

TO ALTER OR ABOLISH

JACK M. BALKIN & SANFORD LEVINSON*

INTRODUCTION

Perhaps the most famous sentence in the Declaration of Independence, for twenty-first century readers, is its statement of the “self-evident” truth that “all Men are created equal,” and that they are “endowed by their Creator with certain unalienable Rights,” which include “Life, Liberty, and the pursuit of Happiness.”¹ Equally famous is the Declaration’s explanation that the very purpose of organized government is “to secure these [unalienable] Rights” through political forms that “deriv[e] their just Powers from the Consent of the Governed.”² But that is not the end of the sentence. Jefferson goes on to assert that it is equally “self-evident” “[t]hat whenever any Form of Government becomes destructive of these Ends”—that is, of securing unalienable rights—“it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.”³

The notion that governments have a responsibility to protect fundamental human rights seems as self-evident to many today as it was to Thomas Jefferson and his colleagues. Around the world, people have been socialized to believe in universal human rights; Jefferson’s famous language resonates far more broadly and deeply now, in the twenty-first century, than it ever did in 1776.

* Jack M. Balkin is Knight Professor of Constitutional Law and the First Amendment at the Yale Law School; Sanford Levinson holds the W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School and is also Professor of Government, University of Texas at Austin. This Article is based on remarks given at a conference on the Declaration of Independence at the National Constitution Center in Philadelphia on April 14, 2015. We are grateful to Alex Tsesis for inviting us to participate, and for arranging the videoconferencing that made Levinson’s participation possible.

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
2. *Id.*
3. *Id.*

But what about the rest of this famous sentence? Is it equally clear that any group that designates itself as a “People” has a self-evident right “to alter or to abolish” “any Form of Government” that it believes has become “destructive” of its rights or the rights of its members?⁴ Is it a self-evident truth that members of the public, both around the world and in the United States, have the right to overthrow their government if they feel it is not sufficiently protecting their rights? The Declaration’s use of the word “any” suggests that *no* government is immune from the right to alter or abolish.

The right of a people to throw off their government is not confined to a single sentence in the Declaration. The idea pervades the entire document, especially its first and last paragraphs. The first paragraph asserts that “it [has] become[] necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s God entitle them.”⁵ The last paragraph “[d]eclare[s], [t]hat 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.”⁶

In his invaluable study of the impact of the Declaration around the world, David Armitage emphasizes that the first and last paragraphs of the Declaration—which actually declare independence—have had far more significance in world history than the assertion of rights set out in paragraph two.⁷ The reason is not difficult to see. The beginning of the Declaration asserts the existence of “one People” who have the right to throw off their erstwhile rulers, to whose rule they no longer consent, while the final paragraph proclaims the entry of that people into the international community of sovereign states, with all of the rights and privileges that free and independent states enjoy in international law. Every nationalist assertion, every revolutionary movement, and every secessionist party after 1776 could point to the Declaration of Independence as justification for its

4. Although the Declaration does not guarantee a right to happiness, it guarantees a right to pursue happiness. What then, if that that opportunity is (substantially or completely) denied? See Timothy W. Ryback, Opinion, *The U.N. Happiness Project*, N.Y. TIMES (Mar. 28, 2012), <http://www.nytimes.com/2012/03/29/opinion/the-un-happiness-project.html> (discussing United Nations Resolution 65/309, in which the General Assembly unanimously endorsed placing “happiness,” the primary aspirational value of the Kingdom of Bhutan, on its agenda).

5. THE DECLARATION OF INDEPENDENCE para. 1.

6. *Id.* para. 33.

7. See generally DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* (2007).

cause.

Americans, who are especially enamored of phrases like “all Men are created equal” and “Life, Liberty, and the pursuit of Happiness,” tend to forget the all-important assertions of peoplehood and collective sovereignty that lie at the heart of the Declaration. “Once independence had become an uncontested fact,” Armitage writes, “Americans had little need to remember the assertions of independent statehood in the Declaration’s opening and closing paragraphs.”⁸ Well, not quite. In the middle of the nineteenth century, a sizeable group of Americans remembered these words all too well. The Southern states that attempted to leave the Union between Abraham Lincoln’s election and the beginning of the Civil War styled themselves as the defenders of the Declaration’s right of revolution, and of the right of “one People to dissolve the Political Bands which have connected them with another,”⁹ because they no longer consented to the federal government. Even today, when one approaches the Texas State Capitol in Austin, one is likely to see a substantial monument to Jefferson Davis and the Confederate war dead, inscribed with the following words:

DIED FOR STATE RIGHTS GUARANTEED UNDER THE
CONSTITUTION

THE PEOPLE OF THE SOUTH, ANIMATED BY THE SPIRIT OF
1776, TO PRESERVE THEIR RIGHTS, WITHDREW FROM THE
FEDERAL COMPACT IN 1861. THE NORTH RESORTED TO
COERCION. THE SOUTH, AGAINST OVERWHELMING
NUMBERS AND RESOURCES, FOUGHT UNTIL EXHAUSTED.¹⁰

It comes as little surprise, then, that South Carolina’s Ordinance of Secession would allude to the Declaration’s powerful conclusion that former colonies, and now former members of the Union, “are, and of Right ought to be Free and Independent States.”¹¹ As it was in 1776, so it was in 1861, or so the Confederates asserted. For the North, this was not a second Declaration of Independence, it was a Declaration of Treason. The question, of course, then, as now, is how to tell the difference.

The Southern invocation of the Declaration poses a second problem, which remains with us to this day. The legislature of South Carolina asserted that it spoke on behalf of “one People”—the people of South Carolina. But not everyone in South Carolina agreed that secession was

8. *Id.* at 93.

9. THE DECLARATION OF INDEPENDENCE para. 1.

10. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 313 (6th ed. 2015).

11. THE DECLARATION OF INDEPENDENCE para. 31.

justified. Many Southerners remained loyal to the United States.¹² And not to put too fine a point on it, the secession ordinance was speaking for the white people of South Carolina, who constituted less than 45 percent of the total population of that state in 1860.¹³ To the Confederate revolutionaries, though, slaves were not part of the people whose consent or lack of consent mattered.

In the North, however, many would have begged to differ. The South's claim of a people withholding consent to a tyrannical government was a monstrous fiction—one part of the South was asserting the right to drag the rest of its population with it. And instead of leaving the Union in a quest for freedom, Confederates were doubling down on the right to engage in oppressions of their own.

When nationalist and secessionist movements arise, they are rarely unanimous. During the Revolutionary War, the American colonies were full of loyal British subjects who wanted no part of what the "Patriots" were offering.¹⁴ Then, as now, the question is how to tell whether "one People" really have decided to exercise their right to alter or abolish and throw off government, or whether a political crisis has been manufactured by a rump faction, or, even worse, by a group of local hegemony who want free rein to oppress a local minority.

The goal of this Article is twofold. The first goal is to remind us of the language in the Declaration that actually mattered the most to the most people in history: not the language of equality and rights, but the language of collective sovereignty, independence, and nationalist self-assertion. The second goal is to point out that this language, powerful and memorable as it is, raises a host of complications and problems that have never fully been solved, from Jefferson's time to our own.

There are a number of books and essays that call upon us to take the

12. See, e.g., DAVID WILLIAMS, BITTERLY DIVIDED: THE SOUTH'S INNER CIVIL WAR 2–3, 10, 35 (2008) (noting strong opposition to secession even in the states that ultimately left the Union). In fact, the problem in 1861 is the same problem that occurred in 1787. Article VII of the Constitution authorized the people of South Carolina and the other states to organize a convention that would speak in that people's name. A ratifying convention was called, and it ratified the proposed Constitution, thus joining the Union. JOHN R. VILE, 1 THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA'S FOUNDING 658 (2005) (noting final vote of 149-73 within the South Carolina convention). But, of course, not everyone in South Carolina had initially consented in 1787. Some people opposed the new government, and some—like the state's large population of slaves—were not even consulted.

13. Michael Trinkley, *South Carolina—African-Americans—Slave Population*, S.C.'S INFO. HIGHWAY, <http://www.sciway.net/afam/slavery/population.html> (last visited Feb. 23, 2016).

