Bill of Rights as securing “invaluable benefits,” and the “other advantages” of the Constitution were “derived from the Legislature alone . . . for [it was] the real security and true happiness of all the citizens, which so eminently distinguish a Government, founded on the very basis of freedom.” James Iredell, Charge to the Grand Jury for the District of Massachusetts, (Oct. 12, 1792), *in* GAZETTE OF THE U. S. (Phila.), Nov. 3, 1792, at 1. Also, when the Bill of Rights was submitted for ratification, it included a preamble that does not support the “presumption of liberty” or natural rights theory:

The Conventions of a Number of the States having, at the Time of their adopting the Constitution, expressed a Desire, in order to prevent mis-construction or abuse of its Powers, that further declaratory and restrictive Clauses should be added: And as extending the Ground of public Confidence in the Government, will best insure the beneficent Ends of its Institution

1 JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES 163 (N.Y., Thomas Greenleaf 1789).

²⁸⁶ WILSON, *supra* note 163, at 196; *see also* Jack N. Rakove, Book Review, 1 N.Y.U. J. L. & LIBERTY 660, 669 (2005) (reviewing RANDY E. BARNETT, RESTORING THE LOST

pure democratic society were the means and ends by which the equal preservation of “life, liberty, and the pursuit of happiness” would flourish.

While modern legal commentators may envision the Constitution as creating a utopian society of individualized liberty,²⁸⁷ the entire impetus of the Constitution was to restore order to society, and conceptualize a nation based on the consent or happiness of the people. Enumerated rights were never intended to be conceptualized under some libertarian paradigm. Each right draws a constitutional line of disembarkation that the political branches cannot cross, which was intended to ensure the success of the American republic for generations, what Josiah Quincy Junior scribbled down as the “essential rights” of the people.²⁸⁸ Indeed, the political branches are judiciously checked from infringing on each enumerated right’s core, but this was never intended to dilute the former’s power to regulate conduct in order to “prevent the wonton of injury and destruction of individuals” and ensure there is a legal “line some where, or the peace of society would be destroyed by the very instrument designed to promote it.”²⁸⁹

What the Constitution, as a whole, embodies is a well-regulated republican society or government. Its true revolutionary principle is that its structure is based on the consent of the people, reserving to government “the right, as well as the necessity of holding every [person] accountable to the community, for such parts of [their] conduct by which the public welfare appears to be injured or dishonored, and for which no legal redress can be obtained.”²⁹⁰ Judge David Campbell articulated the legal principle best before an Ohio grand jury:

Some men may exclaim, they ought not to be restrained from doing what they please in a free government: But, let them know, that, in a well regulated society, every individual is only at liberty to do what is most conformable to his inclination and his interest, provided it be not inconsistent with the properties and liberties of others.²⁹¹

CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004)) (arguing that the main fault with Barnett’s “presumption of liberty” thesis is that “the Constitution . . . was much more about powers than rights”).

²⁸⁷ Commentators frequently cast off our Anglo origins or fail to consider the law of nations in the eighteenth century without any understanding of historical context. *See* Charles, *supra* note 275, at 236–37.

²⁸⁸ Quincy, *supra* note 249, at 172.

²⁸⁹ Liberty, Editorial, INDEPENDENT CHRONICLE & THE UNIVERSAL ADVERTISER (Bos.), Aug. 20, 1789, at 1.

²⁹⁰ *The Address of the Committee of the City and Liberties of Philadelphia, to their Fellow-Citizens throughout the United States*, INDEPENDENT LEDGER, & AM. ADVERTISER (Bos.), July 19, 1779, at 1.

²⁹¹ David Campbell, Charge Delivered to the Grand Jury for the Territory of Ohio (1791), *in* FREEMAN’S J.; OR, THE NORTH-AM. INTELLIGENCER (Phila.), Nov. 9, 1791, at 3; *see also* Alexander Widcocks, The Recorder’s Charge to the Grand Jury for the City of Philadelphia,

This governmental presumption to regulate in the interest of the public good extended to constitutional rights as long as it did not affect the core. This is because in a “well regulated government” the “citizens are entrusted with the authority of the whole,” and this equal consent “in promoting the general good of the community. . . . has the general happiness of the people for its object.”²⁹² One example of this principle is the freedom to publish one’s sentiments and libels, as understood in late eighteenth-century legal thought. The right to publish one’s sentiments did not give way to the interests of preserving the public good as a whole. So long as the core of this right was not violated, prior restraint—the utilitarian principle of the greatest happiness of the greatest number—was presumed constitutional.²⁹³

Take, for instance, Judge Israel Sumner’s 1791 charge to the grand jury concerning libel.²⁹⁴ The New Hampshire constitution guaranteed that “[t]he Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved.”²⁹⁵ Despite this liberty being the “boast of every citizen,” Sumner knew the core of the right was limited to “the bounds of truth.”²⁹⁶ This meant that any publications based on “falseness” were not constitutionally protected, for they would “undermine the very principles of freedom, and strike[] at the foundation of the public peace and happiness.”²⁹⁷ In the words of Thomas McKean, then-Chief Justice of Pennsylvania, the freedom to publish had to give way to “the preservation of peace and good order,” for it was the “only solid foundation[] of civil liberty.”²⁹⁸ It required publications to be “*decent, candid and true* . . . for the purpose of *reformation*, and not of *defamation*; [so] that they have an eye *solely to the public good*.”²⁹⁹

in ORACLE OF THE DAY (Phila.), Oct. 7, 1794, at 1 (“That man’s happiest condition in this life, and the greatest blessings under the Supreme Being which can attend him, will be the result of the rules and principles of a well-regulated society.—The unrestrained right of judging and acting for himself, which every individual possessed in a state of nature. . . . had an inevitable uniform tendency to produce wrong, injustice and confusion.”).

²⁹² Cato, *No. IV*, PA. MERCURY & UNIVERSAL ADVERTISER (Phila.), Apr. 12, 1788, at 3.

²⁹³ See, e.g., Jeffrey A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439, 450–51 (1987).

²⁹⁴ *Trial for a Libel*, CONCORD HERALD (Concord, N.H.), Apr. 6, 1791, at 1.

²⁹⁵ N.H. CONST. OF 1784, art. I, § 22.

²⁹⁶ *Trial for a Libel*, *supra* note 294, at 1.

²⁹⁷ *Id.* Sumner’s interpretation is consistent with the late eighteenth-century Anglo understanding of the right. See William Mainwaring, A Charge Delivered to the Grand Jury of the County of Middlesex (Dec. 10, 1792), in 43 CHARGES TO THE GRAND JURY: 1689–1803, at 452 (Georges Lamoine ed., 1992) (“The Liberty of the Press is one of the glorious Privileges of Englishmen—it is essential to the Liberty of the Subject, to the Existence of a free State, while exercised for lawful and just Purposes; but when it is made use of as the Instrument of Slander and Detraction, to destroy the Comfort and Happiness of Individuals, or to disturb the Harmony and good Order of the State . . . it becomes the most mischievous and destructive Engine . . .”).

²⁹⁸ Thomas McKean, Charge of the Chief Justice Delivered to the Grand Jury of the Supreme Court of Pennsylvania (Nov. 27, 1797), in ALEXANDRIA ADVERTISER (Alexandria, Va.), Dec. 11, 1797, at 2.

²⁹⁹ *Id.* (emphasis added).

Naturally, how the founding generation interpreted constitutional rights is almost insignificant as a matter of modern constitutional jurisprudence.³⁰⁰ I say “almost” because the Supreme Court has yet to develop a standard of review for the Second Amendment.³⁰¹ The Supreme Court has established different standards for all other constitutional rights—enumerated and non-enumerated alike.³⁰² Certainly, many of these standards use historical guideposts to determine a right’s protective scope, but multiple factors are given weight in addition to the question of whether the conduct is regulated to preserve the public peace and is in the interest of the common good.

This is not to say eighteenth-century jurists’ views on the legal principle embodied by the preservation of “life, liberty, and the pursuit of happiness” are insignificant.

