

Politically Motivated Readings of the Declaration of Independence¹

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The Declaration of Independence is arguably the most important document in American politics. It is recognized by many as the founding document of the United States and lauded for continuing to have ideological significance in modern politics. However, there are others who would argue that the Declaration of Independence is certainly an important historical document, yet deserves to remain a part of history and has no bearing on modern politics, the future of American politics or continuing political ideology. Regardless of the opinions held, the Declaration of Independence undoubtedly is being used in modern politics by both conservative and liberal political thinkers as a means to justify political platforms.

The purpose of this thesis is to explore the ways in which both conservative and liberal politicians are using the Declaration of Independence as a tool to substantiate particular political positions. The first chapter discusses the historical context surrounding the drafting and signing of the Declaration of Independence; it also looks at the text and explores what is achieved through the rhetoric of the Declaration. The following chapter explores modern monuments to the Declaration of Independence, such as the meaning of the Fourth of July and how the Declaration is remembered and represented where it was written, at Independence Hall in Philadelphia, as well as where it is kept, in the National Archives in Washington, D.C. It also considers the importance of the Declaration as a document that shapes the way other countries view the United States and as a document that inspired other nations to seek independence and was the model for many other nations' calls for democracy and liberty. The second half of this thesis deals, in two separate chapters, with the ways in which conservatives and liberals have independently each used the text of the Declaration of Independence to defend and justify

radically different political and social policies. The third chapter deals with conservative uses of the Declaration to promote natural law and more traditional political ideals. While the fourth chapter considers liberal interpretations of the Declaration as a document that, above all, promotes equality as the cornerstone of American political ideology and practical law. To conclude, the limitations of each perspective and the ways in which they are flawed in their modern use of the Declaration of Independence will be discussed.

Chapter 3: Conservative Interpretations of the Declaration of Independence

Introduction

Supreme Court Justice Clarence Thomas is one of the most controversial and often criticized justices on the United States Supreme Court. However, he is much more thorough and steadfast in his Constitutional interpretations that most critics acknowledge. He is known for his generally conservative positions that, even when in agreement with the majority, are still derived from understandings of Constitutional law and are justified through rationale that is very different from that of the other justices. Justice Thomas is recognized for his particular brand of originalism, which focuses on the original intention of the Constitution, and this originalism often requires looking to the Declaration of Independence as a source of law.

In keeping with his conservative counterparts, Justice Thomas believes that it is necessary to interpret the Constitution from an originalist perspective, but in particular Thomas sees the original intent of the writers of the Constitution as important, as opposed to other originalists who base their jurisprudence on the original public meaning and *interpretation* of the Constitution as opposed to the original *intention*. Thomas believes that straying from the original intent of the Constitution chips away at the democratic ideology on which the United States was built; he believes that if modern judges do not interpret and follow the words and intentions of "we the people", as written in the Constitution, in the creation and implementation of law then American law is not truly based on the law and beliefs of the *people*. When the original intention of the Founding Fathers is not clear through the words of the

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Constitution alone, Thomas often looks to the Declaration of Independence for an explanation of the goals and priorities of the country's framers.

Clarence Thomas has been recognized for this use of the Declaration of Independence as a source of legal doctrine in his decisions on the Court. He has cited the Declaration as a source of law in opinions he has issued as a justice on the Supreme Court.

In the 1995 affirmative action case *Adarand Constructors, Inc. v. Peña* he directly cited the Declaration of Independence in his opinion. "There can be no doubt that the paternalism that appears to lie at the heart of this [affirmative action] program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness")." Here, Thomas looks to the Declaration to highlight that the United States was built upon a foundation of equality and therefore affirmative action is contradictory to those principles.

This use of the Declaration is significant because, though logical, it brings the Declaration to the forefront of modern American law. While there is room for many interpretations of the Declaration of Independence and varied perspectives on the purpose of the language, its words are very easily used to justify conservative political platforms.

