

***Calder v. Bull*, interpreting the Constitution as a social compact; or a sequel to Jean Jacques Burlamaqui and the theory of social contract (I)**

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Abstract: *Calder v. Bull* turns to be the vehicle to link the social contract theory of Jean Jacques Burlamaqui with the American Constitution. After analyzing the thought of Samuel Chase and the framers of the Declaration of Independence, we conclude that the pursuit of happiness ought to be seen as a principle of interpretation of a Constitution that is not an isolated document, but part of a larger compact that integrates not only negative liberties but also social rights.

Resumen: *Calder v. Bull* se convierte en el medio vinculatorio de la teoría de Jean Jacques Burlamaqui con la Constitución Americana. Tras analizar el pensamiento de Samuel Chase y de los creadores de la Declaración de Independencia, concluimos que la prosecución de la felicidad debe ser vista como el principio interpretativo de una Constitución que no es un documento aislado, sino parte de un contrato más amplio que integra no sólo libertades negativas sino también derechos sociales.

Key concepts: Samuel Chase; Declaration of Independence; American Constitution; Social Contract; Jean Jacques Burlamaqui.

Palabras clave: Samuel Chase; Declaración de Independencia; Constitución Americana; Contrato Social; Jean Jacques Burlamaqui.

I. INTRODUCTION.

1. After more than two hundred years from the founding, the American Constitution is still being hard to decipher. Depending on who is sitting on the bench,¹ its provisions are given a different meaning in accordance to the beliefs of the voting majority. Debate has raged over the years in every branch of government, as well as amongst public opinion and scholars, on whether it is healthy to live a government by the judges, or even as to what appropriate method of interpretation should be used as a methodology to decide cases and controversies.
2. On this regard, we have seen different possibilities, from plain meaning or textual interpretations all the way to original intent, with several middle grounds on the way. Still, there is no consensus as to how the Constitution ought to be construed. Nevertheless, it is a matter of the utmost importance, especially in a time where Judges to the Supreme Court are not only appointed with respect to their political affiliation or partisanship, but rather on how they think and interpret the constitution, to try to find a method that stands, as closely as possible with the true spirit of the Constitution in order to avoid politically or ideologically motivated decisions.²
3. Picking up on this trail, we consider then that while the Constitution is being shattered by different views and methods of construction, there has to be at least one that is true to the intention and the ends for which it was created. This is, to constitute a nation and to provide it with a government that is going to work for this and the future generations in allowing them to achieve their goals. To do this, one has to reason *quam tabula rasa* and set aside the traditional methodology to be able to rethink these issues without any constraints.
4. A possibility in rediscovering the path to the true intent of the Constitution might be to see it as an aspirational document that should be interpreted according to its finality or ends. On this behalf, comes to our mind a dictum written by Justice Chase in the eighteenth century, fairly forgotten by most

¹ See generally CASS R. SUNSTEIN *et al.*, IDEOLOGICAL VOTING ON FEDERAL COURTS OF APPEALS: A PRELIMINARY INVESTIGATION, Chicago Public Law and Legal Theory Working Paper No. 50, September 2003, at <http://www.law.uchicago.edu/academics/publiclaw/index.html>

² In what was a very awkward dictum due to the questionable result in the case, let us remind, merely for the sake of argument and without endorsing the rest of the opinion, the words of Chief Justice Taney when he stated: "(...) (The Constitution) speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this Court and make it the mere reflex of the popular opinion or passion of the day." See *Scott v. Sandford*, 19 Howard 393 (1857). Ironically, the *Dred Scott* decision would end up doing exactly what Justice Taney was cautioning from.

scholars, that suggested to interpret the constitution according to the first great principles of the social compact. A dictum that, on its face, may seem to fulfill such a conception, especially if we were to consider those “great principles” as that nucleus that defines the Constitution and the reasons for which it stands for.

5. That dictum was part of Justice Chase’s seriatim opinion in *Calder v. Bull*,³ a case that is scarcely given much attention by the prevailing constitutional doctrine in the United States but that may offer the answer we are looking for.
6. Despite this case having fallen relatively into oblivion, we think it of the greatest importance to determine what Justice Chase meant by this dictum to see whether in it we could find a possible solution on how to interpret the Constitution without the so many fluctuations offered by the traditional methods of interpretation in use today.
7. In order to do that, first of all, we will concentrate on Justice Chase’s statement and view of what social contract and principles it would be talking about. This said, we will try to understand where these principles of the social contract can come from, for which goal we will first look into the meaning of the Declaration of Independence, as a possibility of a document providing these goals of government for a nation with the “pursuit of happiness” as one of its main goals to be achieved by every citizen; we will then also see if the concept of a social compact can therefore be construed as a series of foundational documents, this is, by having celebrated multiple compacts, established not only to organize society, but also to grant it with a certain direction, as aspirational documents tending to permit every citizen part of that association the pursuit of their own happiness as one of its inalienable rights.
8. In other words, we will have to assume the premise that government was thought only for the good of the whole social body, above individual interests that may be against them, but compatible with a respect of its natural and inalienable rights. In this we might also assume the Declaration of Independence to be an ideological complement to the constitution. For this purpose, we would have to part with the idea of the traditional lockian-

³ 3 U.S. (3 Dall.) 386. Although *Calder v. Bull* is taken as the famous case for Chase’s statement, there have been some cases during the XVIII and XIX centuries where the Court has taken seriously this concept of declaring a statute as contrary to the social compact. See for example, *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (Paterson J.), *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 139 (1795), and for a list nineteenth century cases HERBERT HOVENCAMP, *THE CULTURAL CRISES OF THE FULLER COURT*, 104 Yale L.J. 2318 and ff. (1994-1995). A similar reasoning is also reached by Chief Justice Marshall in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1820), but being *Calder* nearer to the time of the foundation era, and clearer in its exposition, we believe that it is the proper one to lead us to determining the methodology of establishing what it means to decide a case in accordance to the “first great principles of the social compact”.

rousseauian perspective of only one social contract between the people and government (like a granted charter), to establish the idea that the social contract is made in subsequent phases and contracts (which can all be celebrated separately or at the same moment in time), which would then be: the foundation of society and its goals (Declaration of Independence), the creation of government (ultimately the Constitution, but before it other documents like the Articles of Confederation) and finally, the determination of who and how is going to rule (also done in the constitution, as to the procedure and modes of election, as well as the oaths of office, but differed in time to its celebration in different time periods like elections and tenure of office).

9. Therefore, if we are to take into consideration what has previously been said, the written constitution would then be set in a larger framework, consisting of not just one document, but two, much more than having an unwritten constitution integrated, as some have even suggested when talking about *Calder v. Bull*. Should that be the case, the written constitution would have an ideological support in a document such as the Declaration of Independence, which it could not disregard, because being part of the same social compact, *lato sensu* speaking.
10. This done, if we can set Declaration and Constitution as a block, by looking at Justice Chase's background and relationship with the document and ideas of the Declaration of Independence, we will be in a position to try to give a definitive meaning to these "first principles of the social compact", and to see if the system of interpretation we claim to identify in *Calder v. Bull* could endorse the idea that any provision of the Constitution, every law of the legislature, has to pass the test of an interpretation compatible with the substantive content of the Declaration of Independence.
11. Once that is accomplished, we will proceed to differentiate this dictum from the mere endorsement of the substantive due process doctrine, the existence of an unwritten constitution and natural law, as well as to determine finally what would the implications of such a scheme of interpretation be to determine unconstitutional legislation through the concept of a social covenant. When this is accomplished, we will be in a position of testing this theory with some of the landmark cases in United States Supreme Court history.⁴

⁴ Although it would be interesting to test this method of interpretation with many of the landmark cases in Supreme Court history, like *Lochner v. New York*, or *Dred Scott*, to see what the outcome of it would have been almost a century or two ago had the Court interpreted the Constitution as a social compact, because of the nature of this work, we will have to test but one case, and for that task we have considered *Lochner*.

II. CALDER V. BULL AND THE IDEA OF INTERPRETING THE CONSTITUTION AS A SOCIAL COMPACT: CHASE'S OPINION.

12. *Calder v. Bull* is a case remembered because of its definition of what an *ex post facto* law ought to be. But instead of concentrating in the facts of the case,⁵ and whether Calder or Bull had a right to inherit the estate of Mr. Morrison, whether there was a vested right in the whole controversy, or even an invasion of the state legislature into the powers of the state judiciary, whose decision in the case was overruled by passing a new statute, or even in the debate held between Justice Chase and Justice Iredell to determine if a law repugnant to natural law can be declared void by the Court, which was completely inconsequential⁶ to the outcome of the

⁵ Just to get a sense of the facts of the case, for a bit of background, let's refer to the opening paragraphs of the opinion:

"The Legislature of *Connecticut*, on the 2nd *Thursday* of *May* 1795, passed a resolution or law, which, for the reasons assigned, set aside a *decree* of the court of *Probate for Harford*, on the 21st of *March* 1793, which *decree disapproved* of the will of *Normand Morrison* (the grandson) made the 21st of *August* 1779, and refused to *record* the said will; and granted a new hearing *by the said Court of Probate*, with liberty of appeal therefrom, in six months. A new hearing was had, in virtue of this resolution, or law, before the *said Court of Probate*, who, on the 27th of *July* 1795, *approved* the said will, and ordered it to be recorded. At *August* 1795, appeal was then had to the *superior court at Harford*, who at *February* term 1796, *affirmed* the *decree* of the Court of Probate. Appeal was had to the *Supreme Court of errors of Connecticut*, who, in *June* 1796, adjudged, *that there were no errors*. More than 18 months elapsed from the *decree* of the Court of Probate (on the 1st of *March* 1793) and thereby *Caleb Bull* and wife were barred of all right of *appeal*, by a statute of *Connecticut*. There was no law of that State whereby a *new* hearing, or trial, before the said Court of Probate might be obtained. *Calder* and wife claim the premises in question, in right of his wife, as heiress of *N. Morrison*, physician; *Bull* and wife claim under the will of *N. Morrison*, the grandson.

The Council for the Plaintiffs in error, contend, that the said resolution or law of the *Legislature of Connecticut*, granting a *new hearing*, in the above case, is an *ex post facto law*, prohibited by the *Constitution of the United States*; that any law of the Federal government, or of any of the State governments, contrary to the *Constitution of the United States*, is *void*; and that this court possesses the power to declare *such law void*."

3 U.S. (3 Dall.) 386-387. Furthermore, Justice Chase keeps explaining:

"The *effect* of the resolution or law of *Connecticut*, above stated, is to *revise* a decision of one of its Inferior Courts, called the Court of *Probate for Harford*, and to direct a *new* hearing of the case by the *same Court of Probate*, that passed the *decree against* the will of *Normand Morrison*. By the *existing* law of *Connecticut* a *right to recover certain property* had vested in *Calder* and wife (the appellants) in consequence of a decision of a *court of justice*, but, in virtue of a subsequent resolution or law, *and the new hearing* thereof, *and the decision* in consequence, this right to recover certain property was divested, and the right to the property declared to be in *Bull* and wife, the appellees. The *sole* enquiry is, whether this resolution or law of *Connecticut*, having *such operation*, is an *ex post facto law*, within the *prohibition* of the *Federal Constitution*?"

Id. at 387.

⁶ Jane Shaffer Elsemere, a biographer of Justice Chase believes that the main point of *Calder v. Bull* is the matter concerning whether or not an *ex-post facto* law had been passed, and that the discussion between him and Justice Iredell is largely irrelevant. See JANE SHAFFER ELSMERE, JUSTICE SAMUEL CHASE, 69-70 (Janevar Publishing Co., 1980). Moreover, she states:

decision, we consider it to be more appropriate to concentrate on Justice Chase's dicta in the opinion regarding how the Constitution ought to be construed, since this is the important aspect of the case with regard to the whole scope of this work.

13. On this regard, Justice Chase's dicta, are the following:

"(...) I cannot subscribe to the *omnipotence* of a *State Legislature*, or that it is *absolute and without control*; although its authority should not be *expressly* restrained by the *Constitution*, or *fundamental law*, of the State. The people of the *United States* erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their *persons* and *property* from violence. The purposes for which men enter into society will determine the *nature* and *terms* of the *social compact*; and as *they* are the foundation of the *legislative power*, *they* will decide what are the *proper* objects of it: The *nature*, and *ends* of *legislative power* will limit the *exercise* of it. This *fundamental* principle flows from the very nature of our free *Republican* governments, that no man should be compelled to do what the laws do *not* require; *nor to refrain from acts which the laws permit*. There are acts which the *Federal*, or *State*, Legislature cannot do, *without exceeding their authority*. There are certain *vital* principles in our *free Republican governments*, which will determine and over-rule an *apparent and flagrant* abuse of *legislative power*; as to authorize *manifest injustice by positive law*; or to take away that security for *personal liberty*, or *private property*, for the protection whereof of the government was established. An ACT of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise* of *legislative authority*. The obligation of a law in governments established on *express compact*, and on *republican principles*, must be determined by the *nature* of the *power*, on which it is founded. (...) The *genius*, the *nature*, and the *spirit*, of our State Governments, amount to a prohibition of *such acts of legislation*; and the *general principles of law and reason* forbid them. The

"Possibly carried further than he intended by the heat of the exchange, Chase asserted that 'An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.' According to this reasoning the Court had the right to nullify acts of Congress which might be in agreement with constitutional provisions yet violated the 'nebulous' 'Principles of the social compact.' This would, in effect, permit the Court to set itself above the Constitution and to declare the latter's provisions null and void if it so desired."

Idem at 70. For obvious reasons that are going to be developed in the course of this work, we do not consider this opinion as one that should be considered correct, even if we may partially agree that the debate on natural law held between Justice Chase and Justice Iredell may have been, above all, merely academic in the outcome of the case.