³⁰⁰ This trend may be changing. In the recently decided *Brown v. Entertainment Merchant Ass’n*, 131 S. Ct. 2729 (2011), the Supreme Court held that “new categories of unprotected speech may not be added to the list by a legislature” outside of those prescribed in 1791. *Id.* at 2734. The Court further stated that the protective scope of the First Amendment cannot be altered by any legislature “without persuasive [historical] evidence” that the “content is part of a long tradition . . . of proscription.” *Id.*

³⁰¹ The Supreme Court did not establish a standard of review in either *District of Columbia v. Heller*, 554 U.S. 570 (2008), or *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Those cases merely decided whether the right to “keep and bear arms” protected armed individual self-defense in the home with a handgun. *McDonald*, 130 S. Ct. at 3026–50; *Heller*, 554 U.S. at 599, 635. Perhaps as the Second Amendment moves forward the Court will remain true to its originalist approach and use history as the standard. See Patrick J. Charles, *The Second Amendment Standard of Review After McDonald: “Historical Guideposts” and the Missing Arguments in McDonald v. City of Chicago*, 2 AKRON J. CONST. L. & POL’Y 7, 7–39 (2010). In a *McDonald* concurrence, Justice Scalia did hint that history would provide the basis for examining future challenges. Scalia wrote that the use of historical evidence did not have to be the “perfect means . . . but [might be] the best means available in an imperfect world.” 130 S. Ct. at 3057–58 (Scalia, J., concurring). If this is the case, then perhaps the Court will examine gun control regulations in the context of the public good, and presume such laws constitutional as a means to prevent public injury and maintain the public peace. See generally Charles, *supra* note 275. For some alternative, less history-based standards of review, see Blackman, *supra* note 136 (positing that the Second Amendment should be viewed in a light similar to that of other constitutional rights); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009) (discussing the use of categoricalism and balancing tests in Second Amendment cases); Darrell A. H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009) (proposing the use of a standard of review for gun-control laws that is similar to that used for obscenity); Lawrence Rosenthal & Joyce Lee Malcolm, *Colloquy Debate, McDonald v. City of Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437 (2011) (debating the merits of using traditional strict scrutiny or a lower standard of review for Second Amendment cases); Eugene Volokh, *Symposium, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1480–81, 1516–29 (2009) (arguing that the Court should use four categories to justify restricting Second Amendment rights rather than the three traditional standards of scrutiny).

³⁰² See Blackman, *supra* note 136, at 953–55 (discussing the various standards of review the Supreme Court has applied to some constitutional rights).

Their views expound the importance of our state and federal constitutions as consensual compacts that evolve based on the consent of the people. This premise was consistently repeated in charges to grand juries.³⁰³ Although not legally binding, the charges conveyed the unrestrained views of some of the eighteenth century's greatest legal minds. These include the likes of former Supreme Court Justices John Jay, James Iredell, James Wilson, Oliver Ellsworth, and William Patterson, and other influential jurists like Thomas McKean, Alexander Addison, and Benjamin Rush. In all, they confirm that the presumption of liberty was nonexistent—for laws passed by the consent of the people were presumed lawful.

Alexander Addison was one late eighteenth-century jurist who articulated the preservation of individualized liberty as explicit within the Constitution itself. Other than the list of enumerated rights, including the checks and balances incorporated in its text, Addison understood the preservation of liberty and happiness as resting primarily with the consent of the governed:

Some other governments have been established, to promote the happiness of one or a few; but ours is established to promote the good of the whole people; and the principles necessary or proper for this purpose are laid down in the constitution, and *carried into effect by the acts of the several branches of the government*. It is in the constitution, and not in the opinions of individuals, that we are to discern the principles tending to the good of the people; for the constitution is the work of the whole people, the system which they have chosen to promote their happiness, the maxims by which every branch of the government must be directed, and by which only they can be tried.³⁰⁴

Writing in 1796, Addison was just one of many jurists to link the basis of American liberty and happiness with legislative acts and the ability of the people to amend the Constitution, not individual natural rights. For instance, Associate Justice of the Supreme Court James Iredell wrote, “If [the people] wish for good laws, they must choose able and disinterested men to make them,” for “it is in their power directly or indirectly to secure them by a discreet and judicious exercise of the choice with which they are invested.”³⁰⁵ The “blessings” of American liberty were not legal

³⁰³ See *infra* notes 304–15, 317–27 and accompanying text.

³⁰⁴ ADDISON, *supra* note 229, at 190 (emphasis added); see also Alexander Addison, A Charge Delivered by Alexander Addison to the Grand Jury of the County of Allegheny (Sept. 1, 1794), in DUNLAP & CLAYPOOLE'S AM. DAILY ADVERTISER (Phila.), Sept. 13, 1794, at 3 (“But our constitution has already secured the most democratic principles of representation. Our complaint is only against the ordinary exercise of a legislation. We have now more than a just proportion of representatives. . . . The principles of liberty are completely established in our constitution. Those principles are, that the will of a majority should control the few.”).

³⁰⁵ James Iredell, A Charge Delivered to the Grand-Jury of the United States, for the District of Virginia (May 22, 1797), in NORTH-CAROLINA J. (Halifax, N.C.), June 5, 1797, at 1.

presumptions to be litigated in a court of law, but were “preserved or lost” based on the “conduct of the people themselves,” i.e., elections.³⁰⁶ Similarly, Judge Samuel Hitchcock viewed American liberty as dependent “not upon the arbitrary will of an individual, but upon the sentiments of the great body of the people.”³⁰⁷ “Every law and ordinance of the United States” was presumed lawful, wrote Hitchcock, because it was “made by the legal Representatives of the people, who feel their accountability to their constituents, and whose public conduct is constantly open to the examination, censure or approbation of the tribunal of popular opinion.”³⁰⁸

The Constitution was perhaps the first of its kind in representative principles.³⁰⁹ As Judge Richard Peters stated before the federal grand jury in the District of Pennsylvania, “We are among the very few nations of the earth who enjoy a legitimate government, founded, without alloy, on the authority of the people.”³¹⁰ Peters elaborated on the importance of “the people” in the Constitution:

[I]n a republic there is but one great and leading interest, to wit, that of the whole nation. And in our republic, the majority of our national representatives are the judges, legally authorized to declare, under the guards in the constitution, what this general interest is, and how it shall be directed. Local interests and particular convenience must yield to this. The parts must make sacr[i]fices to the will and to the ordinances of the whole. These local and temporary sacrifices are fully compensated by the protection and general advantages received from the government, in which every one partakes, and has as great a weight as it is entitled to. . . . If any measures are thought unequal and to press severely on any particular description or district of citizens, let

³⁰⁶ *Id.*; see also Iredell, *supra* note 269, at 2 (“We are sensible that the opinions, passions and interests of individuals, or of any particular part of the community, should be subordinate to the *general will* . . .”).

³⁰⁷ Hitchcock, *supra* note 179.

³⁰⁸ *Id.*

³⁰⁹ This view of American constitutionalism in general was prevalent in eighteenth-century legal thought by the end of the American Revolution. See Aedanus Burke, Charge to the Grand Jury at the Court of General Sessions held at Charlestown, South Carolina, in *SOUTH-CAROLINA WKLY. GAZETTE* (Charlestown, S.C.), June 14, 1783, at 1 (“We afford a spectacle more singular and honourable, than was ever before displayed on the theatre of this world: A nation whose citizens live under a form of government, the work of their own hands; constituted peaceably and deliberately by a *social compact*, far remote from that violence, or treachery, or cabal, to which most governments in the old world may claim kin, or trace their origin. . . . Our new Republic is beginning the world, and launching into the immense ocean of future time, blessed with peace and serenity; our own happiness Thus far we differ from any nation that have gone before us.”).

³¹⁰ Richard Peters, Charge Delivered to the Grand Jury of the District Court of Pennsylvania, in *PHILA. GAZETTE & UNIVERSAL DAILY ADVERTISER* (Phila.), Aug. 23, 1794, at 3.

them decently, yet firmly remonstrate, write and speak against them, with the freedom they possess, and I hope will ever enjoy. Let them, so far as in them lies, change the representation in the government, by all peaceable and constitutional means.³¹¹

In 1794, Judge Edward Shippen delivered similar sentiments:

Law, in a popular government, is the will of the people declared by a majority of its representatives; the will of the *few* must necessarily submit to the will of the *many*—This idea is of the essence of a Republican government, and is what distinguishes it from a despotic monarchy, where the will of a single person constitutes the law of the land³¹²

Shippen knew that true liberty and security rested “on the due and vigorous execution of the laws,” so long as the “arm of justice” was “equally stretched forth for the weak and the strong.”³¹³ In other words, it was republican government that embodied “the happiness of a state of society,” and infused “public virtue” or a “love of order and reverence for those laws” that secure freedom.³¹⁴

Judge John Sullivan highlighted the same interrelation between liberty and republican government before a New Hampshire grand jury.³¹⁵ In 1775, it was Continental Brigadier General Sullivan who hoped New Hampshire would establish a republican government with the “one Object” or first rule in view, “namely the Good of the whole.”³¹⁶ Now, in 1790, Judge Sullivan knew that the United States Constitution—“the best form of government for rendering the people perfectly and permanently happy”—provided that vehicle:

Whenever we view and consider mankind, we shall find all engaged in the pursuit of happiness. The Savage and the polished Citizen, invariably pursue the same object: But it must be acknowledged, that the motives and the views of each are in some measure different. The former conceives his Felicity to consist in gratifying his own spirit of revenge, and in ruling and governing himself according to the dictates of his own uncultivated nature; while the

³¹¹ *Id.*

³¹² Edward Shippen, Charge to the Grand Jury Delivered Before the Court of Oyer and Terminer, in DUNLAP & CLAYPOOLE’S AM. DAILY ADVERTISER (Phila.), Aug. 26, 1794, at 3.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ See John Sullivan, Charge Delivered to the Grand Jury for the Federal District Court in New Hampshire, in SALEM GAZETTE (Salem, Mass.), July 27, 1790, at 2.