There is a great amount of natural law rhetoric in the Declaration of Independence and there are significant modern implications if this language is believed to be the most important legacy of the Declaration. Natural law requires that God's moral laws and the laws of logic be prioritized. As a result, conservative following of the Declaration of Independence makes significant use of natural laws as the justification for adherence to many socially conservative political platforms, including opposition to abortion and gay marriage. Adherence to natural law principles also makes it theoretically possible to circumvent the Constitution, positive law and precedents and as a result interpreting the Declaration in this way is a potential threat to a great deal of American political history and progressive change. Justice Thomas sees this use of the Declaration as political doctrine as a necessary tool in adherence to originalist

interpretations of the Constitution; although his method often does criticize precedent, he argues that only strict attention to original intention keeps judges from making law based on their own beliefs. Thomas's strict originalism and conservative tendencies come from his steadfast, and sometimes challenging to uphold, adherence to the original intent of the Constitution, which is often understood through consulting the Declaration of Independence.

Through his attempt to adhere to the original intention of the Constitution, Clarence Thomas brings the Declaration of Independence into play in modern American politics, particularly as a tool for conservative thinkers. Once this document is regarded as a source of American law, there are many significant ways in which traditional social values can be justified and promoted.

Natural Law Rhetoric and the Declaration of Independence

For some politically and socially conservative activists and legal thinkers, the human rights and political rights asserted in the Declaration of Independence are seen as having derived from the concept of natural law. Natural Law refers to principles that are viewed as part of human nature. Natural law differs from "positive law" or "common law," in that natural law is not guided by acts of legislatures or constitutional conventions, as positive law is, or by the accumulated precedent of past decisions by judges, as is the case with common law. Rather, natural law is thought to come before human society and derives, according to its proponents, from either the plan of a divine creator or from the inherent rules of reason and logic. Adherence to natural law is the main foundation of politically conservative interpretations of the Declaration of Independence, as some of the language and ideology represented in the Declaration makes use of natural law concepts. Many proponents of conservative ideology use natural law as the basis for conservative political agendas, such as opposition to abortion and support for gun ownership, and they find the justification for adherence to natural law in the rhetoric of the Declaration of Independence.

The conviction that the Declaration of Independence was intended as statement about rights and obligations under natural law is hardly an invention of present-day conservatives. At the time

the Declaration of Independence was written, belief in natural law was common. When writing the Declaration of Independence, Thomas Jefferson did not reference any specific work or body of thought, except for the sentiment of his contemporaries. In order for the Declaration of Independence to be supported by colonists, it was necessary for Jefferson to use ideas that were commonly accepted and appealing (Becker 25) in the 1770s. In a 1825 letter, Jefferson reflected that the Declaration of Independence “was intended to be an expression of the American mind...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, etc.” (quoted in Becker 26). In *The Declaration of Independence: A History of Political Ideas* Carl Becker elaborates that the notion “that there is a ‘natural order’ of things in the world, cleverly and expertly designed by God for the guidance of mankind; that the ‘laws’ of this natural order may be discovered by human reason; that these laws so discovered furnish a reliable and immutable standard for testing the ideas, the conduct, and the institutions of men” was commonly accepted by colonial Americans; the prevalence of this idea was what made the Declaration of Independence accessible to colonists (Becker 26). Becker also alludes to the belief held by colonists that natural law would help new Americans form laws that were in keeping with their values and ideals; using natural law as a guiding principle was supposed to insure that American law was just and in keeping with religious morals and the laws of nature. At the time that Thomas Jefferson penned the Declaration of Independence, and in that context, it was the belief of most Americans that God created a system of natural laws and morals that humans were capable of interpreting and applying in order to govern themselves in a way that was consistent with Christian teachings. Americans and the founding fathers respected these natural laws but also believed that adherence to these laws would help them create a more equitable and sustainable government.