14. See, for example, Maya Jasanoff's deservedly prize-winning book, *LIBERTY'S EXILES: AMERICAN LOYALISTS IN THE REVOLUTIONARY WORLD* 8–9 (2011).

Declaration's language seriously—by which is usually meant taking seriously its inspiring passages about human equality and inalienable human rights.¹⁵ Yet we might also ask ourselves what it would mean to take the other parts seriously—the parts of the document that actually declare independence—and consider whether there is an equally inalienable right to do so.

I. WHAT KIND OF RIGHT IS THE RIGHT TO ALTER OR ABOLISH?

Jefferson's language raises at least eight different sets of questions.

A. INDIVIDUAL OR COLLECTIVE SOVEREIGNTY?: THE ROLE OF REAL ESTATE

The Declaration speaks of the right of “one People” to dissolve their political bonds and take their rightful place among the nations of the earth. These words assert a collective right of revolt.

Recently, Randy Barnett has argued that the Declaration's language concerns “individual popular sovereignty” as opposed to collective popular sovereignty.¹⁶ Because Barnett supports a libertarian interpretation of the Declaration, he emphasizes that each and every individual is a political sovereign with inalienable rights.¹⁷

The notion of individual popular sovereignty might be plausible within an ongoing polity in which people fight for their inalienable rights and seek reforms within the existing system. But the idea of individual popular sovereignty does not translate very well into an individual right to revolt. Revolutions are collective enterprises, which, when successful, tend to drag everyone else in the country, willing and unwilling, along with them. For every patriot urging revolt, there is a loyalist objecting, perhaps living right next door.

The notion of the loyalist living next door is important because it reminds us that the Declaration was actually about the right to secede from Great Britain *and* keep control of the land on which the former colonies rested.

15. Some recent distinguished examples include: DANIELLE ALLEN, *OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY* (2014) (emphasizing equality); RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016) (emphasizing natural rights); ALEXANDER TESIS, *FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE* (2012) (emphasizing both liberty and equality).

16. Randy E. Barnett, *We the People: Each and Every One*, 123 *YALE L.J.* 2576, 2596 (2014).

17. *Id.* at 2612.

The right to revolt is as much about *territory* as it is about *freedom*. Successful political revolutions are also revolutions in real estate. And because they concern real estate, they require large groups of people to get together to collectively throw off their oppressors and keep the land over which their oppressors once ruled. As any good real estate agent will tell you, the Declaration of Independence is really about location, location, location.

If the right to alter or abolish government were placed in individuals, as opposed to large groups of people, it would be either fruitless or an invitation to anarchy. Individuals cannot, of their own accord, secede from their countries, declare political independence, *and remain in place*. People who try this are eventually surrounded by S.W.A.T. teams and forced to capitulate. If individuals want to refuse consent to the government they live under, the standard remedy is emigration. They don't get to take the land with them. Barnett's idea of individual popular sovereignty makes the most sense as a right to press for recognition of one's rights within an ongoing regime, or, failing that, as a right to leave the country; it makes relatively little sense as a right of individual secession.

As a practical matter, then, the right to alter or abolish is a *collective* right, not an individual right. It is the right of a group of people to change their government while remaining in place. One can certainly imagine political revolutions in which whole populations emigrate to create their own new nation. The Biblical story in the Book of Exodus is the most obvious example. But such large scale moves are cumbersome at best, and present enormous collective action problems for revolutionaries. (In the Exodus story, it helped a great deal that the Almighty himself solved the collective action problems.¹⁸) *Forced* relocation of *unwilling* populations by a centralized government, like the infamous Trail of Tears, is a far more likely scenario than the Biblical exodus. When modern day revolutionaries argue "Let my people go," what they usually mean is, "Let my people go and keep the real estate."

And there's the rub. When revolutionaries overthrow government, control over territory is usually the motivation, and once successful,

18. Of course, once the Israelites made it to the wilderness, the leadership of Moses and Aaron was challenged repeatedly, most notably by Korah and his followers. *See Numbers* 16. By today's standards, at least, Korah's rhetoric seems decidedly populist in tone: "For all in the congregation are holy, every one of them, and the LORD is among them. Why then do you exalt yourselves above the assembly of the LORD?" *Id.* at 16:3. However, instead of calling for elections, God's response was to cause the earth to swallow up Korah and his followers. *Id.* at 16:31-34. Although the Declaration informs us that inalienable rights—including the right to revolt—are endowed by God, those guarantees had not been published at the time these events took place.

reshuffling land rights quickly becomes a major problem. What to do with the people who did not go along? Do they get to keep their land, or should they be expelled or “encouraged” to emigrate, as happened to Loyalists following the American Revolution?¹⁹ What of the property held by the former government? Finally, what about the demands of the people for land reform? Should the estates of the old hierarchy be broken up and distributed equitably to the people, or must they remain, like a bone in the throat of the new regime? It is no accident that, following the American Revolution, in the debates over the Treaty of Paris, land claims were a central bone of contention. And it is also no accident that many of the early cases before the federal courts, like *Martin v. Hunter’s Lessee*,²⁰ involved disputed claims over lands formerly owned by the British nobility or Loyalist subjects.

B. POPULAR SOVEREIGNTY OR INALIENABLE RIGHTS?

The Declaration attempts to link the rights of popular sovereignty and self-determination to the preservation and protection of the inalienable individual rights that governments are created to serve. But the connection between these ideas is contingent: the consent of the governed is

19. See ROBERT PALMER, *1 AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760–1800: THE CHALLENGE 188* (1959). Palmer notes that even if we adopt a low estimate of sixty thousand as the number of such émigrés, that is still substantially higher as a percentage of the total population of the United States at the time than the percentage of those who went into exile as a result of the revolution that occurred in France a decade later. *Id.* Palmer reminds his readers that the Revolution was a “painful conflict” for all concerned. *Id.* It might have begun with a Tea Party, but, as Chairman Mao reminded us, a revolution is “not a dinner party A revolution is an insurrection, an act of violence by which one class overthrows another.” MAO TSE-TUNG, *Report on an Investigation of the Peasant Movement in Hunan*, in 1 *SELECTED WORKS OF MAO TSE-TUNG* 23, 28 (Cent. Comm. of the Communist Party of China ed. & trans., 1st ed. 1965). See generally JASANOFF, *supra* note 14 (detailing the stories of several Loyalist refugees after the American Revolution).

The emigration and displacement of the losers is, of course, not an example of “American exceptionalism.” Tony Judt’s magnificent book on Europe after 1945 actually begins with an analysis of the dissolution during and immediately after World War I of the great empires that had organized much of Central and Eastern Europe, all in the name of self-determination (a point which we discuss further *infra*). TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 1–10 (2005). Given that people(s) claimed the right to leave the previous imperial order while keeping the lands they occupied; this immediately led to massive ethnic cleansing or, more euphemistically, transfer of populations. *Id.* at 4–10. The same regrettable phenomenon continued at the close of the twentieth century, during the disastrous dissolution of Yugoslavia and the fight over who would control the real estate of Croatia, Bosnia-Herzegovina, and the Kosovo area of Serbia. See *The Breakup of Yugoslavia, 1990–1992*, U.S. DEP’T ST. OFF. HISTORIAN, <http://history.state.gov/milestones/1989-1992/breakup-yugoslavia> (last updated Oct. 31, 2013). And, of course, our own era features the further dissolution of the ostensible settlements reached to conclude World War I in the Middle East, with similarly vast emigration, especially from Syria. See SYRIAN REFUGEES: SNAPSHOT CRISIS—MIDDLE EAST & EUR., <http://syrianrefugees.eu/> (last visited Mar. 8, 2016).

20. *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816).

conceptually distinct from the preservation of individual rights. Indeed, the tension between protecting individual rights and respecting popular sovereignty is a recurring issue in liberal political and constitutional theory.²¹

Obviously, governments that govern without popular consent may feel free to violate individual rights, but sometimes they may actually protect them better, depending on the nature of the right. For example, a monarchy may respect religious pluralism more effectively than a democracy; a plutocracy or oligarchy may protect property rights far better than a redistribution-minded popular government, and so on.