³¹⁶ Sullivan, *supra* note 239, at 144.

latter considers, that his happiness is connected with that of others, and consists in promoting, increasing and securing the felicity of all and ensuring to the peaceable and industrious, the quiet possession of the property which they have acquired. Those advantages appear so strikingly superior to what could be obtained in a state of nature, that it is far from being surprising that government was, at an early period, instituted by the general consent of mankind.³¹⁷

Given these judicial affirmations of what constituted the “pursuit of happiness” in eighteenth-century legal thought, it is difficult to ascertain how the natural-rights interpretation of the Declaration of Independence and Constitution can be taken seriously as a matter of historical originalism. It is a theory based more on faith in libertarian ideals than historical fact. In the words of Judge Jacob Rush, brother of the more infamous Benjamin Rush, laws are “indispensably necessary for the happiness of the society.”³¹⁸ Rush knew that individualized theories of what is lawful were moot given that a “perfect government, perfect laws, and a perfect administration of justice, will never be found any where, unless it be in the heated brains of visionary philosophers.”³¹⁹ The founding generation knew there was a time for theory and there was a time for government. The latter was debated and ratified through the text

³¹⁷ Sullivan, *supra* note 315. Sullivan’s words and analysis read eerily similar to David Hume’s, which may have been the inspiration. See HUME, *supra* note 140, at 148–49 (“The great end of all human industry, is the attainment of happiness. For this were arts invented, sciences cultivated, laws ordained, and societies modelled, by the most profound wisdom of patriots and legislators. Even the lonely savage, who lies exposed to the inclemency of the elements, and the fury of wild beasts, forgets not, for a moment, this grand object of his being. Ignorant as he is of every art of life, he still keeps in view the end of all those arts, and eagerly seeks for felicity amidst that darkness with which he is environed. But as much as the wildest savage is inferior to the polished citizen, who, under the protection of laws, enjoys every convenience which industry has invented; so much is this citizen himself inferior to the man of virtue, and the true philosopher, who governs his appetites, subdues his passions, and has learned, from reason, to set a just value on every pursuit and enjoyment. For is there an art and apprenticeship necessary for every other attainment? And is there no art of life, no rule, no precepts to direct us in this principal concern? Can no particular pleasure be attained without skill; and can the whole be regulated without reflection or intelligence, by the blind guidance of appetite and instinct? Surely then no mistakes are ever committed in this affair; but every man, however dissolute and negligent, proceeds in the pursuit of happiness, with as unerring a motion, as that which the celestial bodies observe, when, conducted by the hand of the Almighty, they roll along the ethereal plains. But if mistakes be often, be inevitably committed, let us register these mistakes; let us consider their causes; let us weigh their importance; let us enquire for their remedies. When from this we have fixed all the rules of conduct, we are *philosophers*: When we have reduced these rules to practice, we are *sages*.”).

³¹⁸ Jacob Rush, Charge Delivered to the Grand Jury of the County of Berks, in PHILA. GAZETTE & UNIVERSAL DAILY ADVERTISER (Phila.), Aug. 21, 1794, at 3.

³¹⁹ *Id.*

of the Constitution, and the former was respected—in that the Constitution provided a vehicle to establish or alter a “government[] of our own making”³²⁰:

Tell [the people] there can be no political freedom, without a sacrifice of some portion of those rights which are supposed to be enjoyed in a state of nature; and that it is beyond the wit of man, nay, that it is morally impossible, so to arrange and combine the powers of society, as to exclude from the virtues that compose the character of a good citizen, the duty of obedience *in all cases* where he is thrown into *the minority*. Tell them . . . that nothing is more opposite to every idea of republican government, or more fatally subversive of our democratic systems, than an infringement of the great principle, “that a majority of the people have a right to govern,” without which, it is evident democracy cannot subsist.³²¹

This presumption to govern was the “axiom received among” the American people, stated Rush, “which may justly be considered as the basis of all others, namely, that a majority of the people have a right to govern.”³²² Judge David Campbell did not view the Constitution as some philosophical instrument of natural rights either. “Government is not a scientific subt[le]ty,” stated Campbell, “but a practical expedient for the general good.”³²³ Campbell discussed the interrelation between the social compact, law of nations, legislative acts, and natural rights as follows:

The law of nature and the necessary law of nations being founded on the nature of things, and in particular on the nature of man, it follows, that this law of nature and nations is immutable.

³²⁰ *Id.*; see also Israel Smith, Charge to the Grand Jury of Rutland County, in *FED. GALAXY* (Brattleborough, Vt.), Feb. 20, 1798, at 1 (“But under governments originating like ours, where the commencement was in the general consent, and the foundation laid in wisdom, and moderation; when a just and perfect responsibility is kept up, in those who are entrusted with power, to those who have entrusted them; where provision is made for the amendment and alteration of the constitution, when experience shall teach it to be necessary, and when every reform in our government, and laws, can be effected with greater ease, and greater certainty, in the constitutional modes, than any other; and when from the constitution of the government itself, the powers of it are constantly devolving on the people, inciting and almost compelling them to exercise rights in removing every thing which is offensive . . . ?”); William Stephens, Charge to the Grand Jury of Wilkes County, Georgia, in *GAZETTE OF THE U. S. & PHILA. DAILY ADVERTISER* (Phila.), Feb. 12, 1798, at 2 (“In effecting changes of government, or amending the existing system, we have no need, but to consult, primarily, our own happiness, by having the vast advantages of calmly looking into the forms of constitutions, that our sister states have under, and with that, of the Union . . .”).

³²¹ Rush, *supra* note 318, at 3.

³²² *Id.*

³²³ David Campbell, Charge Delivered to the Grand Jury of the Superior Court of Washington District (1795), in *GAZETTE OF THE U. S.* (Phila.), Nov. 30, 1795, at 2.

The statute laws of any society or state are mutable, agreeable to the will of its legislature . . .

. . . .

Whenever men unite in society, they divest themselves of certain natural rights, agreeable to the complexion and rules of the state. Each citizen subjects himself to the authority of the entire body. The authority of all over each member, essentially belongs to the body politic; but the exercise of that authority may be placed in different hands, according as the society shall ordain.

The end of civil society is procuring for the citizens whatever their necessities require, the conveniences and accommodations of life, and in general, whatever constitutes happiness, with the peaceful possession of property, a method of obtaining justice with security, and a mutual defence against all violence from without.³²⁴

In a 1797 charge to the grand jury of Windham County, Vermont, Judge Lot Hall also declared that “mutual defence and interest gave rise to society . . . in order to advance the general good.”³²⁵ Where the United States differed from other nations was “[i]n the construction of our general, as well as state governments which” was “entirely new” to the world.³²⁶ Hall elaborated on how this *new* government would preserve liberty and happiness:

In constituting our particular government, the circumstances of our country, the interest and happiness of the people, the state of society and manners were taken into consideration; and the establishment made on principles, as nearly as could be; conformable to them all.

A government thus founded upon the interest and happiness of the people, can derive no pleasure from any consideration but the promotion of their good. We ought to bear in mind that no government, however excellent in its form, can long preserve its liberties, *unless it be carried into effect and operation*. . . . Our laws being truly the will of the people, expressed in a constitutional manner, are on that account [e]ntitled to implicit and indiscriminate obedience.³²⁷

At no point did Hall stipulate anything resembling some form of presumption of liberty or a natural-rights interpretation of the law. Such theories were virtually

³²⁴ *Id.*

³²⁵ Lot Hall, Charge to the Grand Jury of Windham County, Vermont (1797), in FED. GALAXY (Brattleborough, Vt.), Aug. 18, 1797, at 4.

³²⁶ *Id.*

³²⁷ *Id.* (emphasis added).

non-existent as a matter of American eighteenth-century constitutional interpretation, for the true fulcrum of liberty and happiness rested with the people. Today, our trust in the representative system that the founding generation laid out for us tends to waiver. Political parties, lobbyists, public interest groups, and influential businesses have diluted the Founders' virtuous form of government. One may even assert that many contemporary political representatives no longer have the "the people" in view. Such perceptions of our modern democratic system, however, do not alter the eighteenth-century perception that liberty and happiness were invested with "We the people of the United States," not some form of judicial presumption.