The Declaration of Independence includes several specific references to the natural law tradition. First, the Declaration references “the separate and equal station to which the Laws of Nature and of Nature's God entitle them.” The

pronoun “them” refers to colonists living in the United States and the overall emphasis of the Declaration rests on the idea that certain rights are guaranteed for all people. Here the text specifically identifies the “Laws of Nature” and “Nature’s God” as guaranteeing to individuals the rights which are required for them to have equality and which allow them to create an independent government that is more protective and better serving of their rights. The use of the phrase “Laws of Nature” is a restatement of the idea of natural laws, and the phrase “Nature’s God” emphasizes the significance of God and religion as the origins of natural law. Additionally, in enumerating the self-evident truths, Jefferson states that men are “endowed by their Creator with certain unalienable Rights.” Here God, or a “Creator” is once again invoked and said to be the source of the rights that humans possess. Religious doctrine and the belief that God entitled humans to certain rights is an important facet of natural law doctrine and is similarly an important part of the Declaration of Independence. The qualification of certain rights as “unalienable” also suggests a belief in the existence of a higher power that supposedly endows humans with these rights; it also more significantly states that these rights cannot and particularly *should* not be infringed upon by any government whatsoever. This particular language firstly serves the purpose of illustrating that Great Britain’s failure to adhere to natural law principles, which were believed to be fundamental to civilized and moral Christian society, was a significant justification for declaring independence from the rule of King George III.

In approving of the Declaration, colonists framed natural law as the ultimate law and essentially argued that any nation or ruler that went against natural law or infringed upon the rights guaranteed by natural law was not a just ruler and did not need to be respected as the authoritative government. The Declaration of Independence asserts that in such a situation the people have a right to create a new form of government that derives its power from natural law and that aims to be fair and protective of its citizens. Moreover, through the colonist’s assertion that going against natural law and alienating the rights of citizens was unacceptable, they presented the principles of natural law as important aspects of government and as integral to creating fair laws in a new nation. As a result, natural law can be seen as an important

basis for the creation of all subsequent American law and a guiding principle throughout politics; but in modern politics strict adherence to natural law and translation of its principles to all issues lends itself to particularly poignant and traditional political agendas.

The Modern Applications of Natural Law Rhetoric

In using the Declaration of Independence as the source of law, conservatives choose specific sections and text of the document that can be used to justify particular political views. The Declaration is used to advance certain political positions because of its validation of natural law, though natural law is only referenced in particular sections of the document. In keeping with natural law principles, conservatives argue that citizens are not free to create their own laws; rather law must follow from the natural laws created by God. For conservatives it then becomes easy to oppose certain social practices that can be considered “morally wrong”, such as abortion and homosexuality. Abortion and homosexuality, among other practices, are viewed as opposed to the natural order of the world. Although most modern Americans might tolerate the legality of same sex marriage and abortion, conservatives want to remind Americans about the natural law roots of the Declaration because natural law justifies the argue that modern Americans cannot legally choose to have a “wicked” society—one that tolerates the murder of innocents and defiles God’s handiwork with unnatural sexual couplings—because laws that would allow these things conflict with the laws of nature upon which the country was built. Arguing for natural law implies that all law must derive and align with the laws of nature and moral principles and that precedents should not be regarded as law. True adherence to natural law theory means accepting that the original source of law was a “Creator,” not the ideas and decisions of citizens who might be wicked or corrupt. This idea is extremely helpful to advancing the agendas of socially conservative politicians. If this logic is followed then it is necessary to look directly to natural law doctrine in order to determine the future of politics and make judgments regarding what laws should be passed. If natural laws, ethics and the logic of rights are looked to in order to answer questions regarding legality, the most traditional

interpretation of laws will generally prevail because these philosophies derive from a basic understanding of rights but do not deal with complexities of many modern issues.

One example of the application of natural law in modern politics is regarding the issue of abortion. The issue of legal abortion is something that is very important to both conservatives and liberals. However, conservatives see abortion as fundamentally wrong and immoral because it is believed to be against the “natural order” that is determined by God. Additionally, Conservatives argue that justifications that explain legalizing abortion necessarily contain contradictions regarding the understanding of the laws of logic. Abortion is particularly important issue for conservatives because it highlights the two main pillars of natural law, adherence to God’s natural order and to the logic of rights. Allowing abortion challenges the foundations of natural law and for conservatives this challenge is seen as a threat to fundamental rights. Natural law is believed to be the source of all legal and political rights and a challenge to these rights could potentially disrupt all of society. Abortion is an issue that brings into question the fundamental ideology of natural law and as a result it is a highly contested issue. Arguing that the Declaration of Independence urges for adherence to natural law ideology is an important justification for anti-abortion platforms but also serves to defend overall adherence to similar conservative positions on social issues and the source of citizens’ rights.