Legislature may enjoin, permit, forbid, and punish; they may declare *new crimes*; and establish rules of conduct for *all* its citizens in *future cases*; they may *command* what is right, and *prohibit* what is wrong; but they cannot change *innocence* into *guilt*, or punish *innocence* as a *crime*; or violate the right of an *antecedent lawful private contract*, or the *right of private property*. To maintain that our Federal, or State, Legislature possesses *such powers*, if they had not been *expressly* restrained; would, in my opinion, be a *political heresy*, altogether inadmissible in our *free republican governments*. ALL the restrictions contained in the Constitution of the *United States* on the power of the *State Legislatures*, were provided in favour of the authority of the *Federal Government*. The prohibition against their making *any ex post facto laws* was introduced for *greater caution* (...).⁷

14. From this excerpt of Chase's opinion we can clearly see that he thinks that the main reasons for which men associate to form a nation are the essence of the social compact, that these "first great principles" are vital to the existence of a free republican government and therefore that they rule the constitution and all power granted therein to the legislature. He also believes that any act contrary to the constitution and its great principles exceeds the limits of the legislative authority, being a manifest abuse of positive law and that consequently, any law incompatible with these vital principles cannot even be called a law since it would be an unlawful act, a political heresy, inadmissible in a free government; in one word, void.
15. Despite that, in what seems to have been a mysterious and strange move within the structure of his opinion, perhaps even incongruent, Samuel Chase would shift to analyze and define the concept of *ex post facto* law, and after determining that it only applies to criminal matters, declares the statute constitutional without making any further mention to the necessity of interpreting legislation through the eyes of the great goals of the Constitution. He just sits on the question by making a strange argument whereby he says he will not give his opinion on whether the Court can declare state legislation unconstitutional, and he determines that the proper courts for that are the state courts and that they found no constitutional anomaly.⁸ Whether he was inconsistent, the dictum was gratuitous, a mere

⁷ 3 U.S. (3 Dall.), 387-389.

⁸ "Without giving an opinion, at this time, whether this Court has jurisdiction to decide that any law made by Congress, contrary to the Constitution of the *United States*, is void; I am fully satisfied that this court has no *jurisdiction* to determine that any law of any state *Legislature*, contrary to the Constitution of such *state*, is void. Further, if this court had *such* jurisdiction, yet it does not appear to me, that the resolution (or law) in question, is contrary to the charter of *Connecticut*, or its constitution, which is said by counsel to be composed of its charter, acts of assembly, and usages, and customs. I should think, that the courts of *Connecticut* are the proper tribunals to decide, whether laws, contrary to the constitution thereof, are void. In the present case they have, both in the inferior and superior courts, determined that the Resolution (or law) in question was *not* contrary

product of the heated debate with Justice Iredell, or a true rule of constitutional interpretation that he did not use at the end because he thought perhaps it would have been too bold or against the general ideas of the Court, but planted the seed for the future, it is very hard to say; but supposing this last idea may have some ground, and that he backed off from interpreting the Connecticut statute according to the great principles of the social compact because he felt that such an idea would not be generally well taken at the time, it would be of great worth then to determine what did Chase try to say by establishing this dictum, in a time an alternative for interpreting the constitution may solve some of the current critics to the system of judicial review and constitutional interpretation by the courts.⁹

III. WHAT DID SAMUEL CHASE MEAN BY THE “FIRST GREAT PRINCIPLES OF THE SOCIAL COMPACT”? DEFINITION OF SOCIAL COMPACT ACCORDING TO CHASE’S PROBABLE VIEW ON THE MATTER.

16. The first question that arises from Chase’s opinion is what is the so-called “social compact”, and once we are able to detect that, we can proceed to determine what are its vital or “great principles”.
17. Did Chase mean that the Constitution is the social compact, and that therefore the great vital principles of it are to be found within its provisions?
18. Some scholars have given some thought to the idea, some others, have even thought that Chase equates the constitution to the social compact, and that therefore there are some extra constitutional principles that rule it, meaning that any law contrary to these principles has to be declared unconstitutional.¹⁰ One aspect of the opinion that would seem to give such

to either their state, or the federal, constitution.” 3 U.S. (3 Dall.), 392-393. Also, the opinion concludes by saying:

“I am under a necessity to give a *construction*, or explanation of the words, ‘*ex post facto law*,’ because they have not any certain meaning attached to them. But I will not go farther than I feel myself bound to do; and if I ever exercise the jurisdiction I will not decide *any law to be void, but in a very clear case*.

I am of opinion, that the decree of the Supreme Court of Errors of *Connecticut* be affirmed, with costs.”

Id. at 395.

⁹ The same thing could be said of Sir Edward Coke’s dictum in Doctor Bonham’s case (see *Reports, Bonham’s case*, Part VIII, 118 a.), which despite setting the foundations for judicial review, such criterion did not rule the outcome of the case. What he meant by including such dictum may be hard to figure, perhaps it was just a mere academic insertion, but the outcome of such dictum being there, no one can deny it was hugely influential in the years to come as one of the foundations upon which judicial review was built.

¹⁰ This is the opinion of prof. Foley: “(...) for Chase, a society’s constitution is its social contract, and thus it should be understood that the ultimate purpose of the Constitution is the same as the ultimate purpose of the social contract.” EDWARD B. FOLEY, *THE BICENTENNIAL OF CALDER v. BULL: IN DEFENSE OF A DEMOCRATIC MIDDLE GROUND*, 59 Ohio St. L.J. 1603 (1998). On this respect, as a consequence of the foregoing, he continues saying: “Given that Chase equates

an impression is when Chase establishes what apparently would seem to be the principles of the social compact, which he refers to in his opinion, in saying that: “the people of the *United States* erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their *persons* and *property* from violence.”¹¹ Although this seems like a reference to the Preamble of the Constitution,¹² in which case perhaps our whole case would be closed, we believe that Chase is not referring himself directly to the Constitution’s preamble, since his reference differs from it in that it contains some extra elements tossed in, like the protection of persons and their property from violence.

19. What is the role of the mention to property? Is it a mere Lockean influence on Justice Chase, a rhetoric statement? Is it a reference to domestic tranquility or to one of the blessings of liberty that have to be secured by the State? -in which case the content of this principle may need in our opinion for other sources of definition-. Is it one of the unalienable rights the Declaration of Independence speaks of? Or lastly, is Chase just including it because he is going to use the example of property later on in his opinion and he just wants to make a point?
20. All these questions seem hard to answer at this point and there doesn’t seem to be a clear cut answer. But we believe that the answer to neither of them is sufficient to close the door on any possible interpretation of the opinion; to the point that any of them, including the one we will defend in this work, seems as valid as the others.
21. Another reason not to think that he may have thought that these principles of the social compact were to be found solely in the Preamble of the Constitution is the fact that, having signed the Declaration of Independence and drafted the Constitution of Maryland in 1776, he had embraced different enunciations of the ends of government in a social compact¹³ that included elements like safety and happiness, which are not in the Federal Constitution and that may be nearer to the concept of protection of persons and property to which he is making reference in the opinion of *Calder*, than what is stated in the text of 1787. Besides, the Constitution in its preamble does not state the ends of government, or the terms of the social compact,

the Constitution with the social compact, it obviously follows from him that any legislation violating an essential term of the social contract must be unconstitutional.” *Id.* at 59.

¹¹ 3 U.S. (3 Dall.) 388.

¹² The Preamble of the Constitution states: “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

¹³ Like we will see when analyzing Chase’s background and relation to the Declaration, see *infra* 3.1 and 3.2.

to use Chase's words, since it is only setting a structure of government to secure those principles of government which are already given for granted.

22. What does the Constitution mean by "domestic tranquility" and "the Blessings of Liberty"? Is it pure rhetoric, or is it assuming that those have been already defined previously?
23. It would seem to us that the answer to this question is to be found in the text of the Declaration of Independence, and therefore, if there are principles and ends of government, then, Justice Chase, who was aware of its content, having himself signed the document, must have had said declaration in mind when referring to the nature and terms of the social compact, not only the preamble of the Constitution.
24. Therefore, an exploration in that direction seems necessary, discarding the simplistic view that the principles of the social compact are to be merely considered in the Constitution.
25. Moreover, a restrictive view as that which we have just mentioned may not be very accurate with the perception of the Founding Era, where substantive content to the principles of the social contract were not always drawn from the Constitution, but also, from other documents like the Declaration of Independence. On this regard, there has been some urgency in reviving, even redeeming the heritage of the Declaration,¹⁴ and consequent to that aspiration, we will examine what is the role played by the Declaration of Independence within the whole social compact scheme of the American Constitution, to determine then how likely, in trying to define these first great principles of the social compact, Samuel Chase might have been considering the content of the Declaration to frame the Constitution.

¹⁴ Some scholars, like prof. Bruce Ackerman, have stated the need of redeeming the promise of the Declaration of Independence by entrenching inalienable rights into the Constitution, for example. On this regard, see BRUCE ACKERMAN, *1 WE THE PEOPLE, FOUNDATIONS*, 321 (Harvard University Press, 1991). On a similar basis, take prof. Sunstein's claim for reviving concepts from the founding era, like the one of a deliberative democracy: "It is now critical to revive this broader understanding of the role of the constitution. That understanding was an inextricable part of the original commitment to deliberative democracy. It is far from anachronistic today." CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION*, vi (Harvard University Press, 1993). But, parting from Cass Sunstein's analysis, this conception in our opinion makes sense only if we can link this concept of a deliberative democracy to the "first great principles of the social compact" which we will define along this work. Democracy is deliberative only because it is a part of a larger framework (a social compact), not because it is its intrinsic characteristic. In this sense, the social contract and its first principles or objectives constitute the inner morality of the concept of deliberative democracy.

3.1.- Samuel Chase's background.

26. It is a sad story that Justice Chase is remembered more because of his failed impeachment¹⁵ than thanks to his legal contributions to the founding period and the Supreme Court.

27. First of all, let's assume that having been Justice Chase a man that lived during the period of the revolution, he went to Law School in the late 1750s early 1760s, that it is likely that he may have been influenced by Aristotle, Locke, Blackstone, Pufendorf, Burlamaqui and Vattel, and that consequently his notion of a social compact might be similar to the ones established by these gentlemen. Also, we have to consider that these were not only widespread theories, but rather the dominant theories on government by the time of the founding¹⁶ and that as a result of that, the political philosophy of a lawyer of that era must not have been substantially different in beliefs,¹⁷ leading us to the presumption that Samuel Chase must have had political beliefs resting in the same shared values as the rest of the founders and framers.¹⁸ Even James Iredell, Chase's nemesis with regard to the dictum that interests us in this work, had the notion that the constitution is an "original contract between the people and their future government"; from that remark, it is easy to conclude that Iredell's notion of a constitution as a social compact is merely that of creating a government, not necessarily founding a nation, a matter which would be the subject of another and

¹⁵ On this, see 1 GEORGE J. LANKEVICH, *THE SUPREME COURT IN AMERICAN LIFE, THE FEDERAL COURT 1787-1801*, 264 (Associated Faculty Press, 1986). With regard to Samuel Chase's impeachment, see the REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE, ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, BEFORE THE HIGH COURT OF IMPEACHMENT COMPOSED OF THE SENATE OF THE UNITED STATES FOR CHARGES EXHIBITED AGAINST HIM BY THE HOUSE OF REPRESENTATIVES, IN THE NAME OF THEMSELVES, AND OF ALL THE PEOPLE OF THE UNITED STATES FOR HIGH CRIMES AND MISDEMEANORS, SUPPOSED TO HAVE BEEN BY HIM COMMITTED (Samuel Butler and George Keatinge, 1805), as well as THE ANSWER AND PLEAS OF SAMUEL CHASE, ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, TO THE ARTICLES OF IMPEACHMENT, EXHIBITED AGAINST HIM BY THE SAID COURT, BY THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES (William Duane & Son, 1805), and finally, ON THE IMPEACHMENT OF JUDGE CHASE, in 4 ELLIOT, DEBATES, 452-453.

¹⁶ "Already in the 1770's, the state-of-nature or modern natural rights analysis appears to have been the dominant theoretical justification for revolution and written constitutions." PHILIP A. HAMBURGER, *NATURAL RIGHTS, NATURAL LAW, AND AMERICAN CONSTITUTIONS*, 102 Yale L.J. 939 (1992-1993).

¹⁷ "In content, eighteenth century natural law in America was not substantially different from what it was at the time as set forth in Grotius and Pufendorf, Vattel and Burlamaqui, Rutherford and Blackstone." ROSCOE POUND, *THE REVIVAL OF NATURAL LAW*, 17 Notre Dame L., 342 (1941-1942).

¹⁸ "There must be a very strong presumption that the arguments (...) used (by Otis, Dickinson, John and Samuel Adams, Jefferson and other leaders of the struggle for independence) rested on widely shared beliefs and invoked widely shared values." THOMAS C. GREY, *ORIGINS OF THE UNWRITTEN CONSTITUTION: FUNDAMENTAL LAW IN AMERICAN REVOLUTIONARY THOUGHT*, 30 Stan. L. Rev. 849 (1977-1978).

previous original contract. Notwithstanding this, we believe that it is this last notion that was most common to the time of the founding.

28. Also, having Chase a reputation for being a very studious and cultivated man, who began by being taught all the classic authors by his father¹⁹ as well as owning a valuable and extensive library, it seems impossible to imagine that he may not have had extensive knowledge of an author like Burlamaqui that was being widely read by most of the framers, his acquaintances, and cited in pamphlet after pamphlet.²⁰ Such was Chase's reputation as a learned man that he has even been seen as having become the intellectual leader of the Ellsworth Court; an aspect that makes it the

¹⁹ Not only his oratory skills earned him the surname of Maryland's Demosthenes, but through his writings we are able to see that indeed he makes reference to classic writers and classical history. An example of this can be seen at SAMUEL CHASE, TO THE VOTERS OF ANNE-ARUNDEL COUNTY, February 9, 1787, in MELVIN YAZAWA (editor), REPRESENTATIVE GOVERNMENT AND THE REVOLUTION, THE MARYLAND CONSTITUTIONAL CRISIS OF 1787, 58 (The John Hopkins University Press, 1975).

²⁰ On this regard, see N. DWIGHT, THE LIVES OF THE SIGNERS OF THE DECLARATION OF INDEPENDENCE, 249-250 (A.S. Barnes & Co., 1852). Also, in this aspect, according to Daniel Leonard's *Massachusettsensis*, a pamphlet published in 1773, Burlamaqui was considered at the time of the founding as a "celebrated author". See 1 CHARLES S. HYNEMAN and DONALD S. LUTZ, AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, 210 (Liberty Fund, 1983). See on this regard Gen. Charles Cotesworth Pinckney statement during the debates on the ratification of the Constitution in the South Carolina Convention too; he would cite Burlamaqui by expressly referring to him as a "writer of great reputation on political law". See 4 ELLIOT, DEBATES, 279.

Furthermore, it is interesting to see the Supreme Court of Washington's opinion in *State v. Rivers*, 921 P.2d 495 (1996):

"J.J. Burlamaqui's text, *The Principles of Natural and Politic Law* (7th London ed. 1859) was the leading natural law text of the period. Burlamaqui was among the most important natural law legal theorists from the American point of view. He was widely read in law schools of the time. (...)

The Burlamaqui text was also frequently cited by the United States Supreme Court in the 19th Century."

In a similar note, Judge Read in a dissenting opinion before the Supreme Court of Pennsylvania stated:

"The works of Burlamaqui, Montesquieu, Puffendorf, Grotius, Locke, Vattel, and all the writers on government and the laws of nations, were familiar to the statesmen of the Revolution, and were largely used in their discussions, which from necessity involved the fundamental principles of civil society: Votes of Assembly, 1770 to 1789, p. 3, &c."