Too often, advocates seek to supersede our laws and amend our constitutions—state and federal—by means of judicial remedy, and attempt to step around the voice of the people. These challenges come from advocates of all political backgrounds, whether democrat, republican, libertarian, constitutionalist, liberal, or conservative. Instead of seeking to educate the people and reestablish virtuous principles among our representatives, we challenge conduct and laws on some form of fabricated constitutional idealism.³²⁸

This practice runs afoul of the Declaration of Independence's purpose of providing the ground and foundation of government on representative principles. The Declaration's, and subsequent Constitution's, reasoning was simple: the people were to guarantee the success of the nation by means of civic republicanism. This meant that the people had to be knowledgeable and virtuous to guarantee liberty. As Judge Israel Smith stated before the grand jury in Cumberland County, New Jersey:

[K]nowledge is absolutely necessary to discern where in [the people's] true interest consists. I do not mean [of] momentary selfish advantage, but their *real and permanent good*—It will

³²⁸ This ad hoc form of constitutionalism is nothing new in the pantheon of American history. As one late nineteenth-century article on the Reconstruction Amendments details:

Every man has a theory of the government under which he lives, and sees it through the medium of his theory. With the government, as seen through this medium, he is either satisfied or dissatisfied. If the former, he is inclined to attribute to its agency a large share of the prosperity and happiness which the people have enjoyed; if the latter, he is equally liberal in charging upon it the adversity and unhappiness they have experienced. In fact, the country appears to these observers to be fortunate or otherwise, and our history and progress respectable or otherwise, accordingly as the government is in conformity or otherwise with their respective theories. With the one, the desire is that the government shall remain as it was created, and the Constitution be interpreted in accordance with recognized canons of legal interpretation; with the other, it is that the Constitution shall be interpreted to agree with his ideas of political expediency, and the government be made to conform to the interpretation.

Henry Reed, *American Constitution in 1787 and 1866*, in 2 INT'L REV. 604, 619 (New York, A.S. Barnes & Co. 1875).

inspire them with a love of their country superior to all others; for . . . he that loves another nation to the injury of his own, is guilty of political whoredom, becomes a patricide, and is as great a monster as a man with two heads. It will teach them that their private and individual interest must give way to that of the public where they chance to interfere; which will seldom be the case, and that they will be gainers by it in the end³²⁹

Without knowledge, it was “impracticable . . . to secure liberty, safety and happiness, to any country, however free,” stated Smith.³³⁰ This held especially true in the United States, “[w]here the people govern themselves.”³³¹ Indeed, our modern democratic structure has evolved from civic republicanism to political factions and interest groups. However, this does not justify advocates and legal scholars in seeking liberty outside the text and intent of the Constitution. It cannot be emphasized enough that the power to expand our liberty and happiness is invested with “We the people.” It is our duty to educate and hold accountable our representatives for perceived wrongs, for only then will our Constitution have been restored.

This process of education and accountability was intertwined with the principle of virtue. At the sixteenth anniversary of American independence, Martin Post orated that “the felicity of [a] nation depends on *the virtue of the people*.”³³² According to Post, “Virtue is the palladium of liberty, and the bulwark of the rights of man.”³³³ Pennsylvania Judge Alexander Addison similarly proclaimed that “virtue is the principle of a republican government” and “to produce public good there must be public virtue in the whole people, for in the hands of the whole people is the authority and force of the nation really vested.”³³⁴ Should “the people” lose this virtue, Addison knew that “a democratic form of government will not long subsist.”³³⁵ Addison elaborated:

[If] the people lose sight of public good and suffer themselves to be corrupted by selfish passions and base views—all the wretchedness of tyranny is united with the reflection, that they are themselves the authors of their own misery. . . . If virtue is extinguished, if the public force is not directed to the public good, if every

³²⁹ Israel Smith, Charge to the Grand Jury of the County of Cumberland, New-Jersey, *in* GAZETTE OF THE U. S. & PHILA. DAILY ADVERTISER (Phila.), June 22, 1798, at 3 (emphasis added).

³³⁰ *Id.*

³³¹ *Id.*

³³² MARTIN POST, AN ORATION DELIVERED AT CORNWALL, ON THE 5TH DAY OF JULY, A.D. 1802, FOR THE ANNIVERSARY OF AMERICAN INDEPENDENCE 9 (Middlebury, Huntington & Fitch 1802).

³³³ *Id.*

³³⁴ ADDISON, *supra* note 229, at 150–51.

³³⁵ *Id.* at 151.

individual, regardless of the common interest, pursues a selfish and separate end, and the exertions of all, instead of co-operating for general prosperity, contend for private and discordant gain, individual exertions mutually defeat each other . . . [and] the liberty of the government exists only in theory and form³³⁶

Associate Supreme Court Justice James Wilson delivered similar sentiments on the interrelation between government, the law, and the people's virtue:

[A]s excellent laws improve the virtue of the citizens so the virtue of the citizens has a reciprocal and benign energy in heightening the excellence of the laws. . . . The *rational* love of the laws generates the *enlightened* love of *our country*. The enlightened love of our country is propitious to every virtue, which can adorn and exalt the citizen and the man.³³⁷

Perhaps it is this interrelation between knowledge, virtue, happiness, and liberty that has confused proponents of a natural-rights interpretation of the Constitution.³³⁸ The Founders' view of republican government was circular in nature. The starting

³³⁶ *Id.*; see also *id.* at 93 ("To produce virtue or public utility is the true end of government. Virtue is most effectually produced by making it the interest of each individual to promote the public good. That form of government must be good which necessarily combines the individual with the general interest, and that form of government must be bad which necessarily disjoins them."); Samuel Huntington, Speech Before the Connecticut House of Representatives (May 12, 1788), in MIDDLESEX GAZETTE, OR, FED. ADVISOR (Middletown, Conn.), May 19, 1788, at 1 ("The promoting of education is a matter of great importance If we consider the subject, not only as it respects the happiness of individuals in this and a future life, but also the effect it must have with regard to the public weal[th], it will appear of the greatest importance:—A happy constitution & government can never be enjoyed or maintained, by an illiterate or savage people.").

³³⁷ JAMES WILSON, A CHARGE DELIVERED BY THE HONORABLE JAMES WILSON, ESQ. ONE OF THE ASSOCIATES OF THE SUPREME COURT OF THE UNITED STATES, TO THE GRAND JURY IMPANELLED FOR THE CIRCUIT COURT OF THE UNITED STATES 29 (Richmond, Augustine Davis 1791).

³³⁸ The importance of "virtue" in democratic republics and eighteenth-century constitutionalism can be found everywhere in the popular print culture. For a great example in eighteenth-century constitutional thought, see Williams, *supra* note 238, at 379–80 ("But a *free government*, which of all others is far the most preferable, cannot be supported without *Virtue*. This virtue is the Love of our country. And after all the devices that sound policy or the most refined corruption have, or can suggest; this is the most efficacious principle to hold the different parts of an empire together, and to make men good members of the society to which they belong. Other principles of political obedience if they are unconnected with this, will in a course of time interfere, clash, oppose, and destroy each other's influence: Or else, and which is more likely and infinitely worse, they will jointly operate to destroy virtue, and to produce universal vice and oppression. But Virtue, like gravitation, will ever draw towards the common centre. And so long as this can be kept up, the rulers and the people, by its influence, will be kept in that place, and move in that course, which the laws of their country have assigned to them.").

and end point was with “the people.” The Constitution affords them the means and ends of ensuring liberty, with the basis of equal liberty resting on the laws of the United States. This is what Judge David Campbell described as “the main spring which puts all the other wheels of government in motion.”³³⁹ Former Chief Justice of the Supreme Court Oliver Ellsworth similarly proclaimed the “national laws” as the “vehicles of life,” for “they give to the whole, harmony of interests, and unity of design.”³⁴⁰ Ellsworth knew that “strength of virtue” alone was insufficient to ensure the success of the American republic.³⁴¹ There had to be “vigilance . . . of laws made by all,” which have “for their object the good of all.”³⁴²

IV. APPLYING THE PRESERVATION OF “LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS” TO MODERN CONSTITUTIONALISM

Often, a problem arises with applying originalist thought to modern constitutionalism, the problem being that the Founders’ view of the Constitution rarely comports with modern jurisprudence. Certainly, courts have applied founding principles and historical guideposts to gauge the protective scope of certain constitutional provisions. However, changes in technology, economics, foreign policy, and the evolution of societal ethics make it difficult to apply the Founders’ interpretation of the law and its interrelation to society.

Fortunately, this dilemma does not present itself as to the general application of preserving “life, liberty, and the pursuit of happiness.” It is a basic democratic principle. The federal and state legislatures, which are appointed by the people, have wide discretion to pass laws in furtherance of the public good. So long as the legislative branches exercise powers in accordance with the constitutional text and do not violate core enumerated rights, laws are presumed valid.³⁴³ This holds especially true for Congress.

As Chief Justice John Marshall wrote in *McCulloch v. Maryland*³⁴⁴:

[W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all

³³⁹ Campbell, *supra* note 291, at 1.