Yet even if a government respects individual rights, it may still govern without the people's consent. And governing without popular consent *by itself* violates the right to self-determination that the Declaration posits. A people—however defined—possesses the collective right to govern itself free from what it comes to regard as an alien power. It follows, then, that the colonies had a right to revolt and establish an American nation even without a showing of a “long train of Abuses.”²² A benevolent despot is still a despot.

What the Declaration seeks to join together—the consent of the governed and the protection of individual liberties—is therefore not required logically, and has often been severed in practice. This fact has been demonstrated all too often in the history of political revolutions; sometimes they protect people's rights, but sometimes they do not. And much depends on *which* people's rights we are asking about—the losers in a regime change often lose rights they enjoyed beforehand.

Thus, the right of self-determination need have little to do with strong theories of individual rights, inalienable or not. Instead, the right of self-determination has everything to do with assertions of collective identity and the political rights that are assumed to attach to this identity. The right of self-determination is a nationalist right: the right of a people to define

21. The most famous example is Alexander Bickel's constitutional theory. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). Bickel simultaneously warns against the “counter-majoritarian difficulty,” while praising the Supreme Court for being “the pronouncer and guardian of [constitutional] values,” *id.* at 16, 24, and protecting fundamental rights through principled decisionmaking. *Id.* at 24–28. Robert McCloskey's classic, *The American Supreme Court*, emphasizes the tension between democracy and individual rights, noting that an important role of the Supreme Court is safeguarding constitutional rights against majority rule. *See generally* ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (Daniel J. Boorstin ed., 1st ed. 1960).

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

itself, and then to govern itself. Unless there is only “one People”²³ occupying a particular territory, it is likely that self-determination by a particular group of people will come at the price of diminishing or even ignoring rights held by a different people in the same territory.

C. WHO ARE THE PEOPLE?

These considerations lead naturally to the next set of problems. If the right to alter or abolish is a collective right of “one People,”²⁴ the question then becomes: Who counts as the “People” who is entitled to exercise the rights of the Declaration? How is the relevant political community to be defined?²⁵ Does the community consist of everyone in a particular territory? Or does the “People” consist of some subset, defined by race, ethnicity, religion, language, or place? Should the relevant people be limited to those who have signed a loyalty oath or otherwise demonstrated commitment to the welfare of the community?

How much do sheer numbers count? How many individuals must band together to constitute “one People” for purposes of the Declaration’s right to alter or abolish? And, as noted above, what happens if there are disagreements about national identity, and dissenters who refuse to accept the existence of “one People,” much less a right to rule over them?

For many years, people in Quebec have argued for the right of the Quebecois to secede unilaterally from the rest of Canada.²⁶ Do the inhabitants of Quebec constitute “one People”? Not only are there many Anglophone Canadians who have no desire to join in such a venture, but there are also Original Peoples living in Quebec who might legitimately claim their own “peoplehood.”²⁷ Note once again that the claim to secede is actually the assertion of a right to take full political control of a *territory* associated with the idea of “one People,” even if that territory contains many people who are not French speakers, or who do not want to secede.

23. *Id.* para. 1.

24. *Id.*

25. See Sanford Levinson, “Who Counts?” “Sez Who?,” 58 U. ST. LOUIS L.J. 937 (2014).

26. See, e.g., DAVID HALJAN, CONSTITUTIONALISING SECESSION (2014); WAYNE NORMAN, NEGOTIATING NATIONALISM: NATION-BUILDING, FEDERALISM, AND SECESSION IN THE MULTINATIONAL STATE (2006).

27. See *Inuit Regions of Canada*, INUIT TAPIRIIT KANATAMI, <http://www.itk.ca/about-inuit/inuit-regions-canada> (last visited Mar. 7, 2016).

D. HOW “DESTRUCTIVE OF THESE ENDS” DOES THE CURRENT GOVERNMENT HAVE TO BE FOR A PEOPLE TO WITHHOLD ITS CONSENT?

Although, as noted above, popular consent is logically distinct from protection of rights, in the Declaration’s formulation the right to alter or abolish is triggered when the current government has been destructive of the ends for which governments are instituted.

Who decides whether the existing government has been sufficiently destructive of the ends for which governments are instituted? Is it enough if government occurs without the consent of those who have a legally recognized right to vote? But the problem may be that the people lack effective representation, as occurred in the American colonies.

What if a group of people possesses formal rights of representation, but its views are predictably “swamped” by permanent majorities, so that in the view of the affected group, they are effectively without a voice in the operating institutions of government? Examples are legion, both in the United States and elsewhere.

Israeli Arabs have a right to vote and in fact elected more than a dozen Arab members of the Knesset in the 2015 elections.²⁸ But could they not insist that their interests are effectively ignored by Israeli coalition governments, and that they therefore have a right to independence?

Or take the case of Scotland with the United Kingdom. Perhaps Scottish independence has seemed attractive because Scots believe that their voice is effectively overwhelmed by the 84 percent English majority in the United Kingdom.²⁹ One reason why Southern states seceded in 1861 is that they believed that they would no longer be able to hold off Northern

28. Shlomi Eldar, *Israeli Arabs Disappointed by Election Results*, AL MONITOR (Sandy Bloom trans., Mar. 19, 2015), <http://www.al-monitor.com/pulse/originals/2015/03/israel-elections-2015-arab-union-list-netanyahu-racism.html>.

29. See *2011 Census: Population Estimates for the United Kingdom, March 2011*, OFF. NAT’L STAT. (Dec. 17, 2012), <http://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/2011censuspopulationestimatesfortheunitedkingdom/2012-12-17>. As the result of the stunning victory of the Scottish National Party in the 2015 parliamentary elections in the United Kingdom, the party that adamantly supported secession (and is presumably not averse to that possibility in the future) occupies fifty-six of the fifty-nine Scottish seats in Parliament. Jason Douglas, *Scottish National Party Wins Landslide in U.K. Election 2015*, WALL ST. J. (May 8, 2015, 12:15 AM), <http://www.wsj.com/articles/scottish-national-party-heads-for-landslide-in-u-k-election-2015-1431036232>. The majority of Scots, who, according to the BBC, had voted “decisively” against independence only eight months earlier may well feel inadequately represented by the nearly 95 percent secessionist majority of Scottish representatives in Parliament. *Scottish Referendum: Scotland Votes “No” to Independence*, BBC NEWS (Sept. 19, 2014), <http://www.bbc.com/news/uk-scotland-29270441>.

majorities who sought to prevent the expansion of slavery.³⁰

The language of the Declaration suggests, moreover, that the right to alter or abolish is not only triggered when rights of representation are denied. Rather, it is triggered when any inalienable right (including the right to life) is violated, or when the relevant people conclude that they can no longer “pursu[e] . . . Happiness”³¹ sufficiently under existing political conditions.

This is not only a question of the identity and content of rights, but also of the degree of their violation. Must a “long train of Abuses”³² have occurred over a sufficiently long time, or is it enough to claim that abuses exist now, and, in the view of the relevant people, are sufficiently intolerable?

How intolerable must things be to invoke the right to alter or abolish?³³ Must the public have been reduced, in the words of the Declaration, to an “absolute Despotism,”³⁴ or might the relevant people who seek to alter or abolish government get to decide that something less might justify changing the form of government?³⁵ After all, why should

30. See, e.g., *Confederate States of America—Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, AVALON PROJECT, http://avalon.law.yale.edu/19th_century/csa_scarsec.asp (last visited Mar. 27, 2016) (“On the 4th day of March next, [the Republican] party will take possession of the Government. It has announced that the South shall be excluded from the common territory, that the judicial tribunals shall be made sectional, and that a war must be waged against slavery until it shall cease throughout the United States.”); James Oliver Horton, *Confronting Slavery and Revealing the “Lost Cause,”* NAT’L PARK SERV., <http://www.nps.gov/resources/story.htm?id=217> (last visited Mar. 27, 2016) (explaining the consensus of professional historians that the desire to preserve slavery was the cause of Southern secession.)