Kneedler v. Lane, 45 Pa. 238 (1863) (READ, J. in dissent).

On this aspect, let's also say to get a scope of the knowledge judges like Chase may have had of Burlamaqui, that there have been over 65 citations of Burlamaqui in Federal and State Court cases; the great majority of them in the 19th century. Burlamaqui was cited in 17 Supreme Court cases before 1945. On this, see also Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 Nw. U. L. Rev. 1062 (2001-2002) note 138. The range of arguments citing Burlamaqui in these cases are of very different nature, going from matters of property, eminent domain, citizenship, children's rights, constitutional rights, taxation, sovereignty, extradition, war, international treaties, natural law, etc., to the nature and structure of government. Some significant citations of Burlamaqui are also provided by John Marshall in the following Supreme Court cases: *M'Ilvaine v. Coxe's Lessee*, 6 U.S. (2 Cranch) 280 (1805); *The Venus, Rae, Master*, 12 U.S. (8 Cranch) 253 (1814) and *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814) and by Joseph Story in the Supreme Court Decision in *U. States v. Smith* 18 U.S. 153 (1820).

more interesting for the purposes of our disquisitions, since that would give a certain moral weight to his opinions on the bench.²¹

29. Moreover, we know that Justice Chase had knowledge of Burlamaqui's work from the citations made in some opinions of the Supreme Court when he was sitting in the Court, being one of the most representative on this subject that in *Ware v. Hylton*, where Chase himself cites Burlamaqui to ground his seriatim opinion.²²

30. Also, by making reference to Coke's *Reports*, and to phrases like not submitting to the omnipotence of the legislature or that it would be a violation of the principles of the social compact to allow someone to be a judge in its own cause,²³ we may think that Chase could have been influenced to a certain extent by the call of Sir Edward Coke in *Bonham's case*, to find a check upon an abusive exercise of legislative authority. Nevertheless, this, far from creating a rationale for invoking natural law restrictions upon constituted power would seem to be a mere call to see the actual constitution within a larger legal frame in a written document, since from the reading one may do from the *Second Part of the Institutes of the Laws of England*, it seems pretty clear that Coke is making a reference to *Magna Charta* as the substantive foundation for judicial review.²⁴ Therefore, if we make an analogical argument regarding the United States Constitution, the proper analogy would seem to be to take a founding document like *Magna Charta* as its substantive foundation, and the most likely one to fulfill that role is the Declaration of Independence.

31. Another speculation on the ideological background of Chase's ideas surrounding the concept of social compact is that he would have read

²¹ See 1 GEORGE J. LANKEVICH, *THE SUPREME COURT IN AMERICAN LIFE, THE FEDERAL COURT 1787-1801*, 263 (Associated Faculty Press, 1986).

²² In *Ware v. Hylton* (3 U.S. 199, 3 Dall. 199), Burlamaqui is cited three times. The first citation is in Chase's opinion when he states: "From these observations, and the authority of Bynkersboek, Lee, Burlamaque, and Rutherford, I conclude, that Virginia had a right, as a sovereign and independent nation, to confiscate any British property within its territory." The other two are made by Justice Iredell in his opinion with regard to who is legitimated to repel or declare void a treaty.

Also, take into account that Chase, cites extensively in his opinion the works of Emmerich de Vattel, who is also presumed to have been a student of Burlamaqui at the University of Geneva; their views are additionally very similar in concept, a fact that sheds more strength to our argument in the sense that Chase's view of the social compact may have been influenced by an ideology compatible to Burlamaqui's.

²³ See 3 U.S. (3 Dall.) 387, 388 and 393.

²⁴ SIR EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND*, 526 (Clarke and Sons, 1817). For further discussion on this topic and judicial review as viewed by Sir Edward Coke using *Magna Charta* as a substantive basis, refer to RAUL PEREZ JOHNSTON, *LOS APORTES DEL DERECHO PÚBLICO MEDIEVAL A LA TEORÍA DEL ESTADO Y DE LA CONSTITUCIÓN (DIÁLOGO CON PAOLO GROSSI)* [The Contributions of Medieval Law to the Theory of the State and Constitutional Theory (A Dialogue with Paolo Grossi)], in 5 *HISTORIA CONSTITUCIONAL. REVISTA ELECTRÓNICA DE LA UNIVERSIDAD DE OVIEDO, SPAIN* (2004). [Hereinafter *The Contributions of Medieval Law*].

Blackstone's *Commentaries*, which also relate to happiness as the ultimate goal of government.²⁵

32. All of this being stated, we can deduct from Chase's background, that he must have had a strong knowledge of the theories circulating during the founding (including those of Burlamaqui), and that it does not seem farfetched at all to think that he might have even based some of its most important public law ideas on his readings of the work of Jean Jacques Burlamaqui and have such an author in his mind when considering issues around the theory of social contract.

3.2.- The Declaration of Independence and Samuel Chase.

33. Samuel Chase signed the Declaration of Independence on August 2, 1776, as a delegate of the state of Maryland.²⁶ Now, this plain fact, was it a coincidence, or could it have been something that marked the life of Chase? In our opinion this is hard to answer, but even if signing the Declaration may not have marked Justice Chase, at least he never manifested being contrary to its principles, nor to the legal implications of the theoretical legal frame it involved.

34. One thing is for sure: if we were to think of a change in minds between 1776 and the adoption of the Constitution, at least, Chase doesn't seem to go along with it, since he claimed to have maintained the same principles during the whole period²⁷ and showed disagreement with the views of "our late reformers" in 1803.²⁸ Chase's thought regarding the purposes of civil society, which he would have maintained unchanged between 1776 and at

²⁵ On Chase citing Blackstone, see SAMUEL CHASE, TO THE VOTERS OF ANNE-ARUNDEL COUNTY, February 9, 1787, in MELVIN YAZAWA (editor), REPRESENTATIVE GOVERNMENT AND THE REVOLUTION, THE MARYLAND CONSTITUTIONAL CRISIS OF 1787, 59 (The John Hopkins University Press, 1975), as well as *Calder v. Bull*, 3 U.S. (3 Dall.) 391 (1798). The reference has to be considered valid if we were not to give any credit to the fact that there have been some accusations in the sense that Blackstone would have actually plagiarized most of its public law ideas out of the works of Burlamaqui. On this, see BERNARD GAGNEBIN, *op. cit.* at 273-274 and for the contrary view, defending Blackstone, PAUL LUCAS, EX PARTE SIR WILLIAM BLACKSTONE, "PLAGIARIST": A NOTE ON BLACKSTONE AND THE NATURAL LAW, 7 Am. J. Legal Hist. 142 (1963), and W. S. HOLDSWORTH, SOME ASPECTS OF BLACKSTONE AND HIS COMMENTARIES, 4 Cambridge L.J. 279 (1930-1932).

²⁶ See JANE SHAFFER ELSMERE, JUSTICE SAMUEL CHASE, 15 (Janevar Publishing Co., 1980).

²⁷ "From the year 1776, I have been a decided and avowed advocate for a representative, or republican form of government, as since established by our state and national constitutions. (...)" SAMUEL CHASE, CONCLUSION OF A CHARGE DELIVERED AND READ FROM THE ORIGINAL MANUSCRIPT AT A CIRCUIT COURT OF THE UNITED STATES, HOLDEN IN THE CITY OF BALTIMORE, ON MONDAY THE 2d DAY OF MAY, 1803, in REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE, Appendix, No. VIII, 60 (Samuel Butler and George Keatinge, 1805).

²⁸ *Id.* at 61.

least 1803, translates according to him in securing public safety, happiness and prosperity through the establishment of government.²⁹

35. An interesting remark on the portion cited of his statement is precisely the fact that not only this is completely compatible with the language of the Declaration of Independence, but also meets most of the requirements set by Burlamaqui with respect to the “first social compact.”³⁰

36. Another example of his adherence to the theories surrounding happiness as an end of government, is the fact that he is accounted for having drafted the Constitution of Maryland in 1776,³¹ where the Declaration of Rights, in its sections I and IV, make a clear reference to social compact theory and happiness as an end of government just like the Declaration suggests: “That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.” and that “The doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.”³²

37. An additional source of compatibility from Chase to the Declaration and the theory of Burlamaqui exposed by Jefferson in said document, is the fact that it is accounted that the principles of the *Federalist Papers* (James Madison) related to social compact theory are drawn from or at least compatible with Burlamaqui’s.³³ The relevance of this, to determine at least certain signs of

²⁹ “The purposes of civil society are best answered by those governments, where the public safety, happiness, and prosperity are best secured; whatever may be the constitution or form of government (...).” *Id.* at 60.

³⁰ See *infra* n. 70.

³¹ “Chase was elected a delegate to the constitutional convention (of Maryland), and he was appointed to the important committees charged with drafting a declaration of rights and a state constitution. Although committee meetings were closed, contemporaries believed that Chase was largely responsible for the conservative features of the documents presented for the convention’s approval.

The declaration of rights recognized the social contract theory, the right of revolution (...).” JANE SHAFFER ELSMERE, JUSTICE SAMUEL CHASE, 17 (Janevar Publishing Co., 1980).

³² Constitution of Maryland, 1776, Sections I and IV of the Declaration of Rights.

³³ Numerous references can be found to the concepts of happiness and social compact in the terms defined in this paper in *The Federalist Papers*, with most mentions by Madison and Hamilton. On this regard, Hamilton stated: “Thus far the ends of public happiness will be promoted by supplying the wants of government, and all beyond this is unworthy of our care or anxiety.” ALEXANDER HAMILTON, THE FEDERALIST PAPERS, No. 30. See also Nos. 1, 9, 31, and 36. On his part, Madison wrote: “A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; (...).” JAMES MADISON, THE FEDERALIST PAPERS, No. 62. See also Nos. 14, 40 and 43.

An interesting comment, though, with regard to THE FEDERALIST, No. 43, is that from its content the idea permeates that in abolishing the Articles of Confederation the parameter to reshape (alter or abolish) the government is the concept of happiness, which will be traced to the Declaration of Independence, and may therefore be compatible with the principle of the existence of several compacts. On this, Madison’s words are clear:

“(...)1. On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it?

what could have been Chase's thought on the matter, to approach him to the pursuit of happiness as one of the ends of government, is the reference he makes in *Calder*³⁴ with regard to the fact that he highly considers the opinion of "the author of *the Federalist*, who I esteem superior to *both* (Wooddeson and Blackstone), for his extensive and accurate knowledge of the *true principles of Government*." So, it is possible to think that if the "author of *the Federalist*" refers to the pursuit of happiness and the principles of the declaration of independence to determine the ends of government, then, Chase might embrace similar principles too, since he considers this source as authoritative in matters concerning the principles of government.³⁵

38. Another factor to throw into the mix is that most surely, had Chase been opposed to the frame of nation proposed by the Declaration of Independence, setting the pursuit of happiness as the ultimate goal of human association, congruent with his impulsive character,³⁶ he would have let any sign of open opposition, like when the Constitution was to be ratified. It would seem that although he opposed the proposed frame or form of government, he did not oppose however, therefore tacitly embraced, the frame of nation.³⁷ Also, the fact that when Jefferson became President both he and Chase became political enemies, because the first was not willing to

(...) by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed."

This language, even with the reference to the law of nature and nature's God, are identical to the ones of the first and second paragraph of the Declaration, being thus clear that the interpretation given by Madison can be read as that the Constitution is to be interpreted through the Declaration with regard to giving legitimation to the process of amending the Articles of Confederation and creating a new constitution. If this is so, the second compact would have then been superseded by a new one that rests upon the great principles of the first compact. (See *infra* 3.4 and 3.5)

³⁴ 3 U.S. (3 Dall.) 391 (1798).

³⁵ On this, see also, JANE SHAFFER ELSMERE, JUSTICE SAMUEL CHASE, 71 (Janevar Publishing Co., 1980).

³⁶ On Chase's character, see 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 1789-1835, 281, 465 (Little, Brown and Company, 1926).

³⁷ On Chase's opposition towards the Constitution, see SAMUEL CHASE, CAUTION, THE MARYLAND JOURNAL, No. 976, October 12, 1787, in PAUL LEICESTER FORD, ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788, 327-328 (Historical Printing Club, 1892). Also, let us say that from an extensive search realized in different sources, like EVANS, EARLY AMERICAN IMPRINTS, 1st series (1639-1800), we were not able to find any publication or reference stating any disagreement by Chase on the principles of the declaration throughout his life. On the contrary, the social contract principle of popular sovereignty of the Declaration seems to be adopted by Chase when he published: "All *lawful* authority originates from the people, and their power is like the light of the sun, native, original, inherent and unlimited by human authority. Power in the rulers and governors of the people is like the reflected light of the moon, and is only borrowed, delegated and limited by the grant of the people." SAMUEL CHASE, TO THE VOTERS OF ANNE-ARUNDEL COUNTY, February 9, 1787, in MELVIN YAZAWA (editor), REPRESENTATIVE GOVERNMENT AND THE REVOLUTION, THE MARYLAND CONSTITUTIONAL CRISIS OF 1787, 56 (The John Hopkins University Press, 1975).

accept any kind of criticism by a Judge in the bench³⁸ which led to the attempt to impeach the latter, does not mean that in the past, or even then, they may not have agreed on the basic foundational principles of the nation and government.

39. Also, one question to take into consideration is that Chase does not refer to any principles of the social compact, but to the “first great” ones. By this, when he defines them to be the purposes for which men enter into society, it cannot mean anything else than a reference to principles like the ones contained in the first social compact (Declaration), which are absent in the second (Constitution), related to the great and most important purposes of the association, i.e. the preservation of equality, life, liberty and the pursuit of happiness.

40. Notwithstanding the above, we also have to consider one factor that could throw to the ground our claim of pretending the Declaration to be the framework of the Constitution in terms of the interpretation by Chase; this factor consists in the fact that some consider him a natural law thinker without control.

41. On this matter, we discard, against a generalized belief, that Chase is a natural law thinker (see also *infra* 4.2) and we do not consider that Chase’s opinion in *Calder* is a call for extra constitutional provisions. Contrary to the claims of prof. Raoul Berger in trying to establish the intent and commitment of the framers towards a narrow concept of positive law,³⁹ we consider that *Calder* is still compatible with such kind of commitment since it would seem that this requirement is met as soon as these “extra constitutional” principles apparently called in *Calder*, are found in what is to be considered as part of the written constitution, this is, in the Declaration of Independence.⁴⁰

42. In this same line of argument, even if we took for good the opinion of prof. Ely with regard to the fact that the point in Chase’s opinion in *Calder* “seems to have been that in the American context, there is no judicially enforceable notion of natural law other than what the terms of the Constitution provide”,⁴¹ if the principles of the social compact are to be drawn from a written document that cannot be dissociated from the Constitution because they

³⁸ See 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 1789-1835, 277 (Little, Brown and Company, 1926).