³⁴⁰ Oliver Ellsworth, Charge Delivered to the Grand Jury of Chatham County (Apr. 25, 1796), in COLUMBIAN HERALD; OR THE NEW DAILY ADVERTISER (Charleston, S.C.), May 25, 1796, at 4.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ U.S. CONST. art. I, § 8, cl. 18.

³⁴⁴ 17 U.S. (4 Wheat.) 316 (1819).

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.³⁴⁵

Although some commentators have interpreted *McCulloch* as supporting a presumption of liberty,³⁴⁶ the holding actually stands for the presumption of constitutionality.³⁴⁷ It is the very essence and purpose of the Necessary and Proper Clause. Congress, a legislative body appointed by the people, must have wide discretion to carry out laws in the advancement of the public good. As was extensively addressed in Part III, this line of thought was prevalent in eighteenth-century constitutionalism. Government required the obedience of the people, the forfeiture of natural rights in the interest of the common good,³⁴⁸ and the enactment of laws to carry it all into effect. To assert otherwise would mean the end of republican government.³⁴⁹

In 1794, Judge Jacob Rush elaborated on this point, stating, “the friends of arbitrary power would have [triumph over us], should the experiment of republican governments be frustrated in this part of the globe, by the inconsideration, the folly or rashness of the people.”³⁵⁰ Rush felt the people must be reminded of their role in the new federal government—otherwise, the American experiment would fail:

[O]ur enlightened notions of the RIGHTS OF MAN, would serve but to display, in a more conspicuous manner, the futility and vanity

³⁴⁵ *Id.* at 421.

³⁴⁶ See BARNETT, *supra* note 115, at 168–90 (discussing scholarly misconceptions about *McCulloch v. Maryland*); see also Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 138 n.181 (2001) (discussing the controversy between James Madison’s and Chief Justice Marshall’s concepts of necessity); McAfee, *supra* note 7, at 1548–52.

³⁴⁷ See generally BARNETT, *supra* note 115.

³⁴⁸ This principle has been touched upon throughout this Article and is consistent with our Anglo origins. See John Hawkins, A Charge to the Grand Jury of the County of Middlesex, (Sept. 11, 1780), in CHARGES TO THE GRAND JURY: 1689–1803, *supra* note 297, at 435–36 (“But as the Ends of Government cannot be answered without Subordination and legal Submission on the Part of those who derive Benefit from it, there necessarily results an Obligation on the People, of Obedience to the legislative and executive Powers That such Respect and Veneration as is here mentioned is due from th[e] People to their Governours, is not only deducible from the Principles of natural Reason . . . but the Exercise of these Dispositions, so necessary to the Existence of Order and the Promotion of national Happiness, is clearly discernible in the Conduct of Mankind . . .”).

³⁴⁹ See ADDISON, *supra* note 229, at 151 (“The object of the laws is public good. When the people lose their love of public good they lose their love of the laws, which are the means of promoting it, and the force of the laws is broken Without virtue the people will not bend to the laws: the laws will bend to the people. . . . Thus failing, the laws fall. The laws are the government. When the laws fall the government falls . . .”).

³⁵⁰ Rush, *supra* note 318, at 3.

of our pretensions; and the United States would furnish to the philosopher and the politician, a melancholy, but decisive proof, that there does not exist in human nature, a sufficient portion of virtue, to establish a government *solely* on the authority of the people.

To prevent this horrid catastrophe to the cause of liberty, nothing more is required of us, than to make the laws of the land the rule of our conduct. We rejoice, gentlemen, and with good reason, that we possess governments of our own making, and representatives of our own ch[oo]sing It is utterly impossible in any form of government, that we can *be all* KINGS³⁵¹

Alexander Addison was perhaps the greatest judicial advocate for interpreting the Necessary and Proper Clause in accordance with the representative principles embodied in the Declaration of Independence. Addison viewed the Necessary and Proper Clause as granting congressional deference to legislate for the common welfare and in the interests of the public good.³⁵² Addison divided our liberty and happiness into the federal and state spheres of government, writing:

[The federal] government is vested [with] all authority over general or national and external subjects. . . . And to this government we must owe the prosperity of our commerce, the payment of our debts and our national defence.

To the government of each state is severally reserved authority over local and internal subjects, the administration of justice, and protection of persons and property within the territory of each. And to this government we owe the security of those personal enjoyments which we regard—life, liberty, reputation and estate.³⁵³

Addison correctly interpreted the Constitution as the “work of the whole people, the system which [the people] have chosen to promote their happiness,”³⁵⁴ and the binds that prevent “a number of separate and hostile states, mutually hating, embarrassing and injuring each other, unhappy at home and contemptible abroad.”³⁵⁵ The Constitution was “established to promote the good of the whole people,” not the “happiness of one or a few,” including that of individual states.³⁵⁶ Addison knew that the means to establish this “good” were implicit in the Necessary and Proper Clause, for the “principles

³⁵¹ *Id.*

³⁵² ADDISON, *supra* note 229, at 189–90.

³⁵³ *Id.* at 189.

³⁵⁴ *Id.* at 190.

³⁵⁵ *Id.* at 189.

³⁵⁶ *Id.* at 190.

necessary [and] proper” for the “good” of the people are “laid down in the constitution, and carried into effect by the acts of the several branches of the government.”³⁵⁷

Opponents of this representative interpretation of the Declaration of Independence and Constitution refer to the Ninth and the Tenth Amendments. As Scott Douglas Gerber argues:

Both provide that the rights not listed in the preceding eight amendments are still to be given government protection. The tenth amendment speaks to rights identified by state law (to be protected by state government), whereas the ninth amendment addresses all *unenumerated* rights (to be protected by both federal and state government).³⁵⁸

In particular, Gerber and others believe that the Ninth Amendment speaks of “both unenumerated *positive* rights and unenumerated *natural* rights.”³⁵⁹ However, this is a misreading of the constitutional principle embodied by the Ninth Amendment.³⁶⁰ The Amendment reads, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”³⁶¹ Its constitutional purpose is simple: the people have a right to engage in all activity that is not forbidden by “the people” through their representatives in the interest of the public good. In the words of former Associate Justice of the Supreme Court Joseph Story, “This clause was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others.”³⁶²

It was a working legal principle that Judge George Thatcher’s 1786–87 editorial debate illuminated. Thatcher did not view the inclusion of a declaration or bill of rights as the totality of the people’s rights, but a list of rights that the government could never usurp.³⁶³ All other activity was constitutional unless the legislature determined it to be inconsistent with the good of the whole:

“All power resides originally in the people;” and in very few instances, if any, is the declaration of rights immediately restrictive

³⁵⁷ *Id.* Addison would go on to influence John Marshall’s interpretation of the Necessary and Proper Clause. See generally Charles, *supra* note 25.

³⁵⁸ GERBER, *supra* note 6, at 70.

³⁵⁹ *Id.* at 73; see also Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006); Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Theory Assist in Interpretation?*, 5 N.Y.U. J. L. & LIBERTY 1 (2010).

³⁶⁰ See Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 362–69 (2004).

³⁶¹ U.S. CONST. amend. IX.

³⁶² 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1898 (Boston, Hillard, Gray & Co. 1833).

³⁶³ See Scribble Scabble, *supra* note 277, at 1–2.

of the rights and powers of the people; But it rather vests powers in the legislature to controul, modify and direct the alienable rights of the people, from time to time, as the legislature shall think the good of the people may require. Thus, though the legislature is undoubtedly vested with authority to controul any, if not all, the alienable rights of the people (except such as are reserved in their bill of rights) yet, until that is actually done by the legislature, the people have a clear right to exercise those rights in the way and manner they think proper; subject only to the great law of reason. And where the declaration secures a particular right, in itself alienable, or the use of a right, in the people, it does not at the same time contain, by implication, a negative of any other use of that right.³⁶⁴

A little later, Thatcher would nicely sum up this principle as follows:

[T]he declaration of rights does not directly give up the rights of the people; but only vests certain powers in the legislature to controul those alienable rights, not secured by the declaration, as the legislature shall think the good of the public requires.³⁶⁵

This is not to say that the people could not add new enumerated and inalienable rights to tailor the power of the political branches. The simplistic genius of eighteenth-century American constitutionalism is that the people could always alter and improve government. Giving “the people” this power made the 1787 Constitution the first of its kind. It was what Addison referred to as the “best form of government” because it “effectually and inseparably combines and unites the general and individual interest.”³⁶⁶ In other words, the Constitution followed utilitarian principles of equal participation and liberty. It was built on “the power and the people, the rulers and the ruled . . . to promote virtue, that is to promote public utility.”³⁶⁷

This representative interpretation of the Declaration of Independence and Constitution does not change with the Tenth Amendment either. The Tenth Amendment reads, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”³⁶⁸ Its text clearly divides government into state and federal spheres.³⁶⁹ At the same time, the Tenth Amendment also embodies a larger

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 2.

³⁶⁶ ADDISON, *supra* note 229, at 93.