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

32. *Id.*

33. Consider, for example, the case of abortion. Some anti-abortion advocates regard the forty years of legalized abortion in the United States as a Holocaust. See, e.g., SURVIVORS ABORTION HOLOCAUST, <http://www.survivors.la/> (last visited Mar. 7, 2016). Why would this not be sufficient to withdraw allegiance to the United States government? For a discussion of whether religious citizens can continue to maintain allegiance to a government that allows abortion as a constitutional right, see Robert H. Bork et al., *The End of Democracy? The Judicial Usurpation of Politics*, FIRST THINGS (Nov. 1996), <http://www.firstthings.com/article/1996/11/001-the-end-of-democracy-the-judicial-usurpation-of-politics>.

34. See *infra* Part I.G.

35. For example, following the decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), recognizing same-sex marriage, presidential candidate Mike Huckabee declared that “I will not acquiesce to an imperial court any more than our Founders acquiesced to an imperial British monarch. We must resist and reject judicial tyranny, not retreat.” *Huckabee Blasts SCOTUS*, HUCKABEE 2016 (June 26, 2015), <http://mikehuckabee.com/blogs/?ID=3CAAABD5-9321-47FC-8D71-1156A6F56FB7>. Huckabee was probably not advocating armed rebellion, but if one felt strongly enough about the issue, why *wouldn't* the destruction of traditional marriage be grounds for invoking the Declaration’s right to alter or abolish?

people have to wait for something to develop as bad as, say, Nazi Germany, before it may exercise its inalienable rights to alter or abolish? Should the people not be able to move proactively?

By what metric would one measure these abuses? And what if there are disagreements within the relevant population?³⁶ We noted previously that the American colonies were full of Loyalists who did not seek separation from the British Crown. Should the question be decided by majority vote? If so, what procedures should be employed? We will return to these questions when we discuss the role, if any, that democracy and the rule of law play in the right to alter or abolish.³⁷

E. FROM THE RULE OF RECOGNITION TO THE ROLE OF RECOGNITION

The right to alter or abolish does not depend solely on the will of the “one People”³⁸ who exercises it. Rather, it also depends, in a practical sense, on other countries recognizing the new entity as a legitimate state. Other countries, however, may choose to recognize (or not recognize) a new state for a variety of different reasons. These reasons may have little to do with the Declaration’s political theory, and everything to do with self-interest, strategic advantage, and other aspects of *realpolitik*.

The factual background to the Declaration provides a ready example. Declaring independence was one thing; winning it was another. And winning independence depended on recognition by other nations, particularly Britain’s great geopolitical rival, France. France was a monarchy, and had no use for Jefferson’s theories about democracy, much less the right to revolt. It was nevertheless engaged in a bitter struggle for world domination with Britain, and the Revolutionary War was, in one sense, a sideshow in a larger world war between Europe’s two greatest powers.³⁹ Eventually, the French Crown understood that supporting the Americans would help it undermine British power.⁴⁰

In fact, the Declaration of Independence was not worth the parchment it was written on without recognition by other nations. Countries that recognized the new United States of America not only gave credence to America’s claims in international law, they could also be sources of

36. For example, while some members of the public might regard legalized abortion as a twenty-first century Holocaust, others might regard it as a constitutional guarantee of women’s rights.

37. See *infra* Part I.G.

38. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

39. ARMITAGE, *supra* note 7, at 83–84.

40. *French Alliance, French Assistance, and European Diplomacy During the American Revolution, 1778–1782*, U.S. DEP’T ST. OFF. HISTORIAN, <https://history.state.gov/milestones/1776-1783/french-alliance> (last visited Mar. 18, 2016).

financial or military support. In particular, France's recognition of American independence following the Patriot victory at Saratoga in 1777 (led, ironically, by Benedict Arnold) proved crucial, as did French military and naval support at the Battle of Yorktown.⁴¹ The Treaty of Paris, an agreement brokered by key European powers, was required for Great Britain to formally surrender its claims to the territory of its former colonies and accept the colonies' independence as a matter of international law.⁴²

F. SUBMITTING THE FACTS TO A CANDID WORLD

The role of international recognition gives particular meaning to the Declaration's challenge—"let Facts be submitted to a candid World."⁴³ The Declaration points to international public opinion as the appropriate judge of whether there is a right to alter or abolish. This is not merely a matter of seeking an impartial, objective observer. It may also be a matter of practical necessity. Although the relevant people decides whether it has the right to alter or abolish, often the decision means little if the international community fails to support its case. The support may range from international recognition to material assistance, financial guarantees, and even military intervention. International support may be especially important in cases of "humanitarian intervention," or in other situations in which the relevant people calls on the international community to take action to guarantee its inalienable rights to life, liberty, and the pursuit of happiness.

The Declaration does not make the rights it announces contingent on international support—after all, it decrees them "unalienable" and "self-evident."⁴⁴ Nevertheless, these rights may prove effectively unenforceable unless some portion of the "candid World" comes to the rescue. Thus, the right to alter or abolish often boils down to not only the ability to claim and hold on to real estate, but also the prospects for international support and intervention. Rightly or wrongly, the right to alter or abolish often rests in the hands of relative strangers, who must be persuaded, for whatever reason, that the "People's" struggle is their struggle as well.

41. ARMITAGE, *supra* note 7, at 81–83.

42. *Id.* at 84 ("The United States formally entered the international system upon joining the Franco-American alliance; *only after that* could the question of American independence be treated as a positive, albeit contested, international fact." (emphasis added)). But, obviously, Great Britain contested this "fact" for another five years, and one can be confident that a different result at the Battle of Yorktown would have wiped out any significance of French recognition of the Declaration and returned a chastened group of colonies to British rule. *See id.* at 85, 87.

43. THE DECLARATION OF INDEPENDENCE para. 2.

44. *Id.*

A recent example of how international recognition affects national self-determination involves Kosovo's unilateral declaration of independence from Serbia on February 17, 2008.⁴⁵ The International Court of Justice issued an advisory opinion⁴⁶ that upheld the right of the Kosovars to issue their declaration under international law, while refusing to decide whether the declaration had any legal consequences under international law,⁴⁷ including the obvious question of "whether or not Kosovo ha[d] achieved statehood."⁴⁸ The court preferred to leave this question to the decisions of individual nations. As of June 2015, 108 of the 193 member nations of the United Nations have recognized Kosovo as an independent country.⁴⁹ Indeed, the United States recognized Kosovo the day after the Kosovars' unilateral declaration, on February 18, 2008.⁵⁰ However, one Western European country, Spain, has not done so.⁵¹ It takes little imagination to see why: Spain faces its own secessionist movement in Catalonia,⁵² and the Spanish government wants to avoid any suggestion that secessionist movements should be approved, much less encouraged, by the international community.

45. *Kosovo Declaration of Independence*, REPUBLIC KOS. ASSEMBLY (Feb. 17, 2008), <http://www.assembly-kosova.org/?cid=2,128,1635>.

46. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. Rep. 403 ¶ 122 (July 22), <http://www.icj-cij.org/docket/files/141/15987.pdf>.

47. *Id.* ¶ 56 ("The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act—such as a unilateral declaration of independence—not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.").

48. *Id.* ¶ 51.

49. IMF, *Republic of Kosovo*, Country Report No. 15/131, at 4 (2015), <https://www.imf.org/external/pubs/ft/scr/2015/cr15131.pdf>; *International Recognitions of the Republic of Kosovo*, REPUBLIC KOS. MINISTRY FOREIGN AFF., <http://www.mfa-ks.net/?page=2,224> (last visited Mar. 6, 2016).

50. Condoleezza Rice, *U.S. Recognizes Kosovo as Independent State*, U.S. DEP'T ST. ARCHIVE (Feb. 18, 2008), <http://2001-2009.state.gov/secretary/rm/2008/02/100973.htm>.

51. Jeff Israely, *Why Kosovo Divides Europe*, TIME (Feb. 19, 2008), <http://content.time.com/time/world/article/0,8599,1714413,00.html>.

52. Ashifa Kassam, *Catalan Secession Bid Ruled Unconstitutional by Spanish Court*, GUARDIAN (Dec. 2, 2015, 1:19 PM), <http://www.theguardian.com/world/2015/dec/02/catalonia-secession-unconstitutional-spanish-court>.