Natural law relates to the argument against abortion in two main ways. Firstly, abortion defies what conservatives view to be God’s natural order in the world. They believe that if a child is conceived, then it must be God’s will and therefore it is not acceptable for humans to decide to go against the will of God. To social conservatives, abortion is morally abhorrent. Additionally, many argue that legalizing abortion contradicts logic itself. The conservative legal scholar Hadley Arkes argues that those who defend a woman’s “right to choose” contradict themselves, because in arguing in defense of the inherent right of a woman, as a human and as an individual, as a justification for her having the power to control her own body and reproduction, they ignore that the fetus should also have rights, based on the same logic of inherent rights that guaranteed rights to the mother. Arkes

believes that if we adhere to the belief that women have inherent rights, which is the justification for the right to choose, a fetus should also have some inherent rights and presumably one of those rights would be life. Conversely, if citizens accept that the right to life can be taken away from the fetus, then it would not be hard to justify that the mother's right to her own life, or similar rights, could be taken away by society at large. Arkes believes that if we use the rights of the mother as a justification for abortion, the same ideology that guarantees the mother's rights should also guarantee the rights of the fetus, because they are essentially the same rights. The issue here can also be considered in terms of who confers rights to both the mother and child. If the child only gains rights when the mother chooses to bestow them on the child, the rights are not natural rights; if natural rights are ignored, then who is to say that the mother has any rights either? Technically, under these conditions (without natural rights) society as a whole could deprive the mother of all of her rights, if people collectively decided that she was part of a group that did not deserve rights because of her race, gender or opinions. Arkes urges that "the people who sign on to the 'right to abortion' in the radical style of our current laws...set in place the logic that deprives them of all of their rights" (Gordon). In his 2002 book, *Natural Rights and the Right to Choose*, Arkes suggests that the issue of abortion and the emergence of the "right to choose" conflicts traditional American political logic, particularly natural law logic. He sees legalizing abortion as having led to a new era of rights that go against natural law logic and bring a different political ideology to the forefront of United States politics. For instance, if we as a society devalue the rights of a fetus, what stops the majority from also devaluing and subsequently infringing on the rights of other minorities, such as racial minorities? For some conservative thinkers, the issue of abortion, particularly as it relates natural law through the inherent rights debated in discussions about the legality of abortion, highlights the conflicts in allowing any set of positive laws to dictate what rights are afforded to groups of people. As a result, the abortion contest is seen as an important and fundamental debate that has bearing on the overall understanding that citizens have of the political and legal rights that American society depends upon.

In the case of abortion, Arkes argues that turning against certain natural law principles could unhinge society and he believes that legalizing gay marriage would have similar results. In the abortion example, Arkes argues that giving society the power to allow women to take away the rights of their fetus would also mean that, theoretically, society could also decide it has the power to take away from minorities the rights that should be inherent to all people. Similarly, he argues that gay marriage should not be legalized because if it were, what would stop other marriages, such as between humans and animals or between individuals who are close blood relatives, from also being legalized? (Arkes, "Supreme Court Hears Cases...") Arkes views gay marriage as morally deplorable and as a violation of the natural order of the world that God intended. Furthermore, he believes that arguments for gay marriage that assert that individuals should be able to do what they want because it will not harm anyone else or take away from the marriages of heterosexual couple, leave open the possibility of using this argument to validate other morally unacceptable marriages that even socially progressive thinkers would not want to allow, such as marriage of adults to young children or to animals. Arkes argues that if homosexual couples are allowed to marry on the basis that their marriage will not affect anyone else's marriage, how can a mother and her son be stopped from marrying? Shouldn't the principle that a marriage between two men would not affect anyone else's life also work to support the marriage of a mother and her son, if they wish to live as man and wife? (Arkes, "Supreme Court Hears Cases...") Arkes believes that allowing certain morally questionable marriages, will open the door for all definitions of marriage to become legalized.

The principles of natural law can be applied to many other situations and have been used to justify that it is important, in modern politics, to adhere to many socially conservative ideas. Overall, natural law is supposed to uphold fundamental moral principles, especially those that the founders intended the United States to be built upon. However, natural law generally ends up being used as a justification for more traditionally religious and conservative ideology.