³⁶⁷ *Id.* at 94–95.

³⁶⁸ U.S. CONST. amend. X.

³⁶⁹ See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 521 (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1891) [hereinafter 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS].

representative principle. Its reference to “powers . . . prohibited by [the Constitution] to the States, a[nd] reserved to the States respectively, or to the people”³⁷⁰ not only references the structure and text of the 1787 Constitution, but also the ability of the States and the people to amend it. Most importantly, though, the Tenth Amendment’s reference to “the people” affirms and illustrates the simple principle embodied by the Ninth Amendment³⁷¹—any unregulated activities are reserved to “the people.”

In other words, the founding generation sought to ensure that the Constitution could not be interpreted as a restrictive or inflexible document. The government could not proclaim an activity unlawful because it lacked an affirmation in the constitutional text. Instead, all activities were presumed lawful until regulated. For modern scholars to expand upon this theory and assert a presumption of liberty when interpreting legislative acts is to take away from republican government its very purpose—the advancement of the public good.

This point is reflected by Addison’s reading of the Tenth Amendment:

The constitution could never intend to make the government of the United States . . . a government of duties without powers: for it was framed expressly to add powers to duties. The constitution was established by the people of the [United] States, “to form a more perfect union, insure domestic tranquility, provide for the common defence, and promote the general welfare.” Any construction of this constitution, not unavoidable, which would deprive the government of any proper means to promote those ends will be rejected. Whatever is fairly involved in any power granted by the constitution, is a power granted by the constitution, and cannot[] be restrained by the provision that the powers not delegated are reserved.³⁷²

Addison’s point was that the Framers of the Constitution knew it was impossible to “put every law in express words.”³⁷³ He was not alone. Joseph Story had personally witnessed arguments asserting rights outside of the Ninth Amendment’s “natural meaning” to “support . . . the most dangerous political heresies.”³⁷⁴ The Tenth Amendment proved no different, as Jeffersonian Republicans asserted a limited interpretation of the Constitution’s text. Story responded, “[The Tenth Amendment’s] sole design is to exclude any interpretation, by which other powers should be assumed beyond those, which are granted.”³⁷⁵ Granted powers were not

³⁷⁰ U.S. CONST. amend. X.

³⁷¹ See Kurt T. Lash, *James Madison’s Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 176 (2006).

³⁷² ADDISON, *supra* note 25, at 21–22.

³⁷³ *Id.* at 31.

³⁷⁴ STORY, *supra* note 362, at § 1898.

³⁷⁵ *Id.* at § 1901.

limited by a strict textual reading of the Constitution. The Constitution embodied grants of powers “express or implied, whether direct or incidental.”³⁷⁶ Story elaborated:

This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty.³⁷⁷

The point of the matter is that there is no provision in the Constitution that embodies a natural-rights philosophy or a presumption of liberty. The idea runs counter to the true republican theory behind preserving “life, liberty, and the pursuit of happiness.” It is the people’s virtue, knowledge, and participation in the political process that preserves liberty and happiness. As Colonel Jedediah Huntington wrote, the Declaration stood for the principle that republican governments espoused “publick virtue and liberty, which [in turn] make the publick happiness.”³⁷⁸ This principle, and this principle alone, is the “truth” that Elijah Waterman thought should be “inculcated upon [the people’s] minds,” for a representative government was the “foundation of their independence” and must be “preserved as the permanent basis of their security and future happiness.”³⁷⁹

CONCLUSION—OUR HAPPY CONSTITUTION

As a matter of historical context, the Declaration of Independence was viewed by many as the legal ground and foundation of United States government. This was confirmed by David Ramsay, who wrote to James Madison that the Declaration of Independence was the “act” by which a “new compact for a new Government was formed between the then residing and consenting inhabitants of these States.”³⁸⁰

Not only did the Declaration establish this by proclaiming an independent nation, but it also provides the philosophical basis by which American government was to be derived. In the words of Harry V. Jaffa, the principles of the Declaration of Independence are “[t]he very soul of the American Constitution.”³⁸¹ While Jaffa

³⁷⁶ *Id.*

³⁷⁷ *Id.* at § 1900.

³⁷⁸ Letter from Jedediah Huntington to Jonathan Trumbull, Gov. of Conn., *supra* note 1, at 510.

³⁷⁹ WATERMAN, *supra* note 63, at 16.

³⁸⁰ Letter from David Ramsay to James Madison (Apr. 4, 1789), in THE PAPERS OF JAMES MADISON DIGITAL EDITION (J.C.A. Stagg ed., 2010), available at <http://rotunda.upress.virginia.edu/founders/JSMN-01-12-02-0036>.

³⁸¹ HARRY V. JAFFA ET AL., ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION 56 (1994) (citation omitted).

only offered broad generalizations to support his interpretative theory,³⁸² this Article provides substantiated historical evidence that the founding generation viewed the preservation of “life, liberty, and the pursuit of happiness” as being implicit within our democratic structure and the text of our constitutions.

In the context of eighteenth-century constitutionalism, “liberty” and “happiness” were not personal or individual guarantees, but conditions that only a virtuous society and public spirit could achieve.³⁸³ True liberty is tough to obtain, rare to find, and has to be earned. To put it another way, the dichotomy between personal and collective liberty that we imagine today is not eighteenth-century liberty.

Indeed, much of our modern jurisprudence and legal commentary has steered away from eighteenth-century perceptions of “liberty,” “happiness,” and “rights,” but this does not excuse the practice of proclaiming that the Declaration stands for individual natural rights or a presumption of liberty under the guise of originalism in order to restore a constitution that never existed. Certainly, the American Revolution was a revolution of ideas and government. However, the revolution that took place was the establishment of a true republican government of “the people.” The evolution from the English *chain of being* and virtual consent to American *equality* and popular consent was a rather significant step in the pantheon of Anglo-American history.³⁸⁴

There was a time when the chain of being and virtual consent preserved all liberty and happiness. This was the basis of English government. A 1792 charge to the grand jury delivered by Sir William Ashurst nicely sums up the pre-revolution view on the happiness afforded by the English form of government:

Gentlemen, it is Civil Liberty that is the parent of industry, and consequently of wealth. For in a state of Nature, there was no security to property, and no man thought of property further than for the momentary supply of his own immediate necessities. But when men have entered into society, the consciousness that their property is secure, induces to habits of industry. . . . [I]t was necessary that mankind, on entering into Society, should give up into the hands of Government that species of Liberty which resulted from the perfect equality of man, and where no man had a right to impose on another a rule of conduct, but every man, as far as his strength carried him through, followed his own will. But, Gentlemen, a state of society cannot subsist without Subordination; there must be general rules laid down by the coercive power of the State wherever it resides, as a standard by which the actions of men are to be measured and punished, so as to prevent them from being injurious to the rights and happiness of their fellow-citizens. And

³⁸² Strang, *supra* note 87, at 436–37.

³⁸³ BAILYN, *supra* note 179, at 368–76.

³⁸⁴ POLE, *supra* note 180, at 1–12.

there must be a coercive power in such hands as the Constitution has thought fit to place it, to enforce such law and rules of actions as the wisdom of the State has prescribed. Happily for us, Gentlemen, we are not bound by any laws but such as ordained by the virtual consent of the whole kingdom, and which every man has the means of knowing; and if men judged aright, they would be persuaded their happiness entirely depended on a due observance and support of these Laws.³⁸⁵

As shown in Part III.C, the eighteenth-century American perception of the interrelationship between nature, liberty, happiness, and consent is nearly identical to the English one³⁸⁶—the difference between the English and American model being that the latter was premised on public virtue and the actual consent of “the people.” Also, unlike their English colonial charters, the new American constitutions established legislative assemblies that could no longer be dissolved by the will of the Executive.³⁸⁷ It is a historical point of emphasis that the founding generation was fighting for the rights of Englishmen in accordance with customary American liberty.³⁸⁸ One of those basic rights was believed to include representation³⁸⁹—a right the Founders traced to

³⁸⁵ William Ashhurst, Charge Delivered to the Grand Jury in Middlesex, (Nov. 19, 1792), in *CHARGES TO THE GRAND JURY 1689–1803*, *supra* note 297, at 447–48.

³⁸⁶ In a rough draft of the third “Clarendon” letter, John Adams wrote on the interrelation between the “public good,” “liberty,” and “happiness” in the context of the British Constitution. See 1 JOHN ADAMS, *THE DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS: DIARY 1755–1770*, at 297–98 (L.H. Butterfield ed., 1962). Adams’s comments, written on January 18, 1766, are similar to his comments on the American Constitution. See *id.* (“For Government is a Frame, a scheme, a system, a Combination of Powers, for a certain End vizt. the good of the whole Community. The public Good, the *salus Populi* is the professed End of all Government, the most despotic as well as the most free. . . . I shall take for granted what I am sure no Briton will controvert, that Liberty is essential to human Happiness—to the public Good, the *Salus Populi*. And here lies the Difference between the british Constitution and other Constitutions of Government, vizt. that Liberty is its End—the preservation of Liberty is its End, its Use, its Designation, its Drift and scope . . .”).