G. HOW DO DEMOCRACY AND THE RULE OF LAW MATTER? MUST THE PEOPLE EXHAUST REASONABLE REMEDIES? IS THERE A DUTY TO NEGOTIATE WITH THE EXISTING GOVERNMENT BEFORE ALTERING OR ABOLISHING?

The American colonists ultimately decided to revolt. But the Declaration explains that this decision did not occur to them suddenly. “In every stage of these Oppressions,” the Declaration explains, “we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury.”⁵³ Moreover:

We have warned [our British brethren] from Time to Time of Attempts by their Legislature to extend an unwarrantable Jurisdiction over us. We have reminded them of the Circumstances of our Emigration and Settlement here. We have appealed to their native Justice and Magnanimity, and we have conjured them by the Ties of our common Kindred to disavow these Usurpations, which, would inevitably interrupt our Connections and Correspondence.⁵⁴

Is this simply a matter of political prudence, or is it required by the nature of the right to alter or abolish? Does the right require some degree of warning or good faith negotiation with an existing government, and is the existing government, in turn, required to negotiate in good faith with would-be rebels or secessionists?

In answering these questions, does it matter how democratic the existing government is? If the government is substantially democratic, does this mean that only non-violent, democratic methods are allowed? In such circumstances, does the right to alter or abolish require following existing procedures and legal norms for separation, or does it allow at least some methods that are currently extralegal? After all, if a political minority is shut out of government, following the existing rules will probably not provide an adequate remedy.

Once again, Quebec provides a useful example. The Supreme Court of Canada actually laid down requirements that the Canadian government should negotiate in good faith if a “clear majority”—presumably something more than a bare 50 percent—voted for independence in a referendum in which the issue was “clearly” presented.⁵⁵ Its decision purported to impose duties not only on the federal government in Ottawa, but also on the

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

54. *Id.* para. 31.

55. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 220 (Can.).

Quebecois separatists themselves.⁵⁶

In fact, in 2000 the Canadian Parliament passed a Clarity Act that ostensibly provided a legal framework for secession; yet, despite its name, the rules it provides are anything but clear.⁵⁷ In any case, what difference should either the Clarity Act or the Supreme Court's decision make to Quebec's right to leave Canada? Suppose that the separatists ignored both the Act and the Supreme Court's ruling—for example, by simply proclaiming that a bare majority of 50 percent plus one was sufficient. Is the right of the people of Quebec to alter or abolish contingent on following the rules laid down by organs of the state whose authority they reject? Or is this merely, as before, a question of political prudence?

H. BY ANY MEANS NECESSARY?

The issue of prudence leads naturally to a final question. Let us assume that the relevant people is easily defined, that it is sufficiently clear that the existing regime has been “destructive” of the ends for which governments are instituted, and that enough of the relevant population in the relevant territory agrees. Is the relevant people permitted to use any means necessary “to alter or to abolish,”⁵⁸ or must it choose the least violent alternative if practically possible? Does the right to alter or abolish,

56. See *id.* at 267. To be sure, the court did not declare that Quebec had a “right” to secede, but only that the Canadian government would be under a duty to engage in good faith negotiations that might well lead to the necessary constitutional amendment that would recognize the dissolution of the existing Canadian federation. *Id.* at 267–68.

57. See Clarity Act, R.S.C. 2000, c 26 s 1(1) (Can.), <http://laws-lois.justice.gc.ca/PDF/C-31.8.pdf>. The Act requires the House of Commons to consider any question that a provincial government “intends to submit to its voters in a referendum relating to the proposed secession of the province from Canada,” and to “set out its determination on whether the question is clear” with regard to manifesting a popular will to secede from Canada. *Id.*

The Canadian government is forbidden to enter into negotiations about secession in the absence of a referendum that provides “clear expression” by the people of the province “on whether the province should cease to be part of Canada.” *Id.* s 1(3). Furthermore, there must be a “clear expression of a will by a *clear majority* of the population of that province that the province cease to be part of Canada.” *Id.* s 2(1) (emphasis added). In determining the existence of such a majority, the House of Commons must consider: “(a) the size of the majority of valid votes cast in favour of the secessionist option; (b) the percentage of eligible voters voting in the referendum; and (c) any other matters or circumstances it considers to be relevant.” *Id.* s 2(2). Among these “other matters or circumstances” to be taken into account is the view of the “Aboriginal peoples.” *Id.* s 2(3).

Finally, inasmuch as any secession would require a constitutional amendment, “[n]o Minister of the Crown shall propose a constitutional amendment to effect the secession of a province from Canada unless the Government of Canada has addressed, in its negotiations, the terms of secession that are relevant in the circumstances, including the division of assets and liabilities, any changes to the borders of the province, the rights, interests and territorial claims of the Aboriginal peoples of Canada, and the protection of minority rights.” *Id.* s 3(2).

58. THE DECLARATION OF INDEPENDENCE para. 2.

in other words, require an exhaustion of peaceful alternatives, or is this also merely a question of political prudence?

Is terrorism justified if it is designed to push the cause of independence forward? One might consider examples ranging from the Boston Tea Party (and the tarring and feathering of British officials) to political violence by Zionist groups in British Mandate Palestine, to any number of “freedom fighters” in nationalist movements around the world. What, if anything, does the Declaration of Independence have to say about the tactics of these groups? Does it tell us when violence is permissible to enforce the right to alter or abolish, or what the limits to this violence might be?

II. THREE WAYS TO ALTER OR ABOLISH

So far we have considered questions of *when* the right to alter or abolish may legitimately be exercised. A different set of questions concerns *how* the right might be successfully invoked. The language of the Declaration suggests three paradigm cases of a right to alter or abolish, which, in practice, may fade into each other. We might interpret the Declaration as offering (a) a right to *extralegal or extraconstitutional reform*; (b) a right to *political revolution or political overthrow*; or (c) a right to *self-determination and/or secession*.

Let us consider each of these cases in turn.

A. THE RIGHT TO EXTRALEGAL / EXTRACONSTITUTIONAL REFORM

Suppose that a group of citizens mobilizes against what they regard as the corruption of the democratic process by inequalities of wealth and by secret campaign expenditures by the super-rich. Despairing of surmounting the strict requirements of Article V,⁵⁹ they decide to hold a national referendum for a new constitution, which they insist will go into operation upon ratification by 50.1 percent of the voting public. Defenders of the proposal argue that they are exercising their right to alter or abolish a national government that no longer enjoys the consent of the governed, but only the consent of the very wealthiest people. According to the Declaration, do they have the political right to engage in an extraconstitutional course of conduct and offer an alternative to the current constitution?

The Philadelphia Convention offers a strong precedent for their action.

59. See U.S. CONST. art. V (requiring a two-thirds majority of both the House and Senate to call a convention to propose amendments to the Constitution).

A group of interested citizens persuaded some (but not all) state legislatures to send delegates to Philadelphia for a convention that quickly exceeded its mandate to suggest revisions to the Articles of Confederation.⁶⁰ The resulting document—the Constitution—then bypassed state legislatures, and was placed before state ratifying conventions.⁶¹ Despite the Articles' guarantee of perpetual union, and despite the requirement of unanimity for amendments to the Articles, the Constitution was considered in force as soon as nine of the thirteen states ratified it.⁶²

In *Federalist No. 40*, James Madison defended the unconventional (and perhaps even illegal) procedures that underlay the Philadelphia Convention; he also defended the substitution of the Constitution's Article VII for the clear and unequivocal language of Article XIII of the existing "constitution," the Articles of Confederation.⁶³ Perhaps not surprisingly, this is the one place in *The Federalist* that alludes to the Declaration of Independence.⁶⁴ Moreover, as Christian Fritz has emphasized in his invaluable book on state constitutional formations in the early nineteenth century,⁶⁵ the people of the states often freely discarded their existing state constitutions under the authority of the natural right of a free people to "alter and to abolish" their systems whenever they were unhappy with their existing ones.

60. See *Constitutional Convention and Ratification, 1787–1789*, U.S. DEP'T ST. OFF. HISTORIAN, <https://history.state.gov/milestones/1784-1800/convention-and-ratification> (last visited Mar. 9, 2016).