Arkes's discussion of natural rights in relationship to abortion emphasizes the view that natural law provides the most consistent logic for

legal doctrine to derive from, but is there a limit to the situations in which natural law should be applied? One potentially problematic conflict is that many rights and actions can be claimed to derive from and be protected by natural law ideology. In “The Natural Law Challenge,” Arkes discusses the use of natural law to justify gun ownership. He says, “Justice Scalia has referred to the right to bear arms, the right of the innocent to protect themselves, as a “pre-existing” right, which was there before the Constitution” (Arkes, “Natural Law Challenge” 973). Many rights, such as the right to protect oneself, are easily associated with natural rights in that these rights are seen, through the rules of logic, as necessary to the preservation of order in human society and to upholding other fundamental rights. Another example of this justification for the application of natural law is the necessity of the right to life as a foundational principle of civilized society. However, it is easy to question how far these rights should be extended. Does the right to protect oneself necessarily include the right to bear arms? And even if the right of an individual to bear arms should be protected, should the type of arms that they can own as a private individual be limited? Although most scholars would probably not go to the extreme of arguing that assault rifles with high capacity magazines should be owned by private citizens, natural law rhetoric could technically be used to justify unchecked right to protect oneself through the right to bear arms. At what point does natural law stop being applicable?

Arkes suggests that Justice Scalia and conservative scholars would argue that the Second Amendment “was meant to secure that natural right” (973); the natural right that Arkes refers to is the right to bear arms. However, it continues to beg the question, is there a point at which this right should be limited? It is possible for the rights of one individual, such as in the case of the right to bear arms, to infringe upon the rights of another individual, such as the right to live safely and securely and be afforded justice through a trial by jury? According to some natural law theorists, however, natural law guarantees the overarching right of individuals to protect themselves, therefore Second Amendment rights should not be infringed upon. Some natural law scholars go so far as to question the need for a Bill of Rights at all, because they claim that rights to “life, liberty, and property”

or the freedom of speech and religious expression are inherent parts of law itself. (Rankin)

Many of the writers of the Constitution were opposed to the Bill of Rights because they felt that the rights that the Bill of Rights was meant to protect should be assumed and therefore did not need to be protected by the government. They also felt that “there was something not quite right in the notion of a Bill of Rights reserving to people rights they hadn’t surrendered to the state, for that implied that they had indeed surrendered the body of their rights to the state and that they were holding back now a few that they hadn’t surrendered” (Arkes, “A Natural Law Manifesto”). Like many of those original critics of the Bill of Rights, conservative advocates of natural law see the purpose of the Constitution as “the securing of those ‘natural rights’” (“A Natural Law Manifesto”). Therefore because the Constitution is a realization of the principles of the Declaration of Independence and the Declaration was built on the belief in natural, pre-existing rights that did not derive from government, there should have been no need for the government to assert that citizens had particular rights, because the government was built to protect rights, not take them away. Essentially, the Bill of Rights is believed by some to undermine the fact that the government was built upon the principles of natural rights and never threatened the rights outlined in the Bill of Rights. Integral to this argument is the idea that even before government was instituted, “we never had a ‘right to do wrong’” (A Natural Law Manifesto) and therefore the government did not deprive citizens of any right to do mischief. Because the government was not denying any rights that individuals ever were entitled to many drafters of the Constitution and modern scholars alike do not believe that it was necessary for the Constitution to assert that it was guaranteeing rights to certain things. They argue that the American government was not depriving any individual of any rights that citizens had before the government was created, and therefore an enumerated Bill of Rights should not have been included in the Constitution because natural law and not the government established the pre-existing right of citizens, such as the right to life. Fundamental rights did not need to be enumerated because they were assumed, if natural law principles were being followed. Natural law scholars in particular are opposed to the Bill of

Rights, because they see the assertion of these particular rights as taking away from the idea that all humans have “certain unalienable rights” (Declaration of Independence). If there were not a Bill of Rights, these rights would have to be seen as unalienable rights, but the fact that they are outlined in the Bill of Rights implies that if they were not enumerated they could potentially be denied. The idea that these rights could be denied is wholly contradictory to natural law ideology.