³⁹ “The Founders were deeply committed to positivism, as is attested by their resort to written constitutions – positive law. Adams, Jefferson, Wilson, Madison and Hamilton, states Robert Cover, ‘were seldom, if ever, guilty of confusing law with natural right.’ For them a constitution represented the will of the people ‘that would determine explicit ... allocations of power and its corresponding limits.’” RAOUL BERGER, GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT, 252 (Harvard University Press, 1977).

⁴⁰ See *infra* 3.6.

⁴¹ See JOHN HART ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW, 210 n. (Harvard University Press, 1980).

form part of the same compact, then, the logical result of the opinion would have had to be different: In what we consider a great inconsistency in Chase's opinion (see *supra* II), had Chase followed the consequences of his own reasoning, by adhering to his definition of *ex post facto* laws to uphold the constitutionality of the statute, the only explainable and coherent outcome we can deduct is that his dictum on the great principles of the social compact, although not endorsing the enforceability of natural law in its abstract sense, would have to be understood as not restricted solely to the text of the constitution, but to the Constitution interpreted through the great principles and ends of government established in the Declaration as part of a bloc of constitutionality.⁴² With regard to this point, and consistently with what prof. Ely suggests,⁴³ we do not hold that the Declaration creates substantive rights, but that the clauses of the constitution have to be interpreted and its extents and limits determined according to the principles set forward in the Declaration.

43. On this aspect, although Justice Chase has been traditionally thought of as a natural-law thinker, we agree that his statement regarding the origin of the right to property in *Calder*,⁴⁴ as well as his allegations before the Baltimore Grand Jury,⁴⁵ would seem to approach him more to a positive law concept

⁴² See *infra* 3.6.

⁴³ *Id.* at 211.

⁴⁴ "It seems to me, that the *right of property*, in its origin, could only arise from *compact express*, or *implied*, and I think it the better opinion, that the *right*, as well as the *mode*, or *manner*, of acquiring property, and of alienating or transferring, inheriting, or transmitting it, is conferred by society; is regulated by *civil* institution, and is always subject to the rules prescribed by *positive law*. When I say that a *right* is vested in a citizen, I mean, that he has the *power* to do *certain actions*; or to possess *certain things*, according to the law of the land." *Calder v. Bull*, 3 U.S. (3 Dall.), 394 (Chase, S., seriatim opinion).

⁴⁵ "It seems to me that personal *liberty* and *rights*, can only be acquired by becoming a member of a community, which gives the protection of the whole to every individual. Without this protection it would, in my opinion, be impracticable to enjoy personal liberty or rights. From hence I conclude that liberty, and rights, (and also property) must spring out of civil society, and must be forever subject to the modification of particular governments. I hold the position clear and safe, that all the rights of man can be derived only from the *conventions* of society, and may with property be called social rights. (...) Any other interpretation of these terms is in my judgment, destructive of all government and all laws." SAMUEL CHASE, CONCLUSION OF A CHARGE DELIVERED AND READ FROM THE ORIGINAL MANUSCRIPT AT A CIRCUIT COURT OF THE UNITED STATES, HOLDEN IN THE CITY OF BALTIMORE, ON MONDAY THE 2d DAY OF MAY, 1803, in REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE, Appendix, No. VIII, 61-62 (Samuel Butler and George Keatinge, 1805). This view is not incompatible with the assertion that Chase may not have believed in natural rights previous to the creation of government, since even in that case, if the principles are provided by human government through the social compact, then they are valid and enforceable. See WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEFJUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH, 145 (University of South Carolina Press, 1995). But even though Chase may not have been prepared to declare the unconstitutionality of a statute on the grounds it violates the natural law, this does not deprive of meaning the concept of declaring void legislation contrary to the first principles of the social compact if these can be traced to the will of the people in the founding document of the nation, i.e. the Declaration of Independence. With regard to this, see also *idem.* at 239.

than a mere apology of natural law in its abstract sense;⁴⁶ but despite that, we believe that one part of the opinion does not have to be irreconcilable with the rest or even with his statement before the Baltimore Grand Jury, but on the contrary, it reinforces our idea that these first principles of the social compact that rule the Constitution are to be found in written form within another source of positive law: the Declaration of Independence.

3.3.- The Declaration of Independence, Thomas Jefferson, the pursuit of happiness and Jean Jacques Burlamaqui.

44. As it is a well known fact, Thomas Jefferson is the person accountable for drafting the Declaration of Independence. This document, composed in great and fervent literary style, is much more than a mere page of rhetoric, much more than a cry for liberty, full equality⁴⁷ or against the oppression of a foreign monarch.

45. In this regard, much thought has been given to where the ideas it contains come from. In order to establish that, we will look a little bit into the possible influences Thomas Jefferson might have had from other authors in drafting the Declaration, to conclude that the major scheme, without ruling out any possible influence of other authors, was drawn mainly from the teachings of the Swiss philosopher Jean Jacques Burlamaqui.

46. The first and typical approach towards the Declaration of Independence is to say that it is entirely drawn out of Locke's *Second Treatise of Government*. This is a thought shared, for example, by Andrew C. McClaughlin who believes the Declaration of Independence is a document produced under the exclusive influence of John Locke.

47. But even a fervent defender of "Locke's cause" as the former history professor of the University of Chicago, recognizes that under the principles of Locke there is no way of knowing what the development of the institutions would turn out to be if they were to be applied in a constitutional setting; on this regard, he establishes that: "Locke did not foresee the development of popular government and its mechanism; nor did he see the full implication of

⁴⁶ On this matter, see CHRISTOPHER L. EISBURGER, JOHN MARSHALL'S JUDICIAL RETHORIC, 1996 Sup. Ct. Rev. 455-456 (1996).

⁴⁷ On a curious note, let us just say that according to John Adams, the draft prepared by Jefferson would have contained a mention against slavery which was suppressed so that it could be adopted by the representatives of the southern states. On this regard, John Adams established: "I was delighted with its high tone and the flights of oratory with which it sounded, especially that concerning Negro slavery, which, though I knew his Southern brethren would never suffer to pass in Congress, I certainly never would oppose. (...) Congress cut off about a quarter of it (...) (obliterating) some of the best of it (...) I have long wondered that the original draught has not been published. I suppose the reason is the vehement philippic against Negro slavery." JOHN ADAMS, Letter to Timothy Pickering, August 6, 1822, cited in HENRY STEELE COMMAGER and RICHARD B. MORRIS Eds., THE SPIRIT OF SEVENTY-SIX, THE STORY OF THE AMERICAN REVOLUTION AS TOLD BY ITS PARTICIPANTS, 314 (Castle Books, 2002).

his assertions; but implications there were; and in the later developments of American Institutions we discover a partial solution of this pressing and imperative question in the full recognition of judicial authority as well as in the right by institutional processes to reorganize government."⁴⁸

48. On this subject, if Locke did not foresee the consequences of its principles, and some of them start to be seen from the frame of social organization and the ends of government established already in the Declaration of Independence, therefore, it is very likely that it was not the sole source of inspiration of the document, and that the answers not provided by Locke were drawn from other authors, like for instance, Burlamaqui, who does provide, under his scheme of a social contract for a possibility of constitutional change as well as for an institutional guardian of the constitution; institutions which are not foreseen by Locke as a practical application of his doctrines.⁴⁹

49. Another aspect we have to take into consideration is that the finality of Locke's treatises were to answer upon the claims made by Robert Filmer in his book titled *Patriarcha*. Therefore, the *Treatises* have to be seen like a liberal republican brief trying to argue against the principles of an absolutist view of monarchy more than a work trying to set a precise and applicable form of government. On the other hand, an author like Burlamaqui, who wrote his works out of the lectures he gave at the University of Geneva, would evidently have had a greater concern for how his theories would apply in a given institutional setting, being his work in consequence much more systematic and easy to read.⁵⁰

50. An additional aspect that makes Locke's influence on the text of the Declaration suspicious is the fact that Jefferson did not include property as an inalienable right of man, like Locke would seem to. The reason for this is that for Jefferson, property would seem as a means to happiness not an end in itself, so, as long as property is subjected to the pursuit of happiness, it will be granted the protection as an inalienable right. This is clearly more in

⁴⁸ ANDREW C. McCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES, 97 (D. Appleton-Century Company, 1936) on similar grounds, see CARL BECKER, THE DECLARATION OF INDEPENDENCE, 72-73 (Alfred A. Knopf, 1966).

⁴⁹ On these last aspects, see generally, BERNARD GAGNEBIN, BURLAMAQUI ET LE DROIT NATUREL (La Frégate, 1944), RAY FORREST HARVEY, JEAN JACQUES BURLAMAQUI A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM, (The University of North Carolina Press, 1937) and RAY FORREST HARVEY, THE POLITICAL PHILOSOPHY OF JEAN JACQUES BURLAMAQUI AND HIS RELATION TO AMERICAN CONSTITUTIONAL THEORY 87-97 (1934) (unpublished Ph.D. thesis, New York University).

⁵⁰ See RAUL PEREZ JOHNSTON, JEAN JACQUES BURLAMAQUI AND THE THEORY OF SOCIAL CONTRACT, in 6 HISTORIA CONSTITUCIONAL. REVISTA ELECTRÓNICA, CENTRO DE ESTUDIOS POLÍTICOS Y CONSTITUCIONALES Y UNIVERSIDAD DE OVIEDO, SPAIN (2005).

the lines of what Burlamaqui would seem to argue than those of Locke in both his treatises on government.⁵¹

51. A different possibility that has been mentioned as a possible ideological source for the Declaration is that of Algernon Sidney. But despite the fact Donald Lutz refers that the author to track for Jefferson's model for drafting the Declaration is Sydney,⁵² we still think that it is Burlamaqui who exerted a bigger influence on Jefferson's second paragraph of the document. Although he might have used Sydney's discourses, whom Jefferson regarded highly, for the "list of grievances", from the reading one can make of his *Discourses*⁵³ it is very unlikely that Sydney was the inspiration behind such concepts so little developed in his work as the pursuit of happiness or his theory of social compact.

52. Unlike Burlamaqui, Sydney does not establish a systematic scheme of several compacts, which the first took from Pufendorf and perfected it, and although Sydney argues in favor of governments being bound and limited in their powers towards the common good of their citizens, which is a common heritage in British republican political philosophy coming from the French Huguenots of the late sixteenth century,⁵⁴ he does not contain a full development of the pursuit of happiness as an end of government. Also, alike John Locke, Sydney's *Discourses* are a response to Filmer's *Patriarcha*, to the point that he follows the same structure of the latter work by answering systematically point by point; therefore, no practical application of his principles can be drawn, but a structured and argumentative stand to an ideological position contrary to that of the author. Moreover, let us remember that Sydney was arrested to be tried and beheaded for the charge of conspiracy before he could finish his work, making it hard for an unfinished work to be the sole source of Jefferson's ideas put in paper through the Declaration.

53. Continuing with the speculation on the sources for Jefferson's Declaration, it has also been suggested that the scheme of it was drawn from the concepts

⁵¹ On the fact that Thomas Jefferson disregarded Locke's emphasis upon property to substitute it in the Declaration of Independence for Burlamaqui's concept of pursuing happiness, see CHESTER JAMES ANTIEAU, *NATURAL RIGHTS AND THE FOUNDING FATHERS--THE VIRGINIANS*, 17 Wash. & Lee L. Rev. 63 (1960).

⁵² See DONALD S. LUTZ, *THE DECLARATION OF INDEPENDENCE AS PART OF AN AMERICAN NATIONAL COMPACT*, 19, No. 1, *PUBLIUS: THE JOURNAL OF FEDERALISM*, 51 and ff. (1989).

⁵³ For this, we have consulted the second edition of the *Discourses Concerning Government*, printed in London in 1704 by F. Darby.

⁵⁴ On this topic, refer to JOHN CHRISTIAN LAURSEN Ed., *NEW ESSAYS ON THE POLITICAL THOUGHT OF THE HUGUENOTS OF THE REFUGE*, (E.J. Brill, 1995) as well as JULIAN H. FRANKLIN, Ed. *CONSTITUTIONALISM AND RESISTANCE IN THE SIXTEENTH CENTURY, THREE TREATISES BY HOTMAN, BEZA, & MORNAY*, (West Publishing Company, 1969).

of Aristotle,⁵⁵ but even if he identifies the search for happiness as the ultimate end of men,⁵⁶ Aristotle's notion of happiness remains still vague and undefined, and is therefore unlikely to have suggested a more complicated scheme of law and social contract theory like the Declaration seems to suggest. Also, if we consider the statement made by some European philosopher, in the sense that after Plato and Aristotle everything

⁵⁵ "(The) natural rights view of the origins of government is reflected in the Declaration of Independence (...). Jefferson's substitution of 'pursuit of happiness' for Locke's 'property' or 'Estate' may reflect his Classical Republicanism as Aristotle (...) identifies happiness as the ultimate end of human life." GARRET WARD SHELDON, *THE POLITICAL THEORY OF THE DECLARATION OF INDEPENDENCE*, in *THE DECLARATION OF INDEPENDENCE, ORIGINS AND IMPACT*, 18 (CQ Press, 2002).

⁵⁶ Aristotle considers that: "As we see that every city is a society, and every society is established for some good purpose; for an apparent (...) good is the spring of all human actions; it is evident that this is the principle upon which they are every one founded, and this is more especially true of that which has for its object the best possible, and is itself the most excellent, and comprehends all the rest. Now this is called a city, and the society thereof a political society (...)." See ARISTOTLE, *POLITICS*, book I, ch. I. This is so, since in accordance to him, the end and perfection of government resides in assuring first, that we may live, but most important, that we may live happily; since this is the nature of man, and government, as a natural product of man, seen as a social animal, has to be in accordance to the nature of its essence; *id est* it has to assure through the association of men the happiness every one deserves. Aristotle says to this respect:

"And when many villages so entirely join themselves together as in every respect to form but one society, that society is a city, and contains in itself, if I may so speak, the end and perfection of government: first founded that we might live, but continued that we may live happily. For which reason every city must be allowed to be the work of nature, if we admit that the original society between male and female is; for to this as their end of everything is the nature of it. For what every being is in its most perfect state, that certainly is the nature of that being, whether it be a man, a horse, or a house: besides, whatsoever produces the final cause and the end which we desire, must be best; but a government complete in itself is that final cause and what is best.