61. See 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 320–32 (Jonathan Elliot ed., 1836).

62. Compare ARTICLES OF CONFEDERATION of 1781, art. XIII (stating that amendments require unanimous consent of the states), with U.S. CONST. art. VII (noting that ratification of nine states is sufficient to establish a new constitution).

63. In a September 30, 1787 letter to George Washington, Madison wrote that Richard Henry Lee had tried to derail the Constitution in the Confederation Congress. See Letter from James Madison to George Washington (Sept. 30, 1787), in 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, IN THE CONVENTION HELD AT PHILADELPHIA IN 1787; WITH A DIARY OF THE DEBATES OF CONGRESS OF THE CONFEDERATION 566, 566–67 (Jonathan Elliot ed., 1845). First, Lee objected that the proposed Constitution went beyond the Confederation. *Id.* at 566. Second, Lee argued that the Confederation Congress should take up amendments to the document before submitting it to the states. *Id.* This suggestion was rebutted because "the Act of the Convention, when altered would instantly become the mere act of Congress, and must be proposed by them as such, and of course be addressed to the Legislatures, not conventions of the States, and require the ratification of thirteen instead of nine States." *Id.* at 566–67.

64. See THE FEDERALIST No. 40 (James Madison) ("[A] rigid adherence to [form over substance] would render nominal and nugatory the transcendent and precious right of the people to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness' . . ." (citing THE DECLARATION OF INDEPENDENCE)).

65. CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 28 (2009).

The most dramatic example is the 1841–42 Dorr Rebellion in Rhode Island, which briefly led to two rival state governments; it is best remembered today for giving rise to the 1849 decision in *Luther v. Borden*.⁶⁶ The Dorr Rebellion suggests how far-reaching the Declaration's theory of extraconstitutional change might be in practice. Indeed, the radical implications of the Declaration's theory proved too much for even the revolutionary generation. When Vermont attempted to join the Union in 1777 after having seceded from parts of New York and New Hampshire, it was met with a stony refusal even by people who were, at that very moment, seeking to secede from the British Empire.⁶⁷

“Spontaneous”—or at least legally unconventional—referenda are not the only type of extraconstitutional reform that might fall within the Declaration's right to alter or abolish. A mobilized public might discard particular aspects of the current constitution and agree to substitute new ones. This is akin to Bruce Ackerman's theory of constitutional moments.⁶⁸ One can also imagine a situation of great emergency—civil or world war, for example—in which the public demands that the current President stay in office despite the two-term limit in the Twenty-Second Amendment.⁶⁹ At some point, the act of discarding constitutional norms will start to look less like a new constitution and more like a coup. To the extent that the change in government is regarded as a coup, this category begins to merge with the next one: political revolution.

B. POLITICAL REVOLUTION / OVERTHROW OF THE GOVERNMENT

Next, imagine that a sizeable group of United States citizens believes that President Obama has become a tyrant.⁷⁰ Like their patriot forbears,

66. *Luther v. Borden*, 48 U.S. 1, 18 (1849) (“[A] majority of the free white male citizens of Rhode Island, . . . in the exercise of the sovereignty of the people, . . . and in the absence, under the then existing frame of government of . . . Rhode Island, of any provision therein for amending, altering, reforming, changing, or abolishing the said frame of government, had the right to reassume the powers of government . . .”).

67. See BARRY ALAN SHAIN, *THE DECLARATION OF INDEPENDENCE IN HISTORICAL CONTEXT: AMERICAN STATE PAPERS, PETITIONS, PROCLAMATIONS & LETTERS OF THE DELEGATES TO THE FIRST NATIONAL CONGRESSES* 9, 532 (2014).

68. See BRUCE ACKERMAN, *1 WE THE PEOPLE: FOUNDATIONS* 108 (1991).

69. See generally CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (illustrating the notion that presidential term limits are potentially dysfunctional or even “stupid”); Jack M. Balkin & Sanford Levinson, *Constitutional Crises*, 157 U. PA. L. REV. 707 (2009) (connecting constitutional crises to deliberate decisions to violate constitutional norms).

70. See, e.g., Matthew Jacobs, *David Mamet: Obama is a “Tyrant,”* HUFFINGTON POST (Nov. 29, 2013, 11:40 AM), http://www.huffingtonpost.com/2013/11/29/david-mamet-obama_n_4360243.html; Bruce Thornton, *Obama the Tyrant: A Presidential Overreach that Undermines the*

they recite “a long Train of Abuses,”⁷¹ including his attempts to limit their Second Amendment rights, his imperial assertion of the right to allow undocumented immigrants to remain in the country and apply for work permits, his expansion of the national surveillance state, the redistribution of tax revenues to support groups they disdain, and Obamacare’s imposition of the individual mandate—yet another tax—to purchase health insurance. According to the Declaration, do these aggrieved citizens have a “self-evident” right to overthrow the United States government and “to institute new Government, laying its foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness”?⁷²

One might immediately object: all that the Declaration means is that citizens have the right to use normal, non-violent methods of democracy to change the government and elect someone else to protect their rights. But the facts of the Declaration belie that placid assumption. After all, the colonies were not simply asserting the right to representation in Parliament. The Declaration does not say that if Great Britain had suddenly changed course, and allowed the colonies representation in Parliament, that the right “to alter or to abolish” would thereby be extinguished.⁷³ The right would still remain, as long as, in the eyes of the governed public, the resulting government was still destructive of the ends of guaranteeing inalienable rights. And one of those rights articulated by proponents of the Revolution was the freedom from parliamentary rule save in very restricted circumstances.⁷⁴ To be granted the right to send a representative to a Parliament that rejected the American critique of Parliament’s powers would be like receiving a deck chair on the Titanic.

To be sure, the Declaration immediately goes on to say that people are unlikely to exercise their rights to alter or abolish except in the most extreme cases: “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes; and accordingly all experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed.”⁷⁵ But as the language of the

Most Important Foundation of the Western Political Tradition, FRONTPAGE MAG (Nov. 23, 2014), <http://www.frontpagemag.com/2014/bruce-thornton/obama-the-tyrant/>.

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

72. *Id.*

73. *Id.*

74. See generally ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING (2014); SHAIN, *supra* note 67, at 24.

75. THE DECLARATION OF INDEPENDENCE para. 2.

Declaration itself indicates, the notion that the right to alter or abolish should not be lightly invoked is a consideration of *prudence*, not a question of *political right*. Thus, the Declaration confidently asserts, if a people decide that there has been “a long Train of Abuses and Usurpations,” it is not only the people’s “Right” to act, “it is their Duty, to throw off such Government, and to provide new Guards for their future Security.”⁷⁶

C. SELF-DETERMINATION / SECESSION

Finally, suppose that several counties in the state of Montana decide that they want no more of the United States of America and decide to secede. Or imagine that a group of conservative Christians decide to move to those counties to create a Christian homeland free from the strictures of secular government. According to the Declaration, do the citizens in this part of the state have the “self-evident” right to leave the Union and “institute new Government”?⁷⁷ This, of course, was the assertion of the states of the Confederacy when they left the Union.

One might insist that, despite its language, the Declaration does not actually recognize such a right. All that it guarantees is the right of the United States *as a whole* to decide whether to split up, and it must do so through a fair, open, and democratic process. If Congress agrees to allow part of Montana to go its own way, the rights guaranteed in the Declaration have been served.