In discussing the Declaration of Independence, Jefferson acknowledged that its text was not meant to promote any particular political theory. Instead the Declaration represented many common 18th century ideas about government and political theory so that the document would be accessible to colonists (Becker 25). The reason that these philosophies were significant and included in the Declaration of Independence was because they, firstly, were commonly understood in the 18th century. Additionally, these ideas were important because they could be used as an attempt to justify the treasonous act of declaring independence from Great Britain. The natural law ethic implied in the Declaration of Independence was certainly important to the purpose of the Declaration and an important political theory in colonial America, however it is easy to question whether such a philosophy was meant to be carried into the 21st century and used as the basis for modern law. The example regarding the right to bear arms shows that natural law is significant in justifying, explaining and protecting the rights that citizens have, but Carl Becker and other scholars suggest that Jefferson used many common political philosophies to unite citizens in the call for independence and did not intend for particular ideologies to be paramount in future law. Natural law is certainly an important philosophy in early American politics, but Becker’s points out that it was not necessarily meant to be *the* founding principle, although it was cited with many others. Modern conservatives draw upon the natural law rhetoric of the Declaration of Independence because it allows them to justify their political positions through assumed American ideology.

The question of the importance of the Declaration of Independence has many implications. In addition to helping conservatives justify certain political positions through applying natural law rhetoric, recognizing the Declaration of

Independence as a source of law could create the opportunity for individuals to ignore the law created by the Constitution. Although the year 1776, when the Declaration of Independence was signed, is regarded as when the United States was created, the Constitution is regarded as the ultimate source and origin of all law. If the Declaration of Independence, which predates the Constitution, is regarded also as a source of law, there is the possibility that laws in the Constitution could be ignored in favor of the earlier laws or ideologies outlined in the Declaration of Independence. Natural law already suggests that common law and positive law are unimportant, and as a result, looking towards the particularly natural law rhetoric of the Declaration allows for a great deal of positive law, including the Constitution, to be circumvented in favor of adherence to natural law. Although the Declaration of Independence is certainly an important document in American cultural and political history, should its text be read as law and should its words be followed as such? Conservative scholars could potentially use the Declaration of Independence to argue for adherence to natural law principles in all matters. In the example of the legality of abortion, adherence to the Declaration of Independence would mean that the issues of the Ninth Amendment and the right to privacy that are viewed as central to the decision in *Roe v. Wade* (1973) are irrelevant, instead the central issue would be the origin of rights, the conflict between the rights of the mother and of the fetus and the determination of the point at which a fetus has rights. Interpretation of the Declaration of Independence as law could result in the circumvention of the Constitution, many positive laws, and court-established precedents. Adherence to the Declaration of Independence as a source of law would allow judges and lawmakers to ignore many important American laws and look only to the Declaration and the ideologies it presents in order to govern the United States. Using the Declaration of Independence as a source of law could lead to a significant change in the interpretation and application of American law.

Conservatives see the natural law argument as a way to defend their political beliefs. Many conservative politicians and thinkers who argue for more traditional interpretations of the Constitution use the natural law defense to take the Constitution back to its original and more traditional meanings,

which they view as originating in the Declaration of Independence. Additionally, they see a more liberal and progressive view of the Constitution as allowing judges to interpret the Constitution however they would like. In the Introduction to his book, *Beyond the Constitution*, Hadley Arkes writes “the liberal commentators on the law have been willing to advance a ‘living Constitution,’ an arrangement in which judges are freer to adapt the law to the ‘sensibilities of our time,’ without being overly constrained by the text of the Constitution” (Arkes, *Beyond the Constitution* 11). The argument in favor of the importance of natural law in the Declaration of Independence serves as a tool to argue for traditional interpretations of the Constitution and American political ideology; moreover upholding these principles also often includes interpreting the Constitution in a very traditional, originalist manner which, similarly, results in upholding conservative political views.