³⁸⁷ See THE DECLARATION OF INDEPENDENCE para. 7 (U.S. 1776) (“He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.”).

³⁸⁸ See CHARLES, *supra* note 18, at 53–82; MASSACHUSETTS PROVINCIAL CONGRESS REPORT OF THE PROCEEDINGS OF THE CONTINENTAL CONGRESS ADOPTED (1774), in 1 AMERICAN ARCHIVES, 4th ser., *supra* note 172, at 997–98 (“the *American Bill of Rights* [approved by the Continental Congress in September 1774] therein contained, appears to be formed with the greatest ability and judgment, to be founded on the immutable laws of nature and reason, the principles of the *English Constitution*, and respective Charters and Constitutions of the Colonies, and to be worthy of their most vigorous support, as essentially necessary to liberty.”).

³⁸⁹ For an example, see GEORGIA GENERAL ASSEMBLY, RESOLUTION, 1 AMERICAN ARCHIVES, 4th ser., *supra* note 172, at 1157 (“That the foundation of *English liberty*, and of all free Government, is a right in the people to participate in the Legislative Council; and as the *English Colonists* are not represented, and, from their local and other circumstances,

the 1689 Declaration of Rights.³⁹⁰ This republican form of government remained constant from the first state constitutions and Articles of Confederation to the federal Constitution. Regarding the Articles, former Associate Justice of the Supreme Court William Cushing described the compact as the “union of the states, which is & must continue to be the basis of our liberties & independence.”³⁹¹

Liberty was not based on judicial presumptions, but on the decisions of the people themselves. If anything, the presumption worked the other way. In the words of Judge George Thatcher, laws—based upon the consent of the people—were presumed valid “on the presumption that they will produce the degree of happiness before-mentioned.”³⁹² This republican creed of consensual liberty remained true through the ratification of the Constitution. As James Madison stated before the Virginia Ratifying Convention:

I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.³⁹³

cannot properly be represented in the *British* Parliament, they are entitled to a free and exclusive power of Legislation, in their several Provincial Legislatures . . .”).

³⁹⁰ See Bill of Rights, 1 W. & M., c. 2, art. I (Eng.) (“That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegall.”); *id.* at art. II (“That the pretended Power of Dispensing with laws or the Execution of laws by Regall Authoritie as it hath beene assumed and exercised of late is illegall.”); *id.* at art. XIII (“And that for Redresse of all Grievances and for the amending strengthening and preserving of the Lawes Parlyaments ought to be held frequently.”); LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689*, at 59–64, 98–101 (1981) (discussing the origins of these grievances); Letter to the Inhabitants of Massachusetts-Bay, No. 7, from the Cnty. of Hampshire, in 2 *AMERICAN ARCHIVES: DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA*, 4th ser., 247 (Peter Force ed., 1839) (“Our first Charter enabled this Colony expressly ‘from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions necessary for the well ordering and governing the same.’ This most certainly included in it the right of making laws for taxation, as well as those for any other purpose. In order to determine whether the argument drawn from the principle of our being entitled to *English* liberties, destroys itself, deprives us of the Bill of Rights, and all the benefits resulting from the Revolution, the *English* laws, and the *British* Constitution, it may be necessary to call to mind their chief excellencies, and their essential and principal characteristic.”).

³⁹¹ Letter from William Cushing to John Hancock, *supra* note 47.

³⁹² Scribble Scrabble, *supra* note 278, at 4.

³⁹³ 1 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS*, *supra* note 142, at 536–37.

In 1798, on the anniversary of American independence, George Clinton conveyed similar sentiments. Clinton knew that without independence of “knowledge and virtue,” the Constitution’s representative form of government—the basis of our liberty and happiness—was merely a “*carte blanche*”³⁹⁴ or blank check:

The first and most essential support of republican government is the virtue of the people. Constitutions may be formed; institutions may be established on the most liberal, just and philanthropic principles; and all in vain—if the morals of the people be corrupt; if self-interest predominate[s] over the love of country, and vice and licentiousness usurp the place of religion.³⁹⁵

There is a reason the founding generation often referred to their state and federal constitutions as *happy*. It was a carry over from their English predecessor, which was often termed the “happy constitution.”³⁹⁶ It referred to the English Constitution’s permanence, its evolving social character based upon the virtual consent of the people through Parliament, and its interrelation with the people’s liberty and happiness. In other words, the founding generation remained cognizant that liberty was conditioned on the consent of the people, which evolves as a means to ensure their safety and happiness.³⁹⁷ As Richard Salter preached before the Connecticut General Assembly, the “happy constitution of Britain” consisted of “that form of government, in which the liberty, property and life of the subject, hath the strongest security.”³⁹⁸ It required the people to “consent[] to give up their natural rights” as a means to ensure “the sole original end and design . . . which[] is . . . the public happiness.”³⁹⁹

What made the pre-revolution American colonies’ charters or constitutions particularly *happy* were the election processes and the role of the people. In 1769, an “important privilege of our happy [Massachusetts] constitution,” Jason Haven stated before Governor Francis Bernard, was “that of choosing Gentlemen to sit” at the

³⁹⁴ CLINTON, *supra* note 233, at 10.

³⁹⁵ *Id.* at 9; *see also supra* note 338 and accompanying text.

³⁹⁶ *See* RICHARD SALTER, A SERMON, PREACHED BEFORE THE GENERAL ASSEMBLY OF THE COLONY OF CONNECTICUT, AT HARTFORD 9 (New London, Timothy Green 1768).

³⁹⁷ NORTH CAROLINA CONVENTION, RESOLUTION, *in* 1 AMERICAN ARCHIVES, 4th ser., *supra* note 172, at 736 (“That liberty is the spirit of the *British* Constitution, and that it is the duty, and will be the endeavour of us as *British Americans*, to transmit this happy Constitution to our posterity in a state, if possible, better than we found it; and that to suffer it to undergo a change which may impair that invaluable blessing, would be to disgrace those ancestors, who, at the expense of their blood, purchased those privileges which their degenerate posterity are too weak or too wicked to maintain inviolate.”).

³⁹⁸ Salter, *supra* note 396, at 8–9.

³⁹⁹ *Id.* at 8.

legislature.⁴⁰⁰ It was a privilege “always dear to our fathers” and “on which the happiness of this people not a little depends.”⁴⁰¹ It was this dichotomy between the happy English Constitution and colonies’ charters that the American Revolution initially sought to maintain. As the New York legislature said in a petition to King George III, “we wish only to enjoy the Rights of *Englishmen*, and to have that Share of Liberty, and those Privileges secured to us, which we are intitled to, upon the Principles of our free and happy Constitution.”⁴⁰²

However, reconciliation never materialized, and the Declaration of Independence provided the international legal means to erect a new ground and foundation of happiness built upon and balanced by the true consent of the people.⁴⁰³ It is worth noting that even before the Declaration of Independence was authorized by Congress, in a prolific charge to the grand jury, Judge William Henry Drayton infamously declared South Carolina independent from England and outlined a new constitution.⁴⁰⁴ Drayton distinguished his newly proposed South Carolina constitution from the English Constitution in terms of happiness:

Under the *British* authority, Governours were sent over to us who were utterly unacquainted with our local interests, the genius of the people, and our laws. Generally, they were but too much disposed to obey the mandates of an arbitrary Ministry; and if the Governour behaved ill, we could not by any peaceable means procure redress. But, under our present happy Constitution, our Executive Magistrate arises according to the spirit and letter of Holy Writ: “Their Governours shall proceed from the midst of

⁴⁰⁰ JASON HAVEN, A SERMON PREACHED BEFORE HIS EXCELLENCY SIR FRANCIS BERNARD 44 (Bos., Richard Draper 1769).

⁴⁰¹ *Id.*

⁴⁰² New York General Assembly, *To the King’s Most Excellent Majesty: The Humble Petition of the General Assembly of the Colony of New-York* (Mar. 25, 1775), in 1 THOMAS JONES HISTORY OF NEW YORK DURING THE REVOLUTIONARY WAR 534 (Edward Floyd de Laney ed., New York, New York Historical Society 1879).

⁴⁰³ See Letter from Samuel Adams to the Public (Mar. 27, 1781), in 17 LETTERS OF DELEGATES TO CONGRESS: 1774–1789, at 93–94 (Paul H. Smith et al. eds., 1976–2000) (“There is no Restraint like the pervading Eye of the virtuous Citizens. I hope therefore, our Country men will constantly exercise that Right which the meanest Citizen is intitled to, & which is particularly secured to them by our happy Constitution, of inquiring freely but decently into the Conduct of the publick Servants.”); Letter from Josiah Bartlett to Mary Bartlett (June 24, 1776), in 4 LETTERS OF DELEGATES TO CONGRESS: 1774–1789, at 308 (Paul H. Smith et al. eds., 1976–2000) (“May God grant us wisdom to form a happy Constitution, as the happiness of America to all future Generations Depend on it.”).