Yet once again the actual context of the Declaration undermines the idea that the right to alter or abolish can be limited in this way. After all, the colonies did not think that they needed the permission of Great Britain to leave, or that secession would be legitimate only if it emerged from a fair, open, and democratic process within the British Empire. Moreover, as noted earlier, the precedent of the Philadelphia Convention points in the opposite direction. Following the Convention, nine states decided to secede from the “perpetual union” established by the Articles of Confederation⁷⁸ to create the new government of the United States of America. Even if the other four states had not eventually joined them, they had asserted their right to begin a new political regime without obtaining the permission of the states left behind. Louisiana Senator Judah Benjamin made precisely this point to his colleagues in his farewell speech in December 1860,⁷⁹

76. *Id.*

77. *Id.*

78. ARTICLES OF CONFEDERATION of 1781, art. XIII, para. 2.

79. Judah Philip Benjamin, *You Can Never Subjugate Us*, in 5 GREAT DEBATES IN AMERICAN HISTORY 365, 384–87 (1913) (speech made to the Senate, Dec. 31, 1860). See also Dave Benner, *Judah P. Benjamin: Able Statesman, Forgotten Patriot*, ABBEVILLE INST.: ABBEVILLE BLOG (Sept. 4, 2015),

before leaving Washington to join the Confederate States of America, which had decided to break with the Union and form a new constitution in February 1861.⁸⁰

D. UNUM OR E PLURIBUS?

Secession, of course, can involve not only breaking away from a larger entity, but also a decision to join another polity after leaving the first. New England, for example, might secede from the United States to join Canada, much as Texas left Mexico only to join the United States several years later. Nor does secession require that a single entity be formed. The end of British rule in India quickly led to the creation of the separate countries of India and Pakistan, and, sometime later, the secession of Bangladesh from Pakistan.⁸¹

Moreover, the language of the Declaration does not, *pace* Lincoln, unequivocally require recognition of a single indissoluble country. The penultimate sentence of the Declaration describes the creation of *multiple* entities, not a single nation.⁸² It states:

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, establish Commerce, and to do all other Acts and Things which Independent States may of right do.⁸³

Although John Jay would insist in *Federalist No. 2*, echoing the beginning of the Declaration, that Americans were a single people joined by language, custom, and religion,⁸⁴ the truth was quite different. As Danielle Allen notes in her magisterial explication of the Declaration, the claim that the former colonies constituted a single people was “surprising. They had long been a very fractious set of quite diverse communities—from all the various parts of England, as well as from Ireland, Scotland,

<http://www.abbevilleinstitute.org/blog/judah-p-benjamin-able-statesman-forgotten-patriot/> (referring to his “farewell speech”).

80. Benjamin, *supra* note 79, at 384–87.

81. *August 15, 1947: India and Pakistan Win Independence*, HISTORY, <http://www.history.com/this-day-in-history/india-and-pakistan-win-independence> (last visited Mar. 9, 2016); *After Partition: India, Pakistan, Bangladesh*, BBC NEWS, http://news.bbc.co.uk/2/hi/in_depth/629/629/6922293.stm (last updated Aug. 8, 2007).

82. THE DECLARATION OF INDEPENDENCE para. 33.

83. *Id.*

84. THE FEDERALIST No. 2 (John Jay).

Wales, the Netherlands, and Germany.”⁸⁵ “Puritans with rigorous demands for personal and public morality” contrasted with members of more latitudinarian sects.⁸⁶ (After all, the Puritans had hung Quakers and exiled Roger Williams to Rhode Island.⁸⁷) Nor were the colonies homogenous in language. In 1787, the Constitution was translated into German for the benefit of the German-speaking community in Pennsylvania, who might have otherwise had difficulty understanding the country’s new charter.⁸⁸ Moreover, one must assume that, like many other American “Patriots” of 1776, Jay would have been delighted had French-speaking Quebec joined the insurrection against Great Britain.⁸⁹ In any event, as Armitage notes, following the Revolution, “European commentators . . . construed” the 1781 Articles of Confederation not as the political constitution of a single people, but “as an international agreement entered into by thirteen free and independent states.”⁹⁰

85. ALLEN, *supra* note 15, at 116.

86. *Id.*

87. FRANCIS J. BREMER, *THE PURITAN EXPERIMENT: NEW ENGLAND SOCIETY FROM BRADFORD TO EDWARDS* xvi, xxi (1995).

88. Christina Mulligan et al., *Founding-Era Translations of the Constitution* 3 (Brooklyn Law Sch., Legal Studies Paper No. 402, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2486301.

89. Note that for Allen, “one People” means “simply a group with shared political institutions . . . separate and different from those of the mother country.” ALLEN, *supra* note 15, at 116. But are “shared political institutions” sufficient to constitute a nation, if the inhabitants differ in language, ethnicity, custom and religion? The late political scientist Samuel P. Huntington did not think so. He described this assumption as the “classic Enlightenment-based, civic concept of a nation,” in which nationalism, lacking any other commonalities, was predicated entirely on commitment to abstract propositions and the institutions predicated on them. SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY* 19 (2004). “History and psychology, however, suggest that this is unlikely to be enough to sustain a nation for long.” *Id.* Allen might respond that, despite the diversity of its population among multiple dimensions, America has held together for some 240 years; while Huntington might point to the Civil War and the uneasy reconciliation of the North and South in the postbellum period.

90. ARMITAGE, *supra* note 7, at 88. Ironically, this conceptualization of the Articles gives succor to some, like Akhil Reed Amar, who reject the narrative of illegal conduct by the Philadelphia Convention and instead defend its radicalism on the ground that the patent inefficacy of the Confederation—described by Edmund Randolph and Alexander Hamilton alike as an “imbecility”—meant that it had lost its status as a binding international agreement of “perpetual union.” See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 466–67 (1994); DAVID ROBERTSON, *THE ORIGINAL COMPROMISE—WHAT THE CONSTITUTION’S FRAMERS WERE REALLY THINKING* 61 (2012) (“The imbecility of the Confederation is equally conspicuous when called upon to support a war.” (quoting Edmund Randolph)); *THE FEDERALIST* No. 15 (Alexander Hamilton) (“The imbecility of our government even forbids [foreign powers] to treat with us.”).

III. WOODROW WILSON AND THE DYNAMITE OF SELF-DETERMINATION

Among the many advocates of the right of peoples to self-determination, surely one of the most important in the past century is Woodrow Wilson. There is a direct link between the Declaration of Independence's right to alter or abolish and Wilson's embrace, in a famous 1918 address to Congress, of the political right to "self-determination."⁹¹

This connection becomes even more obvious if we recall that Wilson, despite having served as the president of Princeton University and the governor of New Jersey, was the first native Southerner to win the White House since the 1840s. Wilson was born in Virginia in 1856, but his family soon moved to Augusta, Georgia, where his father accepted a call to head the local Presbyterian Church and, more importantly, to "become an ardent spokesman for the Southern cause."⁹² Wilson was just shy of four when the Civil War broke out, and it proved a formative influence on his thinking. In his book, *Division and Reunion*, written only two years before he became president, Wilson offered a distinctively Southern perspective on the war as the South's "Lost Cause": "The triumph of Mr. Lincoln," he wrote, "was, in her [the South's] eyes, nothing less than the establishment in power of a party bent upon the destruction of the southern system and the defeat of southern interests, even to the point of countenancing and assisting" slave revolts.⁹³ "It seemed evident to the southern men," Wilson wrote, "that the North would not pause or hesitate because of constitutional guarantees."⁹⁴ Moreover,

Southern pride, . . . was stung to the quick by the position in which the South found itself. . . . They knew that they did not deserve such reprobation [as they were receiving from Northern opponents of slavery]. They knew that their lives were honorable, their relations with their slaves humane, their responsibility for the existence of slavery among them remote.⁹⁵

Indeed, Wilson argued, as a result of the 1860 election, "power had been given to a geographical, a sectional, party, ruthlessly hostile to

91. Woodrow Wilson, *Address to Congress on International Order: February 11, 1918*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=110448> (last visited Mar. 7, 2016).

92. A. SCOTT BERG, *WILSON* 30, 34 (2013).

93. WOODROW WILSON, *EPOCHS OF AMERICAN HISTORY: DIVISION AND REUNION 1829-1909*, at 208 (Edward S. Corwin ed., 1916) [hereinafter *WILSON, DIVISION AND REUNION*] (emphasis added).

94. *Id.*

95. *Id.* at 208-09.