Hence it is evident that a city is a natural production, and that man is naturally a political animal (...)." ARISTOTLE, *POLITICS*, book I, ch. II

Consequently, government has to assure happiness, or at least create an environment where people might be able to pursue it; this seems to be the lesson to draw from Aristotle's *Politics*, as we have just cited. This concept has been picked up by numerous authors, creating hence a whole way of justifying the means and ends of the state in accordance to its greater goal: to allow people to look for its own wellbeing. Therefore, a government can only act if it is for the good of the commonwealth, and its actions should be void if it were to exercise power contrary to what the general welfare requires. With respect to this, it is interesting to see the critic made by Sir Robert Filmer to the title of one of Hobbes' works: "I wish the Title of the Book (speaking of Hobbes' *De Cive*) had not been a Common-Wealth, but of a Weal Publique, or Common-Weal, which is the true word, carefully observed by our Translator of Bodin de Republica into English." ROBERT FILMER, *OBSERVATIONS CONCERNING THE ORIGINALL OF GOVERNMENT*, Preface, IV (R. Royston Ed., 1652). This observation would imply then that the original goal of government would be not to create a common wealth, but that government through its action is meant to assure to its subjects the public or common well.

Also, it is noteworthy to point out the idea that the people would raise kings to power and lend them their ears, hands and eyes with the sole purpose of governing for the good of the commonwealth, and on the contrary, that when kings are acting for evil purposes they lack them and therefore lack legitimation too. On this regard, see JUNIUS BRUTUS (PHILLIPE DU PLESSIS-MORNAY), *VINDICIAE CONTRA TYRANNOS: A DEFENCE OF LIBERTY AGAINST TYRANTS. OF THE LAWFUL POWER OF THE PRINCE OVER THE PEOPLE, AND OF THE PEOPLE OVER THE PRINCE*, quest. III, 66 (Richard Baldwin Ed., 1689) (1579).

has been said, we would fall into the conclusion that the two Greek philosophers should be credited for the whole evolution of mankind, which is a little bit farfetched. Finally, if we consider Jefferson's opposition to slavery,⁵⁷ Aristotle justification of the matter would rule him out of being the sole ideological source of Jefferson's draft. Therefore, we also see as unlikely to have Aristotle as a direct source of the Declaration; despite that, like with Sydney and Locke, this doesn't mean that Jefferson may not have had them in his mind as a complementary source for his draft.

54. Another probability, suggested by Edward Corwin, is that the influence, notably in installing the pursuit of happiness as an unalienable right in the Declaration comes from Sir William Blackstone. But this is not a very likely scenario either, since he is recognizing also that Burlamaqui may be credited for the concept.⁵⁸

55. Professor Morton White, on the other hand, emphatically believes that the true ideological influence behind Jefferson's draft has to be attributed to Jean Jacques Burlamaqui.⁵⁹

⁵⁷ See *supra* n. 47.

⁵⁸ Corwin suggests: "The phrase 'pursuit of happiness' was probably suggested by Blackstone's statement that the law of nature boils down to 'one paternal precept, that man should pursue his own true and substantial happiness' I Bl. Comm. 41. BURLAMAQUI, PRINCIPLES OF NATURAL AND POLITICAL LAW (...), teaches the same doctrine at length." EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW, 42 Harv. L. Rev. 403 n. (1928-1929). Despite Corwin's assertion, one could remind at this point that there have been serious accusations that Sir William Blackstone plagiarized the political doctrines of Jean Jacques Burlamaqui and inserted almost textually his principles into his Commentaries. On this regard, see *infra* n. 62 as well as RAUL PEREZ JOHNSTON, JEAN JACQUES BURLAMAQUI AND THE THEORY OF SOCIAL CONTRACT, in 6 HISTORIA CONSTITUCIONAL. REVISTA ELECTRÓNICA, CENTRO DE ESTUDIOS POLÍTICOS Y CONSTITUCIONALES Y UNIVERSIDAD DE OVIEDO, SPAIN (2005).

⁵⁹ "In my opinion, Burlamaqui reveals more explicitly than any other writer read by Jefferson the logical substructure upon which Jefferson built when he wrote in the Rough Draft (of the Declaration of Independence) (...)." MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION, 163 (Oxford University Press, 1978). Other references by the same author on the fact that Jefferson might have used Burlamaqui as a frame to draft the Declaration of Independence can be found in *Id.*, at 164, 236 and 269. In the same line of argument:

"As for the right to pursue happiness, which Jefferson drew from Burlamaqui's incorporation into natural law, it had nothing whatever to do with today's contemporary celebrations of materialism. Rather, happiness was viewed by Jefferson (in deference to Pufendorf and Locke) as a condition to be achieved as a result of humankind's commitment to reason. Above all else, perhaps, the Declaration of Independence codified a social contract that sets limits on the power of any government. Its purpose was to articulate a set of universally valid constraints upon all secular political authority."

LOUIS RENE BERES, OPPOSING THE PEACE PROCESS: ISRAEL, CIVIL DISOBEDIENCE AND THE PRINCIPLE OF A HIGHER LAW, 13 Ariz. J. Int'l & Comp. L. 126 (1996).

Also, it is interesting to see on this subject the opinion of Judge Napton of the Supreme Court of Missouri in *Snyder v. Warford*:

"Sir W. Blackstone says, that every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase as the acquisition of social and municipal relations. Mr. Jefferson denied this doctrine, because he was of opinion that no

56. But even if White's approach to the matter was questionable, and if Jefferson's sources cannot be traced directly to Burlamaqui, they would still seem so indirectly, since it has been also suggested that the Declaration of Independence was also drawn in part from a pamphlet previously published by James Wilson, in which Burlamaqui is expressly quoted in the exact paragraph that resembles the one of the Declaration that talks about natural rights.⁶⁰ Another indirect source for Burlamaquian influence on the Declaration, might have been the influence of John Adams in the "Committee of Five", to the point that he was handed the draft for revision before passing it to for discussion by the Continental Congress.⁶¹

man had a natural right to commit aggression on the equal rights of another, and that every man was under the natural duty of contributing to the necessities of society, and that no man had the natural right to be the judge between himself and another, but was bound to submit to the umpirage of an impartial third. This contrariety of opinion between Judge Blackstone and the American statesman is rather apparent than real, for Blackstone's definition of natural rights is far more comprehensive than Mr. Jefferson's. The former supposes 'natural liberty to consist properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature.' If this law of nature, as Mr. Jefferson thinks, comprehends those restrictions which 'the equal rights of others'--the duty of contributing to the necessities of society--and submitting to the decision of impartial judges, in disputes between individuals--would imply, there is no essential difference between the opinions alluded to; and this definition of Mr. Jefferson seems to be confirmed by Burlamaqui. 'Moral or natural liberty,' says the writer, 'is the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and that they do not in any way abuse it to the prejudice of any other man.'"

Snyder v. Warford, 11 Mo. 513 (1848).

Moreover, on Burlamaqui's influence on Jefferson see: RAY FORREST HARVEY, *JEAN JACQUES BURLAMAQUI A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM*, at 120 and ff. and BERNARD GAGNEBIN, *Ibid.* at 279. A contrary view to the one expressed by Morton White, in the sense that Burlamaqui's argument is not behind the Declaration of Independence can be found in RICK FAIRBANKS, *THE LAWS OF NATURE AND OF NATURE'S GOD: THE ROLE OF THEOLOGICAL CLAIMS IN THE ARGUMENT OF THE DECLARATION OF INDEPENDENCE*, 11 *J. L. & Religion* 569 and ff. (1994-1995).

⁶⁰ See GILBERT CHINARD, *THOMAS JEFFERSON, THE APOSTLE OF THE AMERICANISM*, 73 (Little, Brown and Company, 1944).

⁶¹ On this regard, John Adams who is also believed to have followed Burlamaqui's teachings (see RAY FORREST HARVEY, *BURLAMAQUI A LIBERAL TRADITION...*, 75, 90 and 117-119), would write: "government has a duty to promote social happiness, and the more social happiness it promotes, the better it does its duty." Cited in MORTON WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION*, 236 (Oxford University Press, 1978). On this aspect, see also 3 JOHN ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, AGAINST THE ATTACK OF M. TURGOT IN HIS LETTER TO DR. PRICE*, 216 (William Young, 1797), as well as the Letter VII in *Id.* at 503.

Moreover, happiness would seem to be a great part of Adams' conception of government, to the point he would make express reference to it when drafting the preamble of the Constitution of Massachusetts of 1780:

"The end of the institution, maintenance, and administration of government is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights and the blessings of life; and whenever these great objects are not obtained the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.

57. Otherwise, we can also say that being Burlamaqui an influential writer of the founding era,⁶² it isn't farfetched to use him as an authority to interpret the principles behind the Declaration, since crediting exclusively Jefferson for "inventing"⁶³ the whole frame of government would be quite naïf.

The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them.

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other, and of forming a new constitution of civil government for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain, and establish the following declaration of rights and frame of government as the constitution of the commonwealth of Massachusetts."

Another interesting aspect that draws Adams closer to Burlamaqui in this preamble, is his definition of a social contract, thought by Joseph Story to be the clearest notion of a social compact (*Commentaries*, vol. I, ch. III, parr. 338, page 307 of the 1833 edition) since by the framing of the provision, he would seem to be parting from the idea of several covenants, like Burlamaqui suggests. On this last aspect, see *infra* at 3.4. In addition, and if the views referred above were not sufficient, if it was the case that Adams took as a model for drafting the preamble of the 1780 Massachusetts Constitution, some of the main principles drawn from the *Essex Result* to criticize the 1778 constitution, this document is believed to be the work of Theophilus Parsons, who was himself so acquainted with Burlamaqui, that he would have read the *Principles of Natural and Politic Law* to all his law students; see RAY FORREST HARVEY, *op. cit.* at 152.

⁶² "In pamphlet after pamphlet the American writers cited (...) Burlamaqui (...) on the laws of nature and of nations, and on the principles of civil government." BERNARD BAYLIN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION*, 27 (Harvard University Press, 1992). On this regard, the knowledge of Burlamaqui during the revolution has been thought of as widespread within lawyers and politicians of the time and writers like Alexander Hamilton, James Madison, Thomas Jefferson and James Wilson, just to name a few, who have been thought to have been directly influenced by the political theory of Jean Jacques Burlamaqui. See JOHN C. FORD, *NATURAL LAW AND THE PURSUIT OF HAPPINESS*, 26 *Notre Dame L. Rev.* 442 n. 32 (1950-1951). With regard to Hamilton, see *idem*, at 27, and RAY FORREST HARVEY, *JEAN JACQUES BURLAMAQUI A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM*, 116 (The University of North Carolina Press ed. 1937); on James Madison, see BERNARD GAGNEBIN, *BURLAMAQUI ET LE DROIT NATUREL* 279 (La Frégate, 1944) and JEFF ROSEN, *WAS THE FLAG BURNING AMENDMENT UNCONSTITUTIONAL*, 100 *Yale L.J.* 1076 (1990-1991); and on James Wilson, MORTON WHITE, *op. cit.* at 132 and ff., 227; RAY FORREST HARVEY, *Ibid.* at 114 and ff. and BERNARD GAGNEBIN, *Ibid.* at 279. This would seem to be accentuated if we take into consideration the claims made against Sir William Blackstone, as we have already mentioned, of having committed plagiarism in his *Commentaries* and having copied textually from Burlamaqui his political philosophy, who was unquestionably also a very highly influential figure of the time. On this, see BERNARD GAGNEBIN, *Ibid.* at 273-274 and defending Blackstone, PAUL LUCAS, *EX PARTE SIR WILLIAM BLACKSTONE, "PLAGIARIST": A NOTE ON BLACKSTONE AND THE NATURAL LAW*, 7 *Am. J. Legal Hist.* 142 (1963), and W. S. HOLDSWORTH, *SOME ASPECTS OF BLACKSTONE AND HIS COMMENTARIES*, 4 *Cambridge L.J.* 279 (1930-1932). On Burlamaqui's influence, see also *supra* n. 20.

⁶³ "(...) The 'Rights of Man,' a doctrine widely diffused through the colonies (...) by the teachings (...) of Locke, Burlamaqui and Beccaria, the second named of whom wrote 'Principles of

3.4.- Burlamaqui's theory of several compacts.⁶⁴

58. Before we enter into the discussion of Burlamaqui's social compact scheme, we want to establish briefly why this theory would sound more suited to interpret subsequently the context of the Declaration of Independence by first making a couple of reflections on the classical compact doctrine, as well as on Pufendorf's theory.

59. The basic analogy to the classic social contract theory and limited government is that of a ship at sea. In this regard, authors of this orthodox view, to which Locke is definitely an heir, would say:

“(...) It is a thing most evident, that he which is established by another, is accounted under him that hath established him, and he which receives his Authority from another, is less than he from whom he derives his Power. (...) So it is, that for the Ships Sail, the Owner appoints a Pilot over her, who fits at the Helm, and looks that she keeps her Course, nor run not upon any dangerous Shelf; the Pilot doing his Duty, is obeyed by the Mariners; yea, and of himself that is Owner of the Vessel, notwithstanding the Pilot is a Servant as well as the least in the Ship, from whom he only differs in this, that he serves in a better place than they do. In a Commonwealth, commonly compared to a Ship, the King holds the Place of Pilot, the People in general are Owners of the Vessel, obeying the Pilot, whilst he is careful of the publick Good (...).”⁶⁵

60. And although one may think that this construction is flawless, and describes perfectly the celebration of the social contract theory as it is to be understood in all our modern constitutions, there are a couple of aspects that were left aside: First of all, our author takes for granted that the ship is already at sea and that it already has a destination to which to sail; but before that is possible, first, some people must get together and conceive

Natural Law.’ By equality he meant political equality; desire and pursuit of happiness were with him ‘the key of the human system.’ The Declaration of Independence was the epitome of these ideas which everybody then held, and did not originate with Jefferson.” SIDNEY GEORGE FISHER, TRUE HISTORY OF THE AMERICAN REVOLUTION, a Monthly Review of Current Literature (1870-1904); Feb 1903; 34, 2; APS Online pg. 32.

⁶⁴ Even though this topic has been extensively treated in RAÚL PÉREZ JOHNSTON, JEAN JACQUES BURLAMAQUI AND THE THEORY OF SOCIAL CONTRACT, in 6 HISTORIA CONSTITUCIONAL. REVISTA ELECTRÓNICA, CENTRO DE ESTUDIOS POLÍTICOS Y CONSTITUCIONALES Y UNIVERSIDAD DE OVIEDO, SPAIN (2005), for easier reference and understanding of the topics herein treated, we will make a short recap of Burlamaqui's theory on social contract, but, for more extensive reference, please refer to the cited article.