Although the argument for natural law is not necessarily slanted towards a conservative position, the modern extension of natural law rhetoric ends up being used to justify very specific conservative platforms. Natural law is most often used as a tool to defend traditional and conservative political positions, and more generally to defend the rights of individual citizens. In this way, natural law has the affect of being critical of government taxation for social programs and of the regulation of businesses, among other things. Natural law is an integral part of the ideologies behind the Declaration of Independence but the application of natural law to individual political issues can also complicate issues and possibly takes natural law principles out of context; the literal application of natural law principles often creates significant conflicts when strictly applied to specific issues in modern American politics.

Clarence Thomas and Looking to the Declaration of Independence

In his essay “The Natural Law Challenge”, Hadley Arkes suggests that utilizing natural law principles in court rulings can help judges avoid getting stuck in the manipulation of law and can keep judges from bringing their own bias to rulings and statutes (Arkes 966). Arkes’s assertion highlights the overall significance of the Declaration of Independence in modern politics: many socially conservative politicians and

particularly natural law scholars hope that using the Declaration of Independence as a source of law will justify the use of more traditional ideology, such as natural law, as the basis for future laws and court rulings and encourage originalist interpretations of the Constitution.

Supreme Court Justice Clarence Thomas is a poignant example of an influential individual who believes in the validity of using the Declaration of Independence as a source of law, promotes natural law principles for conservative ends and, overall, sees the role of judges as interpreting the original intention of law and avoiding clouding their decisions with personal political beliefs. Thomas’s paramount priority as a Supreme Court Justice is to uphold the original text of the Constitution. However, his reasoning for this is much more complex than most critics give him credit. Thomas believes that “[o]ne does not strengthen self-government and the Rule of Law by having the non-democratic branch of government make policy” (quoted in Baker 509). Essentially, Thomas urges that the role of the Justices is not to make law, but to interpret the law that was written in the Constitution. Thomas believes that the words of Constitution, written by the people of the United States, are important to follow closely, particularly because they illustrate the law and will of the people. Thomas believes that if judges stray from strict adherence to the words and intentions of the Constitution in their interpretation, they are straying from the democratic principles of self-government upon which the United States is built (Baker). Thomas is unique on the Supreme Court because of the rationale the leads him to decisions; he often agrees with his conservative peers, however these agreements are usually the result of very different reasoning.

Thomas has developed his own unique type of “originalist” constitutional interpretation. Justice Antonin Scalia, who Thomas is often compared to, interprets the Constitution from the angle of “original public meaning”. This means that Scalia first tries to interpret the meaning of the Constitution by the language, but when the intention of the words of the Constitution are not clear through the text alone, Justice Scalia then interprets the Constitution based on historical information regarding how it would have been originally interpreted, applied and enacted. Original public meaning is distinguished by the importance of

original *interpretation* as opposed to the original *intention* (Franck). In contrast to Justice Scalia, Justice Thomas's brand of originalism is often referred to as "original general meaning". His approach to constitutional interpretation is much more eclectic than Justice Scalia's approach. Thomas is "more willing to examine 'original intent' in sources like the records of the Constitutional Convention, or 'original understanding' in the records of the state ratifying conventions, as well as examining dictionaries and other evidence of the common (or legally specialized) use of the words in the text of the Constitution. He seeks, by use of these various sources, the best possible contemporaneous understanding of the text that he is interpreting" (Franck). Justice Thomas is a very committed and rigorous originalist and in this pursuit, he often looks much further and deeper than other justices.

Justice Thomas also seeks to encourage restraint in judges' interpretations of the Constitution through the promotion of adherence to its original purpose. "Thomas employs his original general meaning approach as a means of constraining judicial discretion and encouraging judicial restraint" (Rossum, "Understanding Clarence Thomas..."). Speaking about his original general meaning approach Thomas has said that it "reduce[s] judicial discretion and maintain[s] judicial impartiality", explaining that "it deprives modern judges of the opportunity to write their own preferences into the Constitution by tethering their analysis to the understanding of those who drafted and ratified the text" (Rossum, "Understanding Clarence Thomas..."). Thomas believes that looking to the original purpose and intent of the Constitution for guidance will make it more difficult to interpret the Constitution in ways that do not align with the goals of its writers, "the people", and that contradict the political ideology on which the nation was founded. Thomas's approach favors a traditional view of the Constitution and particularly uses the Declaration of Independence to do so.