[Southern] interests.”⁹⁶

One could hardly find a more sympathetic account of why Southerners in 1860 had reason to believe that they enjoyed a right of self-determination recognized in the Declaration of Independence. In fact, Wilson argued that the South might have had the Constitution on its side: “The principles upon which secession was attempted were . . . plain enough to everybody in the South, and needed no argument. The national idea had never supplanted in the South the original theory of the Constitution . . . as an instrument of confederation, not of national consolidation.”⁹⁷

Some of these themes reappear in new guises in Wilson’s famous 1918 speech defending the right of self-determination: “Peoples are not to be handed about from one sovereignty to another by an international conference or an understanding between rivals and antagonists,” Wilson proclaimed.⁹⁸ Instead, “[n]ational aspirations must be respected; peoples may now be dominated and governed only by their own consent.”⁹⁹ No longer should “[s]elf-determination” be treated as “a mere phrase.”¹⁰⁰ Rather, “[i]t is an imperative principle of actions which statesmen will henceforth ignore at their peril.”¹⁰¹

Wilson declared that the “roots” of the Great War lay “in the disregard of the rights of small nations and of nationalities which lacked the union and the force to make good their claim to determine their own allegiances and their own forms of political life.”¹⁰² Wilson believed that recognizing claims of self-determination might give some small measure of meaning to the slaughter that occurred between 1914 and 1918, and possibly prevent future wars. Thus, Wilson famously asserted that “[e]very territorial settlement involved in this war must be made in the interest and for the benefit of the populations concerned,” in contrast to the claims of traditional “rival states.”¹⁰³ This meant that “all well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and

96. *Id.* at 212.

97. *Id.* at 241–42.

98. Wilson, *supra* note 91.

99. *Id.*

100. *Id.*

101. *Id.* (emphasis added).

102. *Id.* Cf. WILSON, DIVISION AND REUNION, *supra* note 93, at 212. In *Division and Reunion*, Wilson described the South as having been pushed around by the rest of a rapidly developing country while it alone had “stood still . . . and retained the old [constitutional] principles which had once been universal.” *Id.* Wilson lamented that “[h]er slender economic resources were no match for the mighty strength of the nation with which she had fallen out of sympathy.” *Id.*

103. Wilson, *supra* note 91.

antagonism that would be likely in time to break the peace of Europe, and consequently of the world.”¹⁰⁴ This language, of course does not specify how these ends are to be achieved, and the qualifications at the end of the sentence may place severe limitations on the right asserted at its beginning.

Self-determination disrupts settled expectations about the way the world works, and in the process, it may unleash unpredictable forces. In August 1991, as the Soviet Empire fell apart, Karl Meyer described Woodrow Wilson as “the man of the hour in post-Communist Europe.”¹⁰⁵ “From the Baltics to the Adriatic, from the Ukraine to the Balkans,” Meyer noted, “oppressed millions have given new life to his imperative—and often troublesome—principle.”¹⁰⁶ “Indeed, if results are the measure, Wilson has proved a more successful revolutionary than Lenin.”¹⁰⁷ Leninist theory has mostly been in decline since 1991—although it is still given lip service in the increasingly capitalist People’s Republic of China. But the language of popular sovereignty and self-determination can be found everywhere. Preambles to contemporary national constitutions often speak in the name of the people and their right to form a government.¹⁰⁸

Wilson’s exuberant language did not go unchallenged even within his own administration. His Secretary of State, Robert Lansing, described the magic slogan of “self-determination” as “simply loaded with dynamite.”¹⁰⁹ In a confidential memorandum written in December 1918, Lansing asked, altogether presciently:

What effect will it have on the Irish, the Indians, the Egyptians, and the nationalists among the Boers? Will it not breed discontent, disorder, and rebellion? Will not the Mohammadans of Syria and Palestine and possibly of Morocco and Tripoli rely on it? How can it be harmonized with Zionism, to which the President is practically committed?¹¹⁰

104. *Id.* (emphasis added).

105. Karl E. Meyer, Editorial, *Woodrow Wilson’s Dynamite*, N.Y. TIMES (Aug. 14, 1991), <http://www.nytimes.com/1991/08/14/opinion/editorial-notebook-woodrow-wilson-s-dynamite.html>.

106. *Id.*

107. *Id.*

108. *See, e.g.*, SPANISH CONSTITUTION, Dec. 27, 1978, pmbi. (“The Spanish Nation, desiring to establish justice, liberty, and security, and to promote the wellbeing of all its members, in the exercise of its sovereignty, proclaims its will”); CONSTITUTION OF UKRAINE, December 8, 2004, pmbi. (“The Verkhovna Rada (the Parliament) of Ukraine on behalf of the Ukrainian people—Ukrainian citizens of all nationalities, expressing the sovereign will of the people, . . . guided by the Act of Declaration of the Independence of Ukraine of 24 August 1991, approved by the national vote of 1 December 1991, adopts this Constitution as the the Fundamental Law of Ukraine.”); CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Dec. 18, 1996, pmbi. (“We, the people of South Africa, . . . through our freely elected representatives, adopt this Constitution as the supreme law of the Republic”).

109. Meyer, *supra* note 105.

110. *Id.*

Indeed, Lansing asked, would Wilson's own principle mean that "Lincoln was wrong to deny self-determination to seceding Confederate states?"¹¹¹ (Perhaps he was unfamiliar with Wilson's book on the Civil War.) Moreover, what unit or category defined the self-determination of a people? Was a people defined by race or ethnicity, by an already occupied geographical territory, or simply by an inchoate sense of national community? "Without a definite unit which is practical," Lansing wrote, "application of this principle is dangerous to peace and stability."¹¹²

The indeterminacy of Wilson's concept has been an invitation for political opportunism. The idea of self-determination has been "trumpeted by dictators as well as democrats," Meyer pointed out.¹¹³

Lenin's Bolsheviks championed self-determination—for those not under Soviet control. Hitler claimed the right for those *Herrenvolk* who were outside Germany, while subjugating whole nations without pity or scruple. . . . [Moreover, t]o dissolve a union by unilateral secession can nullify democracy and sunder a nation that owes its existence to an act of self-determination. Few states are tidily homogeneous; frontiers are often disputed.¹¹⁴

Yet no matter how problematic Wilson's assertion of the principle of self-determination, and no matter how many criticisms have been leveled at it, it still survives in popular imagination,¹¹⁵ not to mention as a principle of international law.¹¹⁶ As Meyer recognizes, "qualifying a principle is very different from rejecting it."¹¹⁷ A skeptical Lansing declared that Wilson's vision was simply "the dream of an idealist who failed to realize the danger until too late. . . . What a calamity that the phrase was ever uttered!"¹¹⁸ Meyer responds: "[t]ry telling that to a billion people whose liberation has been speeded by a doctrine enshrined in the first article of the United Nations Charter,"¹¹⁹ which states that one of the "[p]urposes of the United Nations" is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."¹²⁰

111. *Id.*

112. *Id.* See also *supra* Part I.C.

113. Meyer, *supra* note 105.

114. *Id.*

115. See, e.g., Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 *YALE L.J.* 2644 (2014).

116. See sources cited *supra* note 108; *infra* note 120.

117. Meyer, *supra* note 105.

118. *Id.*

119. *Id.*

120. U.N. Charter art. 1, para. 2.

CONCLUSION

The Declaration's guarantees of inalienable rights of liberty and equality, phrased in high-minded and abstract terminology, have generated a host of issues: who should be treated equally with whom (and in what respects), the rights that the people enjoy, the limits to these rights; and so on. Moreover, there is an ongoing controversy about the provision of third-generation economic rights, such as medical care or education, in addition to first-generation negative rights to be free from state interference and second-generation rights of political participation.

But the Declaration of Independence was more than an invitation to discuss rights. It was, quite literally, a declaration of independence—an assertion of the right to alter and abolish government and institute new government. This right was its very reason for being. And the Declaration's language on this central issue is every bit as puzzling as its language about equality or inalienable rights. If the Declaration offers us little help in defining the parameters of liberty and equality, it offers even less help in explaining the contours of the right to change or overthrow governments.

This does not mean that the Declaration is without value today. Far from it: it continues to serve as a source of inspiration for political reform, not only in the United States, but around the world. But its value is precisely that—as a source of inspiration—and not as a set of clear guidelines or justifications for action. Today, even as it did in 1776, the Declaration submits itself to a “candid World,” posing questions that others will have to answer—and answer for—in the crucible of practical politics.