⁶⁵ JUNIUS BRUTUS (PHILLIPE DU PLESSIS-MORNAY), VINDICIAE CONTRA TYRANNOS, 64-65 (Richard Baldwin, 1689) (1579). Although one of the first to use this metaphor was Aristotle, we consider that Du Plessis-Mornay has developed it with more precision, hence we are quoting the latter.

the voyage, agree on the destination, obtain a ship, hire a crew, name a pilot or captain for the vessel, get provisions for the journey, etc. All of this is done through subsequent agreements that are previous to the ship sailing. Coming back from our metaphor, before the compact celebrated between the owners of the ship and the pilot, it was necessary that a community was formed for the ship, that the end, goals and destinations were set before the voyage; that a medium for such objectives was built and put into place, that a designation of the pilot was made by the ship's community or owners, and finally, that the pilot agreed to take the ship at sea under certain contractual conditions drawn mainly, but not exclusively, from the purpose and destination of the voyage.⁶⁶ Putting it in terms of political theory, to the creation of a nation, the people, before celebrating a compact with the people in charge of government, have to celebrate several previous compacts.

61. The doctrine of several social compacts was not initiated by Burlamaqui, but rather, he took it from Pufendorf who foresees the necessity of three social compacts (or one compact and two decrees): One of foundation of the political community, another in which the constitution is created, and a third one where the constitutional government is entrusted to a person or a group of persons bound by it.⁶⁷ Despite that, there is no way, in our opinion that Pufendorf may be linked to the Declaration of Independence, since his view of man is quite pessimistic (in the lines of Machiavelli and Hobbes) while Burlamaqui, on the contrary, is an optimistic (just like Jefferson) who thinks that men unite to be happy, not for fear of each other.⁶⁸

62. This leads us then to determining Burlamaqui's scheme of social compacts, and for this, it is necessary to refer ourselves to his express words:

“Tracing the principles here established in regard to the formation of states, &c. were we to suppose, that a multitude of people, who had lived hitherto independent of each other, wanted to establish a civil

⁶⁶ As a curious note on the practical application of this metaphor, please refer to the *Mayflower Compact*, composed by William Bradford on board of the Mayflower on November 11, 1620.

⁶⁷ On this regard, see SAMUEL VON PUFENDORF, *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW*, bk. II, ch. 6, 136-137 (Cambridge University Press, 1991) (1673). For a comprehensive explanation of Pufendorf's theory, also, LUIS RECASENS SICHES, *HISTORIA DE LAS DOCTRINAS SOBRE EL CONTRATO SOCIAL [HISTORY OF THE DOCTRINES ON SOCIAL CONTRACT]*, 23-24 (Universidad Nacional Autonoma de Mexico, 2003) (1941).

⁶⁸ On Pufendorf's conception of man, see *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW*, bk. II, ch. 5, at 133-134. On the different approach of the Declaration towards man, see GILBERT CHINARD, *THOMAS JEFFERSON, THE APOSTLE OF THE AMERICANISM*, 75-76 (Little, Brown and Company, 1944). Also, take into account prof. Morton White's words in the sense that: “Burlamaqui's incorporation of the duty to pursue happiness into the body of natural law represented a significant change in the doctrine.” MORTON WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION*, 231 (Oxford University Press, 1978).

society, we shall find a necessity for different covenants, and for a general decree.⁶⁹

The first covenant is that, by which each individual engages with all the rest to join forever in one body, and to regulate, with one common consent, whatever regards their preservation and their common security. These, who do not enter into this first engagement, remain excluded from the new society.

There must afterwards be a decree made for settling the form of government; otherwise they could never take any fixt measures for prompting effectually, and in concert, the public security and welfare.

In fine, when once the form of government is settled, there must be another covenant, whereby, after having pitched upon one or more persons to be invested with the power of governing, those, on whom this supreme authority is conferred, engage to consult most carefully the common security and advantage, and the others promise fidelity and allegiance to the sovereign. This last covenant includes a submission of the strength and will of each individual to the will of the head of the society, as far as the public good requires; and thus it is, that a regular state and perfect government are formed.

(...) And though we are strangers to the original of most states, yet we must not imagine, that what has been here said concerning the manner, in which civil societies are formed, is a mere fiction. For, since it is certain, that all civil societies had a beginning, it is impossible to conceive how the members, of which they are composed, could agree to live together, dependant on a supreme authority, without supposing the covenants abovementioned.”⁷⁰

⁶⁹ By “general decree” we understand that Burlamaqui refers most probable to a written constitution in the modern sense of the term, disagreeing on this account with prof. Thomas C. Grey, who sustained: “But what is important (and difficult) for us to remember is that this idea of an enacted constitution was relatively novel in 1760, while the idea of an ancient and unwritten constitution compounded of custom and reason was comfortable and traditional in the English-speaking world. It was still this traditional idea that sprang to the minds of Americans when they read in Burlamaqui (...) of ‘constitutions’ and ‘fundamental laws’ (...)” THOMAS C. GREY, ORIGINS OF THE UNWRITTEN CONSTITUTION: FUNDAMENTAL LAW IN AMERICAN REVOLUTIONARY THOUGHT, 30 Stan. L. Rev., 864 (1977-1978).

⁷⁰ 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 26-27 (Harvard University Press, 1807) (1751). For a major comprehension of Burlamaqui’s social compact scheme, it is worthy mentioning that the author avoids some of the classical objections made to contractualist theories by saying that the covenant is express between the founding generation, and then becomes tacit with those belonging to future generations, who, when acquiring majority of age, will decide whether they will live under the established rules, or leave to another country, or through the mechanisms established in the constitution, change the rules of government if they so decide. This tacit covenant is being renewed with the course of time, generation after generation, since the founding generation has no right *a priori* to bind the will of their children. See *Id.* at 30-31.

63. As we can see, Burlamaqui sees the necessity of compacts upon the agreement and will of a certain number of people deciding to leave the state of nature, but furthermore, as a historical explanation as to why societies have developed and become what they are today, or at least, in his day. This gradual and evolutionary process is then met by a series of agreements: two covenants and one decree.

64. The first one of the covenants dealing with the creation of the political community or civil society and the ends of the association; the second, creating a constitution and the form of government to meet the ends for the established constitution; and finally, a third compact or “decree” in which those who are to be entrusted with the exercise of the sovereign power are to be elected and pledged to fulfill the mission that is being put in their hands: to guide the ship to safe port in order to procure for the happiness of all the passengers.

65. On this aspect, man, by submitting to the will of the social body, would be entrusting his own happiness to the fulfillment of a general standard of happiness by this “whole body”.⁷¹ In such a case, man sacrifices its individuality or independence of the state of nature to become part of a whole community that will look after what is best, not for each and everyone of its components individually, but for the whole of them.⁷²

66. But to achieve this, the first step that has to be taken is the formation of the civil society, or political community: the first social compact. It is very easy to determine that Burlamaqui is foreseeing two things that have to be performed in this first step: the creation of the national community through consent of every member,⁷³ and on the other hand, the setting of the main objectives of the association, by regulating whatever regards the preservation and common security of the community, in other words, the main guidelines for the pursuit of happiness.

67. This is achieved by a transformation of the whole body of the nation into one unit. Man ceases to be an independent unit and by associating himself with others, by creating a political community that becomes a collegiate body from which sovereignty is born.⁷⁴ The whole, acting as a sovereign body, can now proceed to design and create a government and to choose those who are to be entrusted with its exercise in order to better achieve the ends

⁷¹ 1 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 39 (Harvard University Press, 1807) (1747).

⁷² JEAN JACQUES BURLAMAQUI, ÉLÉMENTS DU DROIT NATUREL, 11 (Librairie Philosophique J. Vrin, 1981) (facsimile edition of the Lausanne 1783 edition).

⁷³ Those who do not want to be part of the community can opt out at the moment of celebrating it, not afterwards, since the association is thought to be perpetual. See *supra* n. 70.

⁷⁴ 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 24.

for which the body of the nation was created: the collective pursuit of happiness.

68. This concept of happiness is consequential and central to the creation of the covenants as considered by Jean Jacques Burlamaqui. According to him, the end of law and the State in general, is to pursue true and solid happiness,⁷⁵ by establishing that happiness is the possession of good leading to the preservation, perfection, conveniency or pleasure of men;⁷⁶ but this concept is not to be understood lightly, since it has to be compatible with reason and the natural state of man, otherwise it would lead to evil and prevent man from being happy.⁷⁷

69. This takes us to the fact that if reason is the measure of happiness, man, in a society, has to live under rules that obey reason in order to achieve its goal of assuring the happiness and wellbeing of its members; therefore, the need for laws that assure men to act in accordance to these principles; rules that, being compatible with the nature of man, are to be drawn from natural law to be put into a frame of society as long as it purports to the satisfaction of the general good. For Burlamaqui, the end of natural law is then to take man into a state of individual happiness,⁷⁸ while the end of the State would be to take the whole community to a state of collective happiness. Therefore, a State is going to assure the happiness of its members, as long as it acts in respect of natural law and the interests of the whole community. This equilibrium can only be set by the framing of a constitution, which leads us to the necessity of celebrating a second compact.

70. Anarchy is not a solution provided in the scheme of Jean Jacques Burlamaqui, and therefore, a set of rules are needed to establish a government and the form and shape it ought to have in order to maintain the public security and promote the general welfare. On this regard, the second compact is defined by Burlamaqui as a written document where the form of government is set. This document, according to our author, should rest on the following principles of government: it is going to be considered the

⁷⁵ 1 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 1.

⁷⁶ "By *Happiness* we are to understand the internal satisfaction of the mind, arising from the possession of good; and by good, whatever is suitable or agreeable to man for his preservation, perfection, conveniency or pleasure." *Id.* at 10.

⁷⁷ "True happiness cannot consist in things that are inconsistent with the nature and state of man. This is another principle which naturally flows, from the notion of good and evil. For whatsoever is inconsistent with the nature of a being tends for this very reason to degrade or destroy it, to corrupt or alter its constitution; which, being directly opposite to the preservation, perfection, and good of this being, subverts the foundation of its felicity. Wherefore, reason being the noblest part of man, and constituting its principal essence, whatever is inconsistent with reason cannot form his happiness. To which I add, that whatever is incompatible with the state of man cannot contribute to his felicity (...)" *Ibid.* at 39.

⁷⁸ For a comment on this, see BERNARD GAGNEBIN, BURLAMAQUI ET LE DROIT NATUREL, 274 (La Frégate, 1944).

fundamental law, superior to the acts of government,⁷⁹ the form of government will be of limited powers, restricted in their actions to the promotion of security and general welfare to allow everyone the opportunity of pursuing happiness,⁸⁰ with a threefold separation into legislative, executive and judiciary,⁸¹ also, should the law go beyond the ends of government and the provisions of the Constitution, it is going to be deemed to be null and void, and therefore should be disobeyed.⁸² In this regard, Burlamaqui also considers the necessity of an institutional guardian of the constitution that may declare the unconstitutionality of the laws violating the fundamental laws of the country comprised by the social covenants.⁸³

71. The third of the compacts relates to the designation of those who are going to exercise government, in accordance to the form of government previously established in the constitution, be it a person, an assembly or a group of different bodies, however the people may have deem proper and better for the fulfillment of the ends of government in the second compact.

72. Thus, within the last of the covenants, the people elect a certain number of government officials who have to engage themselves to act in fulfillment of

⁷⁹ 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 45-46.

⁸⁰ *Ibid.* at 42-44.

⁸¹ *Ibid.* at 49-50, 52-54 and 58-60.

⁸² *Ibid.* at 118-119

⁸³ *Ibid.* at 49-50 and RAY FORREST HARVEY, THE POLITICAL PHILOSOPHY OF JEAN JACQUES BURLAMAQUI AND HIS RELATION TO AMERICAN CONSTITUTIONAL THEORY 87-97 (1934) (unpublished Ph.D. thesis, New York University). One interesting comment about this is that although Burlamaqui is clearly one of the exponents of the natural law school of thought, which he develops extensively to demonstrate that man is not completely free in the state of nature, because bound by natural law, and that the principles of government and government action have to be in accordance to it, it would seem also that in the compact system he creates, there is no much room for the use of natural law: it becomes a subsidiary source of law. On the contrary, the government has to act and legislate in accordance to the superior law: the fundamental laws of the country comprised by the compacts signed by the sovereign body: the people. If government fails to do so, then it is clear that there are two solutions according to his theory: First, an institutional solution which demands that those acts are tested through the dispositions and principles of the compacts: this is, the founding documents of the nation, of government and even, the terms of the oath of office, which would bring us back to the first two, especially if it contains a provision saying that it is the duty of that government officer to uphold the constitution and the fundamental laws of the country, which is the case of most oaths of office. The other solution, if the violation committed by government cannot be remedied by institutional mechanisms, then, facing the insufficiency of the law, the people would have to resort to natural law to reassume their rights of sovereignty and either three, changes government, reformulates/amends the constitution, or initiates a revolution that allows them to obtain these first two through violent means if those in power oppose to any peaceful solution. But even in this last hypothesis, the invocation on the law of nature would seem a little bit obscure, since there is no return to the state of nature with a revolution unless the nation is dissolved and a new nation is formed through the repel of the old and celebration of a new compact (of the first kind); otherwise, the revolution would have to be made in accordance to the principles set in the first covenant. This being said, Burlamaqui's social compact theory seems to be in a certain way more tending to the respect of positive law than allowing an indiscriminate power of the people to use and invoke natural law to disobey government.

their duty; this is, to guide the whole society in the pursuit of their happiness by governing for the common good, while in exchange they obtain the promise of obedience by the people who are by this act entrusting them with the exercise of the sovereign power. In this sense, once the government is designated, the people lose their sovereign character and owe complete obedience to the designated government and to the laws it issues, unless there would be a breach in the terms of the contract, since acting within the terms of the contract is the condition of the legitimacy of government.⁸⁴

73. On this regard, it is worthy saying that the rulers are people chosen within the community, they are “one more of the bunch” before the election, and they are still a part of the people in general after they are “anointed” to their public charge; which follows that acting as particulars, they are like anybody else, but when acting under the authority that has been invested in them, they have to be obeyed. That is why so many precautions have to be established according to Burlamaqui so that the due exercise of government is not abused, since it would be creating an unnatural distinction between men, a distinction that would initially be forbidden even in the state of nature.⁸⁵

74. An interesting thing about this is that this compact can be celebrated in various ways. The most common is by a ceremony in which the people, or its representatives are present when the sovereign assumes the charge he has been given and in exchange swears to uphold the fundamental laws under which he derives the totality of its power. On this account, Burlamaqui makes a beautiful description of this by explaining the example of the oath of allegiance in the ancient kingdom of Aragon,⁸⁶ but this principle applies today with coronation ceremonies in monarchies or oath of office ceremonies in republics.