Justice Thomas believes that the Constitution was a direct result of the Declaration of Independence and that the Declaration gives important insight into the intentions of government and the laws outlined by the Constitution; when the meanings of Constitutional passages are unclear, Thomas believe that the Declaration can and should

be used as a source of law. "Thomas believes that the Declaration's principles are foundational to the Constitution—they 'preced[e] and underl[ie] the Constitution'—and he grounds his opinion explicitly in them. In a 1987 article in the *Howard Law Journal*, Thomas declared that 'the 'original intention' of the Constitution [was] to be the fulfillment of the ideals of the Declaration of Independence, as Lincoln, Frederick Douglass, and the Founders understood it" (Rossum, "Understanding Clarence Thomas..."). Justice Thomas believes strongly in the ideological importance and continued relevance of the Declaration of Independence, particularly as a tool for maintaining judicial restraint; his commitment to its ideology has helped to make it a relevant document in modern politics. In attempting to discern the intention of the Constitution, the Declaration is an important source. Additionally, with the Declaration of Independence being used as a reference for judicial review, the idea of natural law clearly becomes relevant to discussion of the intention of Constitutional law and the appropriate application and extent of modern law.

Thomas's belief that many benefits come from looking to and citing the Declaration of Independence as a reference in opinions issued by the Supreme Court is in keeping with Arkes's argument regarding the benefit of the inclusion of natural law principles. Justice Thomas is an excellent example of natural law theory at work in modern politics and constitutional review; he proves how relevant the Declaration of Independence is and how its ideology can be applied to modern political thinking. Moreover, he demonstrates that using the Declaration of Independence as a source of American law can have a significant affect on the outcome of law and court decisions; viewing and using the Declaration as a source of law should not be taken lightly.

Thomas's commitment to upholding the text of the Constitution leads to his frequent willingness to question established precedents. Thomas firmly beliefs that judges need to adhere to the original intention of the Constitution and as a result he is willing to overturn precedents that contradict his understanding of the intention of the Constitution. His willingness to overturn precedents often ultimately promotes conservative positions, however his purpose is not to promote those positions, but to uphold the text of the Constitution

above all. Thomas's tendency to question established precedents is sometimes seen as contradictory to his promotion of judicial restraint, however a close examination of Thomas's logic will show that his overturning of precedents is even more in keeping with his originalist prioritization of the intent of the Constitution than not because his justification for re-evaluating established precedents is that the precedents do not align with the original intent of the Constitution, as written by the people; Thomas sees these wrongful precedents as establishing law as a result of the opinions of judges rather than based on the direct words of the people.

Clarence Thomas's thorough originalist interpretation of the Constitution includes frequent questioning of precedents and positive law, but it is also particularly characterized by Thomas's return to the text of Declaration of Independence. Of course, many of the principles of the Declaration of Independence, that Justice Thomas refers to as being foundational, are those based in natural law. However, natural law is a "natural ally" of judicial restraint (Baker). Arguments in favor of natural law easily align with judicial restraint, because judicial restraint ignores precedent and returns to original meanings and ideology, of which natural law is a dominant feature, particularly when the Declaration of Independence is interpreted as legal doctrine. Natural law has the potential to circumvent the Constitution, positive law and established precedents because following natural law requires that all laws are created and deemed to be acceptable primarily on the basis of their agreement to the morals and theory of logic understood through natural law.

Justice Thomas has come to be recognized for his tendency to "cite the Declaration as a source of legal principle in the decision of cases" (Franck). This tendency sets him apart from other justices but also importantly brings the Declaration to the forefront of Constitutional interpretation and modern political ideology, thereby securing the Declaration's place as *the* source of American political thought and the authority on the goals of the nation, but also as a historical document that still bears relevance to modern politics. Thomas's approach to judicial restraint is significant to legal doctrine, but also significant to the conservative cause. Thomas's emphasis on the Declaration of Independence accentuates and justifies judicial restraint, which is very sympathetic to conservative

causes and often lends it self to similar ideology, among judges, and validates conservatives' use of Declaration as a source of political thought in modern politics. There is no doubt that, in the Declaration of Independence, conservatives have found excellent tools to advance certain political ideas in twenty-first century America.

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