⁴⁰⁴ Drayton’s charge was so well known that it was used as a defense during the impeachment trial of Associate Supreme Court Justice Samuel Chase. See Charles, *supra* note 25, at 567–68.

them.” Thus, the people have an opportunity of choosing a man intimately acquainted with their true interests, their genius, and their laws; a man perfectly disposed to defend them against arbitrary Ministers, and to promote the happiness of that people from among whom he was elevated, and by whom, without the least difficulty, he may be removed and blended in the common mass.⁴⁰⁵

Drayton further elaborated on societal benefits of this new and *happy* constitution by discussing the interrelation between equality of law, virtue, knowledge, and the consent of the people:

[T]he new Constitution is wisely adapted to enable us to trade with foreign nations, and thereby to supply our wants at the cheapest markets in the universe; to extend our trade infinitely beyond what it has ever been known; to encourage manufacturers amongst us; and it is peculiarly formed to promote the happiness of the People, from among whom, by virtue and merit, the poorest man may arrive at the highest dignity. Oh, *Carolínians!* happy would you be under this new Constitution, if you knew your happy state.

Possessed of a constitution of Government, founded upon so generous, equal, and natural a principle—a Government expressly calculated to make the People rich, powerful, virtuous, and happy—who can wish to change it, to return under a Royal Government, the vital principles of which are the reverse in every particular? It was my duty to lay this happy Constitution before you in its genuine light. It is your duty to understand, to instruct others, and to defend it.⁴⁰⁶

The grand jury returned a mock verdict supporting Drayton’s proposition.⁴⁰⁷ The jury found that “necessity . . . obliged the people to resume into their hands those powers of Government which were originally derived from themselves for the protection of those rights which *God* alone has given them, as essential to their happiness.”⁴⁰⁸ The jury divulged its “unfeigned joy” and “pleasing expectations of happiness from a Constitution so wise in its nature, and virtuous in its ends, (being

⁴⁰⁵ William Henry Drayton, Address to the Grand Jury at Charlestown, S.C. (Apr. 23, 1776), in 5 AMERICAN ARCHIVES, 4th ser., *supra* note 252, at 1031.

⁴⁰⁶ *Id.*

⁴⁰⁷ PRESENTMENTS OF THE GRAND JURY (Apr. 23, 1776), in 5 AMERICAN ARCHIVES, 4th ser., *supra* note 252, at 1033.

⁴⁰⁸ *Id.*

founded on the strictest principles of justice and humanity, and consistent with every privilege incident to the dignity of a rational being).⁴⁰⁹

Naturally, King George III, Parliament, and the loyalists' perspective were that the American colonies were violating the *happy* English Constitution.⁴¹⁰ It was treason to take up arms against the Crown, and perhaps suicide to "exchange their happy constitution for paper, rags, anarchy and distress."⁴¹¹ But the founding generation came to the realization that a truly "happy constitution" was in the eyes of the beholder, or derived from the consent of the people. Declaring independence offered a chance for true consensual happiness, which in turn maintained the war effort. The hope of a "good government" gave the Continental soldier and militiaman "legal *title* to liberty" because he was fighting for the "prospect of ending his days under a happy constitution."⁴¹² The "spirit" that produced these "happy" constitutions was even toasted at taverns.⁴¹³

By the summer of 1787, though, it was determined that the Articles of Confederation, the first national constitution, no longer prescribed the happiness of the Union.⁴¹⁴ A national government based upon limited powers produced jealousies between states and was even susceptible to foreign interference and influence.⁴¹⁵ The solution offered was a federal constitution, and its purpose was to effectuate the happiness of the people. This fact was conveyed at the South Carolina Ratifying Convention. Alexander Tweed supported the Federal Constitution as the voice of his people and to prevent "some powerful despot" from "seiz[ing] the reigns of

⁴⁰⁹ *Id.*

⁴¹⁰ See *supra* notes 182–203 and accompanying text (discussing Bentham's opinion on the legality and principles of the Declaration).

⁴¹¹ Letter from William Tryon to Samuel H. Parsons (Nov. 23, 1777), in PA. LEDGER; OR PHILA. MARKET-DAY ADVERTISER (Phila.), Jan. 21, 1778, at 6.

⁴¹² Union, Editorial, DUNLAP'S PA. PACKET, OR GEN. ADVERTISER (Phila.), Nov. 19, 1776, at 2. The reference to "legal *title* to liberty" was Machiavellian in origin. See 1 J.G.A. POCOCK, BARBARISM AND RELIGION: THE ENLIGHTENMENTS OF EDWARD GIBBONS, 1737–1764 at 104 (1999) ("If liberty, and with it the foundations of government, consisted in the exercise of property there must be property in the exercise of arms; the state of nature and the transition to the state of government depended on this truth. This important, but by modern scholars neglected, proposition in juristic political theory was reinforced by the ancient proposition . . . that it was the capacity to bear arms in a public cause which made man a citizen."). This is why a "well-regulated militia," the intended bulwark of America's defense, was frequently referred to as the "palladium of liberty," for it gave every individual a vested property interest in fighting for and understanding liberty. See Charles, *The Constitutional Significance of a "Well-Regulated Militia," supra* note 140, at 71–85.

⁴¹³ Article, CONN. COURANT (Hartford, Conn.), Dec. 9, 1783, at 2.

⁴¹⁴ See Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusion: An Historical Perspective*, 15 TEX. REV. L. & POL. 61, 95 (2010).

⁴¹⁵ *Id.* at 94–96.

government.”⁴¹⁶ Tweed pleaded, “allow me to ask if history furnishes us with a single instance of any nation, state, or people, who had it more in their power than we at present have to frame for ourselves a perfect, permanent, free, and happy constitution.”⁴¹⁷ Tweed’s view was in line with those who supported the Constitution, such as fellow delegate Charles Pinckney, who “concluded” with “thorough conviction that the firm establishment of the present [Constitution] is better calculated to answer the great ends of public happiness than any that has yet been devised.”⁴¹⁸

In fact, if one actually reads the different state ratifying debates, the constitutional link between preserving liberty and happiness and the Constitution’s text and structure becomes blatantly apparent. The question repeatedly asked and answered among the different state delegates was, “Did the proposed text and structure of the federal Constitution ensure the happiness of the people?”⁴¹⁹ Indeed, different conclusions were reached for and against adoption.⁴²⁰ Yet, in the end, the states agreed that the text and structure of the Federal Constitution was the means and ends of preserving liberty and happiness. There was no discussion of presumptions or how

⁴¹⁶ 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 369, at 332.

⁴¹⁷ *Id.* at 333.

⁴¹⁸ *Id.* at 262–63.

⁴¹⁹ For some examples, see 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 369, at 10 (quoting Archibald Maclaine as stating: “We are to consider whether this system will promote our happiness”); *id.* at 14 (quoting James Irdell as stating: “But if, as I believe and hope, it be discovered to be so formed as to be likely to promote the happiness of our country, then I hope the decision will be, accordingly, in its favor”); *id.* at 51 (quoting Samuel Spencer as stating that the federal government “should not be given” “too much power; for, from all the notions which we have concerning our happiness and well-being, the state governments are the basis of our happiness, security, and prosperity”); *id.* at 54 (quoting Samuel Spencer as stating: “No man wishes more for a federal government than I do. I think it necessary for our happiness; but at the same time, when we form a government which must entail happiness or misery on posterity, nothing is of more consequence than settling it so as to exclude animosity and a contest between the general and individual governments”).

⁴²⁰ See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 364 (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1907) (quoting Governor Edmund J. Randolph as stating: “let me entreat those gentlemen, whose votes will be scuffled for, to consider in what character they are here. For what have they come hither? To deliberate on a Constitution, which some have said will secure the liberty and happiness of America, and which others represent as not calculated for that purpose. They are to decide on a Constitution for the collective society of the United States. Will they, as honest men, not disdain all applications made to them from local interests? Have they not far more valuable rights to secure? The present general government has much higher powers than that which has been so long contested. We allow them to make war and requisitions without any limitation. That paper contains much higher powers. Let it not be said that we have been actuated from local interests. I wish it may not be said that partial considerations governed any gentleman here, when we are investigating a system for the general utility and happiness of America.”).

certain provisions provided unenumerated natural rights. Instead, in the words of Robert J. Livingston, the Constitution provided the opportunity to “fix [a] lasting peace upon the broad basis of national union” and “lay the foundation of our own happiness, and that of our posterity.”⁴²¹ This peace and foundation primarily rested on the revolutionary idea of a republican government, solely dependent on the consent of the people.

⁴²¹ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 147, at 210.