75. Once the three compacts have been celebrated, government is set into place and has the duty to govern in order to procure happiness. This has to be achieved through legislation compatible with reason and tending to the promotion of happiness,⁸⁷ as well as through a set of positive obligations that will limit individual rights only as long as it is done within the aims and goals of government to assure the collective right to happiness.⁸⁸ The

⁸⁴ See *supra* n. 83.

⁸⁵ 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 33-34.

⁸⁶ *Id.* at 48. For a further discussion on the oath of allegiance in Aragon and its effects limiting government and calling for judicial review before the institution of *el Justicia*, refer to RAUL PEREZ JOHNSTON, THE CONTRIBUTIONS OF MEDIEVAL LAW, in 5 HISTORIA CONSTITUCIONAL. REVISTA ELECTRÓNICA DE LA UNIVERSIDAD DE OVIEDO, SPAIN (2004).

⁸⁷ JEAN JACQUES BURLAMAQUI, ÉLÉMENTS DU DROIT NATUREL, 15-16, 19 and 20-21.

⁸⁸ JEAN JACQUES BURLAMAQUI, ÉLÉMENTS DU DROIT NATUREL, 106. This opinion would seem to be confirmed by prof. Grodin, who has written on the subject:

limitation of the individual rights through these positive obligations of the State, in fact, according to Burlamaqui, do nothing but to assert that same liberty in a more effective way.⁸⁹ This being so, we could claim that Burlamaqui is one of the precursors of the theory of *Daseinvorsorge*⁹⁰ and social rights, which is the consequence of the concept of the pursuit of happiness as a collective right.

76. All these principles derived from the theory of multiple compacts, have been thought to be by Ray Forrest Harvey, as the most successful theory in construing the American constitutional principle of a fundamental law.⁹¹ This being so, it is sound to proceed to the analysis of whether we could consider the Declaration of Independence to be the first compact and the Constitution the second, according to the theoretical setting we have just explained, to then draw some interesting consequences on these principles that will affect the extent and meaning Justice Chase gave to his dictum, as well as the method of interpretation that should be followed by the Supreme Court when resolving cases and controversies.

3.5.- The declaration of independence as the first social compact (foundation of the nation) and the constitution as the second (foundation of government).

77. The first consequence we have to draw from the analysis provided by Jean Jacques Burlamaqui with respect to the theory of social compact, is to distinguish two very important moments: the foundation of a nation, and the foundation of government through independent compacts.

78. This being said, it is logic to think that there will be one document in which the political community will be created and its objectives set, and then, this done, there will be another one constituting the government for the new nation.

79. In the case of the United States, we believe that the first and only document to found the nation was the Declaration of Independence. With regard to

“Burlamaqui (...) appears to be talking about affirmative obligations imposed upon government by the nature of human beings, including an obligation to increase the happiness of its citizens.

For Burlamaqui, man has a duty to pursue happiness, and he posits an extension of that duty upon the state. Burlamaqui, (...) reaches back to the earlier classical tradition of *salus populi*.”

JOSEPH R. GRODIN, REDISCOVERING THE STATE CONSTITUTIONAL RIGHT TO HAPPINESS AND SAFETY; 25 *Hastings Const. L.Q.* 15 (1997-1998).

⁸⁹ See 2 JEAN JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW*, 22-23; as well as: 1 JEAN JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW*, 70.

⁹⁰ For an explanation of this concept, see *infra* 4.3.2.

⁹¹ See RAY FORREST HARVEY, *JEAN JACQUES BURLAMAQUI A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM*, 52-54 (The University of North Carolina Press, 1937).

this, we do not want to trace the origins of the social compact in America all the way back to the Pilgrim Father's *Mayflower Compact*, since we believe this is an unrealistic claim of a creation of a new nation from the state of nature, especially since, from the beginning, the affiliation with Great Britain was never contested. This "foundational" document –the *Mayflower Compact*- was celebrated therefore as part of the British realm, not as a new body politic; a circumstance that which will occur by the time of the independence.⁹²

80. The theoretical "state of nature" for the Americans occurred in 1776, when war had broken with the British Empire, the former ties broken and a group of colonies decided to unite themselves to form a new political entity.⁹³ The task of the Declaration was therefore not only to establish the list of grievances to justify the separation or revolt against an oppressive king, but to give life to a new political organization. In this sense, Jefferson's text is profoundly coherent with Burlamaqui's definition of the first social compact,⁹⁴ where the people in the state of nature join to form a new political unit and to regulate with their common consent the great principles of the association that regard their preservation and their common security.⁹⁵ Setting aside the long list of grievances, the Declaration has two important sections for our purposes. In the first, the nation is formed:

"When in the course of human events, it becomes 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, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

(...) We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these

⁹² For reference to the *Mayflower Compact* as a first realization of the social compact theory in America, see EDWARD S. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW*, 42 Harv. L. Rev. 386-387 (1928-1929).

⁹³ Supporting this claim, Patrick Henry said during the first Continental Congress, that: "Government is dissolved (...) Where are your landmarks, your boundaries of Colonies? We are in a state of nature, sir (...) the distinctions between Virginians, Pennsylvanians, New Yorkers, and New Englanders are no more. I am not a Virginian, but an American." Cited in *Id.* at 401. On this same line of argument, David Ramsay's Oration at Charleston, South Carolina established that "[t]he declaration of independence, dissolved the political bands – it cut the nerves of former compacts." See 2 *THE DEBATE ON THE CONSTITUTION*, 518 (The Library of America, 1993).

⁹⁴ See *supra* 3.4.

⁹⁵ Note also, that in the same lines of Burlamaqui, Jefferson is already establishing in the Declaration the need for a second set of compacts subsequent to that one, in which the people, through their consent, will establish governments and the form of these governments (see paragraph two of the Declaration).

colonies solemnly publish and declare, 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 do all other acts and things which independent states may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.”

81. Clearly, from this passage, the first paragraph alludes to a state of necessity that justifies declaring as inexistent the previous political arrangement. By the reference to the “laws of nature” as a source for independence, instead of a legal source, we can deduct that Jefferson is alluding to the inexistence of any compact binding the people gathered through their representatives, in a word, he is referring to the state of nature. Then, this fact being stated, the people of the United States of America through their representatives establish the right to govern themselves free from any ties with their former sovereign by forming a Union.⁹⁶ This Union, as it is formed, also expresses the need to a new set of principles to guide it, and consequently, establishes the second part of the Declaration as a founding document of the nation by saying:

“We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.”

82. This second part, just like Burlamaqui states it, and Jefferson seems to have understood it well, establishes the great principles for which men associate themselves out of the state of nature to institute a new social organization

⁹⁶ “(...) The declaration of independence (...) was emphatically the act of the whole *people* of the united colonies, by the instrumentality of their representatives (...). It was therefore the achievement of the whole for the benefit of the whole. (...) The declaration of independence has accordingly always been treated, as an act of paramount and sovereign authority, complete and perfect *per se*.” 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION, 198-199 (Hilliard, Gray and Company, 1833).

that will have to follow and secure such principles,⁹⁷ being these: equality and the enjoyment of certain unalienable rights.⁹⁸ Furthermore, if the established governments through compact, become destructive of those ends (securing the equality and unalienable rights of man), the people will have the right to alter or even abolish them.⁹⁹ In this regard, the second part of the Declaration becomes the guaranty set by the people that their liberties, as a nation, will be respected.¹⁰⁰ But careful enough, Jefferson did not go beyond the aim of the first compact and stopped at the constituting of the nation and the great principles for which men lose their individual independence to become a community, without trying to set into the Declaration any provision that would be the subject of a constitution (related to the setting of a specific form of government).¹⁰¹ Therefore, we can validly say that the Declaration of Independence is truly the equivalent of Burlamaqui's first social compact established by the representatives of the American nation, since it contains all of its elements and none pertaining to the second compact.

⁹⁷ The self evidence of these principles is logical in Burlamaqui's scheme, since being these natural rights issued out of the laws of nature, they are discernible by any rational being, impossible to be ignored, since they spring out of the nature and constitution of man. See 1 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 126-127 and 133. Also, of great interest to link the former idea is the thought of prof. McLaughlin: "Before government was established, men were in a state of equality; after government was established they were not; they gave up their equality and subjected themselves to a superior; but this superior must rule for the common good. This is the sum and substance of the philosophy (...) of the Declaration of Independence." ANDREW C. McCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES, 104 (D. Appleton-Century Company, 1936).

⁹⁸ The opinion is also shared by Andrew McLaughlin in that: "The (...) (Declaration of Independence) is of very great moment in American history because of the philosophy of government set forth in the opening paragraphs. (...) It was the philosophy (...) of compact and natural rights (...) which announced the principle of the popular origin of government and proclaimed the doctrine that governments were possessed of *derived* authority (...)." *Id* at 101-102.

⁹⁹ In the same sense: "(...) The Declaration's principles have a reasonable precise meaning, one that leads to definite conclusions about how government ought to be structured and what it ought to do." THOMAS G. WEST, THE DECLARATION OF INDEPENDENCE, THE U.S. CONSTITUTION, AND THE BILL OF RIGHTS, in THE DECLARATION OF INDEPENDENCE, ORIGINS AND IMPACT, 74 (CQ Press, 2002).

¹⁰⁰ On this aspect, the following opinion is compatible to what we have just asserted: "The Declaration of Independence asserts the political liberty of the American people. The Declaration describes the shared freedom of the community of Americans, not of its isolated individual members." ROBERT W. HOFFERT, THE DECLARATION OF INDEPENDENCE AND THE ARTICLES OF CONFEDERATION: A COMPLETED CONSTITUTIONAL COVENANT, in THE DECLARATION OF INDEPENDENCE, ORIGINS AND IMPACT, 56 (CQ Press, 2002).

¹⁰¹ In this regard, the opinion that the Declaration postpones the formation of the government is shared by Martin Diamond: "(the Declaration of Independence) limited the dangerous passions of the revolution only to the unmaking of a tyrannical government. It gave no license to new rulers to carry those revolutionary passions directly into the making of new government. That making of new government would have to find its way through still uncharted paths to be trod soberly and prudently." MARTIN DIAMOND, THE REVOLUTION OF SOBER EXPECTATIONS in IRVING KRISTOL, *et al.*, THE AMERICAN REVOLUTION: THREE VIEWS, 70 (1975) cited in BRUCE ACKERMAN, 1 WE THE PEOPLE, FOUNDATIONS, 351 n. 50 (Harvard University Press, 1991).

83. This idea is reinforced by the fact that the establishment of the first compact leads to the necessity of a second one. In this sense, the Declaration is the foundation for the second covenant; the “first” second covenant issued by the American nation was the document known as the “Articles of Confederation”.¹⁰² In this sense, if we acknowledge the compatibility of the two texts, in that the second is taking the principles of the first into account, we can validly say that the Declaration, the Articles of Confederation and the oaths of office consequently taken by the government officials elected to office, constitute a completed social compact for the American people in the same terms and extent of Burlamaqui’s theory.¹⁰³

84. But if, consequent to Burlamaqui’s theory, the fact of setting aside a constitution does not imply a return to the state of nature,¹⁰⁴ then, the new constitution only substitutes the former and should continue to form a complete covenant with the first, which is still in force while the nation remains the same.¹⁰⁵ Consequently, the Constitution forms part of the same compact with the Declaration of Independence in as much as it was a constitution given to the same nation in substitution to the precedent form of government (the Articles of Confederation).¹⁰⁶

¹⁰² “The theoretical basis of a completed constitutional covenant is found in the initial constitutional covenant framed by the Declaration. Specifically, the Declaration provides a natural foundation for a national community. As an extension of that covenant from the American people to the American state, the Articles (of Confederation) resonate with the assumptions of a covenanted community already in place. The creation of a constitutional state is not the foundation nor constituting the nation; rather the constitutional nation is the foundation for constituting an appropriately complementary state.” ROBERT W. HOFFERT, *THE DECLARATION OF INDEPENDENCE AND THE ARTICLES OF CONFEDERATION: A COMPLETED CONSTITUTIONAL COVENANT*, in *THE DECLARATION OF INDEPENDENCE, ORIGINS AND IMPACT*, 67 (CQ Press, 2002).

¹⁰³ “Taken together, the Declaration of Independence and the Articles of Confederation and Perpetual Union provide a completed constitutional covenant for the American people. They offer a set of formative principles, reflecting shared commitments, on which America as a nation (a people) and as a state (a government) was founded.” *Id.* at 56.

¹⁰⁴ See *supra* n. 83.

¹⁰⁵ “The Declaration of Independence, together with the Americans’ first national constitution, the Articles of Confederation, constituted a national compact. When the Articles of Confederation were found to be inadequate, they were replaced by the present Constitution, written in the summer of 1787. There was, however, no need to replace the Declaration of Independence because it, and the people it created, still stood. (...) If the social compact represented by the Declaration of Independence had not still been in effect, there would have been no basis for a new national Constitution. The Americans are, then, still living under a national compact.” DONALD S. LUTZ, *THE DECLARATION OF INDEPENDENCE AS PART OF AN AMERICAN NATIONAL COMPACT*, 19, No. 1, *PUBLIUS: THE JOURNAL OF FEDERALISM*, 43 (1989).

¹⁰⁶ The fact that the American Constitution is a compact, or part of one, is more clearly understood from the moment it is not thought of as a mere treaty, but as a constitution for the whole nation. On this regard, Madison’s opinion given on July 23, 1787 before the Federal Convention is important: “The doctrine laid down by the law of Nations in the case of treaties is that a breach of any one article by any of the parties, frees the others from their engagements. In the case of a union of people under one Constitution, the nature of the pact has always been understood to exclude such an interpretation.” 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 93 (Yale University Press, 1937). Also, take into account that the

85. Another fact that confirms our view of the Declaration and the Constitution as part of the same social covenants is the fact that the Constitution, in itself, does not contain a description of the ends of government. The reason for this in the Philadelphia Convention was thought to be the fact that this was not necessary, that this had already been done before and consequently it had no place in the Constitution since it is already implicit in the whole setting of compacts. Hence, although a preamble seemed proper, it does not contain the great ends for which men associated themselves to create the nation as the Declaration does.¹⁰⁷

86. The fact that the Preamble of the Constitution does not make mention to the inalienable rights of man, but takes them for granted when referring to assure the blessings of liberty, is not the result of a change in minds

distinction made by Joseph Story between a social compact and a fundamental law is on the overall incorrect (*Commentaries*, vol. 1, at 307 and ff.) or even irrelevant since it is only used to challenge a very specific meaning of this term used by certain members in the Convention, in the sense that the parties to the contract (states or individuals) cannot construe it or abrogate it at will. In this regard, the fundamental law would not be comparable to a treaty or a simple contract (see *id.* at 343). The reason behind such interpretation is that fallaciously, these members of the Convention we have referred to, were trying to impair a social compact with a mere treaty (as in a traditional confederacy), and because of the danger of this argument, which may even rise to the right of secession is why Story makes the distinction; not because in reality the Constitution is not a social contract.

¹⁰⁷ As reported by the *Committee of Detail*, "(...) A preamble seems proper. Not for the purpose of designating the ends of government and human polities – This display of theory, howsoever proper in the first formation of state governments, is unfit here; since we are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society (...) The object of our preamble ought to be briefly to declare that the present federal government is insufficient to the general happiness; that the conviction of this fact gave birth to this convention; (...)" 4 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 38 (Yale University Press, 1937). The sketch of this document, prepared by Edmund Randolph, on July 26, 1787, appears in the *Supplement* to Farrand's *Records*, at 183 (Yale University Press, 1983). According to Thomas West, Edmund Randolph was referring here to the Declaration of Independence which already contained the theory of government for the American people, therefore, this was unnecessary in the new constitution being discussed. See THOMAS G. WEST, *THE DECLARATION OF INDEPENDENCE, THE U.S. CONSTITUTION, AND THE BILL OF RIGHTS*, in *THE DECLARATION OF INDEPENDENCE, ORIGINS AND IMPACT*, 73 (CQ Press, 2002).

Moreover, this seems to be confirmed by the reference Randolph makes of the necessity of a new constitution, where he argues that this is due to the fact that the one in place is "insufficient to the general happiness". In other words, what Randolph seems to be saying is that since the Articles of Confederation were not working to secure the pursuit of happiness as an unalienable right, as a goal of government set forth in the Declaration of Independence; therefore, a new constitution was needed. In this sense, from Randolph's document approved by the founding fathers in the 1787 Convention, it would seem as if the Declaration is being acknowledged as the founding document of the nation; as the first part of the social compact.

On a similar note we could consider Gouverneur Morris' words when he stated that "[o]n the declaration of independence, a government was to be formed", since this would be implying that once the Constitution set the objectives of the nation, it would be the Constitution's sole purpose to establish the form of government. See 5 ELLIOT, *DEBATES*, 286.

between 1776 and 1787, but to the conscience that the two documents, as part of the social compact, fulfilled different functions.¹⁰⁸

87. A question that could also be supported by the fact of the inclusion of the Ninth Amendment of the Constitution.¹⁰⁹ This is so, since even if the Ninth Amendment has been subject of the debate on whether there certain unenumerated rights are permitted by the Constitution,¹¹⁰ we believe that the mention of other rights outside the formal text of the Constitution could serve as a parameter to accept our theory that certain rights or principles contained in another document, like the Declaration of Independence, may have a constitutional value in the likes of the rights and powers expressly enumerated in the Constitution.

88. In consequence, the Declaration of independence has to be seen as much more than a simple exultation of rhetoric principles; furthermore, it should be seen and read as the result of the construction by the founding fathers of a

¹⁰⁸ We agree generally with prof. Ely that the changes between the Declaration and the Constitution cannot be attributed to a change of intellectual fashion, but to a difference in function between the two documents. See JOHN HART ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW*, 49 (Harvard University Press, 1980). This doesn't mean though that we adhere to his view that the difference in function between the two is because the Declaration is an ill advised brief against an oppressive monarch, advertising some admirable but assuredly open-ended goals (like the pursuit of happiness), while the Constitution is a frame of government; see *id.* at 89. On the contrary, like we have said, we consider that the Declaration is the foundational document of the political community while the constitution sets a frame of government for that community.

This difference in function may also be one of the reasons why James Madison, when drafting the Bill of Rights, may not have included several proposals requesting the recognition of the pursuit of happiness as part of the Bill of Rights that would eventually pass as the first ten amendments of the Constitution. On this regard, one of the reasons for such rejection, more than being a clear opposition to the notion, which we don't consider from what we have seen of Madison's thought (see *supra n.* 33), we think it could be the fact of not redounding in the Constitution the ends of government that had already been set in the Declaration of Independence. Therefore, if the pursuit of happiness is more of a collective right and an end of government, it would be ill placed alongside other individual rights in the Constitution.

On this point, there were several proposals, of which we will signal as the most important that of the Virginia Convention which demanded:

"That there be a declaration or bill of rights asserting, and securing from encroachment, the essential and unalienable rights of the people, in such manner as the following:

1st. That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety."

See 3 ELLIOT, *DEBATES*, 657. Also, for a further notion on this, refer to the amendment proposals of the legislature of New York, based on George Mason's *Master Draft of the Bill of Rights* (*cf.* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, 190 (Department of State, 1894) and those proposed by the North Carolina Convention which are almost identical to those of Virginia (*cf.* 4 ELLIOT, *DEBATES*, 243).

¹⁰⁹ The text of the amendment is as follows: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

¹¹⁰ On this regard, see JOHN HART ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW*, 34-36 (Harvard University Press, 1980).

very specific theory of social compact¹¹¹ which contained the core of the principles that are to rule the institutional life in America. It is what gives substance and meaning to the constitutions, state and national, to the point that one has to be seen as the legal framework of the others.¹¹²

3.6.- Both documents cannot be separated but are interlinked (the Declaration of Independence frames the Constitution).

89. As a consequence of what we have established, the Constitution and the Declaration would be but one document. The Constitution as the second compact, derived from the one founding the nation and prescribing the ends of government (the Declaration), derives its force and authority from the latter, to the extent it is the legal ground upon which rests the Constitution.¹¹³ In that perspective, thinking of the Constitution cannot be in terms of ignoring the principles of the Declaration, since the conception itself of the Constitution is derived from the spirit of it; both documents are linked, inseparable by nature.¹¹⁴ The unalienable rights of man of the Declaration as is the pursuit of happiness, are therefore part of the Constitution, not as a substantive right, but as the principles through which we have to interpret it in order for the same to fulfill its goals.¹¹⁵ In this case, the Constitution would

¹¹¹ "The Declaration is not to be read as if it had no meaning (...). It contains doctrines which on their peculiarly theoretical side have lost their cogency. The notion that the only way in which men can legitimately bound is by a promise, or something akin to promise and contract, is to-day not quite orthodox political philosophy or quite the thinking of the common man. (...) But the significance of the Revolution is lost if one does not see the Americans taking this 'compact' philosophy seriously (...)." ANDREW C. McCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES, 101-105.

¹¹² "The second paragraph of the Declaration of Independence, in which those principles are stated, is the heart of our American system. That passage, together with the Bill of Rights, constitutes the dynamic force in our government. Without them our Constitution, State and national, are little more than machines of authority." ALBERT J. BEVERIDGE, SOURCES OF THE DECLARATION OF INDEPENDENCE, An address delivered before the Historical Society of Pennsylvania, June 2, 1926, p. 10.

¹¹³ "American constitutionalism is grounded in the principles of the Declaration of Independence. These principles do not dictate any specific constitutional design. They provide a broad outline of the structure and purposes of government. The ends of government are absolute and unchanging. The means are not." THOMAS G. WEST, THE DECLARATION OF INDEPENDENCE, THE U.S. CONSTITUTION, AND THE BILL OF RIGHTS, in THE DECLARATION OF INDEPENDENCE, ORIGINS AND IMPACT, 72 (CQ Press, 2002). According to the same author, this same belief would have been shared by George Washington and James Wilson when justifying the new constitution during the time of ratification. See *id.* at 72.

¹¹⁴ "The Constitution was conceived in large part in the spirit of the Declaration of Independence which declared that to secure such 'unalienable rights' as those of 'Life, Liberty and the Pursuit of Happiness' (...) Governments are instituted among Men, deriving their just powers from the consent of the governed." *Bute v. Illinois*, 333 U.S. 651 (1948) Harold Burton's majority opinion.

¹¹⁵ On this aspect, the view that the goals of the Constitution are contained in the Declaration of Independence can be found in the words of Mr. Wilson in the debates before the Pennsylvania Convention for the ratification of the Constitution said:

"This, I say, is the inherent and unalienable right of the people; and as an illustration of it, I beg to read a few words from the Declaration of Independence, made by the representatives of the United States, and recognized by the whole Union.

be the document that would develop the principles of the Declaration in such a way that the sum of its elements should allow all citizens to pursue their own happiness. This being so, it is important to remember Chief Justice Jay's opinion in *Chisholm v. Georgia*:

“Let us turn to the constitution. The people therein declare, that their design in establishing it comprehended six objects: (1.) To form a more perfect union; (2.) to establish justice; (3.) to insure domestic tranquility; (4.) to provide for the common defense; (5.) to promote the general welfare; (6.) to secure the blessings of liberty to themselves and their posterity. It would be pleasing and useful to consider and trace the relations, which each of these objects bears to the others; and to show that, collectively, they comprise every thing requisite, with the blessing of Divine Providence, to render a people prosperous and happy.”¹¹⁶

90. All of this said, we may even talk of the Declaration and the Constitution as forming a certain “constitutional bloc”, in same sense as the *bloc de constitutionnalité* construed by the French *Conseil Constitutionnel* (Constitutional Council), or by such authors as Louis Favoreu and others.¹¹⁷

91. On this regard, the *Conseil Constitutionnel* through diverse decisions has considered that the French Constitution of 1958 lacks a declaration of the fundamental principles that ought to rule the constitution, and that these principles, enumerated and reaffirmed in a certain way in the preamble, make it necessary to have such preamble incorporated into the text of the Constitution through interpretation for it to have a certain meaning beyond the rhetoric value they are usually given.¹¹⁸

(...) [he reads the Declaration from ‘We hold these truths to be self-evident’ to ‘as to them shall seem most likely to effect their safety and happiness’]

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

2 ELLIOT, DEBATES, 457.

¹¹⁶ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). (Jay J., seriatim opinion) Up to what extent this opinion, more than a statement of political theory was in fact a premeditated and practical attempt by Chief Justice Jay to find grounds to make the decision of the Court binding upon the state of Georgia's threats of not submitting to the decision, it is hard to say, but the statement, at least, seems to be compatible with our line of arguments since the depicted “objects” of the Constitution as defined by Jay would be no other thing than an extended regulation of the pursuit of happiness. On Georgia's threat of not recognizing the binding authority of the Court in this case, by considering it “unconstitutional and extra-judicial”, see 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 1789-1835, 100 (Little, Brown and Company, 1926).

¹¹⁷ On this point, general reference is needed to the following works: LOUIS FAVOREU and LOÏC PHILIP, LE CONSEIL CONSTITUTIONNEL [The *Conseil Constitutionnel*] (Presses Universitaires de France, 1978) (see *infra* notes 119-121), LOUIS FAVOREU and FRANCISCO RUBIO LLORENTE, EL BLOQUE DE CONSTITUCIONALIDAD [The Constitutionality Bloc], (Civitas ed., 1991), and FRANCISCO RUBIO LLORENTE, LA FORMA DEL PODER [The Form of Power], 63-90, (Centro de Estudios Constitucionales, 1997).

¹¹⁸ The mentioned preamble of the 1958 Constitution establishes:

92. The only problem is that the Preamble in itself is vague, and in order to give it a precise meaning, it has to be complemented and read through the Preamble of the 1946 Constitution as well as through the Declaration of the Rights of Man and the Citizen of 1789. By this, the *Conseil* has been able to protect in a more efficient way the rights and fundamental liberties of the country, being equality at the heart and soul of them; notwithstanding, such interpretative task has also included social and economic rights (including the right to receive education, healthcare, social security and labor and workers' rights), by declaring unconstitutional any statute contrary to the principles established in the aforementioned documents. It has become a true "charter of jurisprudential liberties".¹¹⁹
93. The question that thus arose is what ought to be the extent of the power of control exerted by the *Conseil*, whose obligation, according to article 62, section 2 of the Constitution is to declare whether a law is in conformity of the constitution. In that regard the controversy was to determine if the preamble could have a certain legal value. Prior to the 1958 Constitution, the approach had been that no disposition of the preamble was justiciable nor enforceable, since it contained no substantive rights in itself; but the *Conseil* made a great shift in jurisprudential interpretation by: "recognizing a legal value to the preamble of the Constitution, this is, to the dispositions of the Declaration of the Rights of Man of 1789 (...) and of the preamble of the Constitution of 1946 (...). In that way, the control over the constitutionality of a law has to be performed *vis à vis* a 'bloc of constitutionality' comprising not only the contents of the clauses of the constitutional text in itself, but also, those of the preamble of 1958, of the preamble of 1946, (and) the Declaration of Rights of 1789 (...)." ¹²⁰
94. In that sense, the *Conseil Constitutionnel* has contributed to assure a better protection of the liberties and fundamental rights of Frenchmen in a direct and essential manner by giving compulsory value to numerous provisions contained in the preambles of the 1946 and 1958 constitutions, as well as in the Declaration of the Rights of Man and the Citizen of 1789.¹²¹

The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004.

By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories that express the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived with a view to their democratic development.

¹¹⁹ See LOUIS FAVOREU and LOÏC PHILIP, *LE CONSEIL CONSTITUTIONNEL*, 75-77 and 80-81 (Presses Universitaires de France, 1978).

¹²⁰ *Id.* at 86-87.

¹²¹ See *id.* at 124. Also, take into account that this interpretation is being already taken as a black letter rule of law, since the National Assembly, through the amendment of March 2005, has included the mention to the Charter for the Environment of 2004 in the preamble. The only reason

95. That being said, the Declaration of Independence and the Constitution of the United States should be seen as a bloc in matters of interpretation so that we can have an assurance that any provision, or any statute that is being construed in accordance to the Constitution is compatible with the ends for which they are supposed to be created.
96. This interpretation in bloc that we have shown should apply to the Federal Constitution should be also thought applicable to the state constitutions according to the multiple compacts theory. On this notion, if we have agreed that the Declaration of Independence was made by “the people of the United States”, the Declaration then refers to the whole people of the United States of America through its representatives; then, it is an act of foundation of one nation, regardless of the fact that the states that sent representatives to the First Continental Congress may have thought themselves sovereign. It is of the essence to realize that the Declaration is in fact forming one nation, not an alliance between different individual nations, despite some possible reference in its own text on the alleged sovereignty of its members, since this seems more like an appeasing compromise rather than something coherent with the ideology behind the document; more than meaning sovereignty by the words “independent states”, we believe the Declaration must have been referring to a concept of autonomy in the exercise of government, especially since it was unrealistic to think in 1776 of an efficient national government, and the imposition of one state over the others was also discarded.¹²²
97. Unconsciously, by declaring the principle of one nation in the Declaration, the states renounced to their sovereignty, meaning by that, that for instance, there was no longer a right to secession since the future compact would not be a treaty but the application of the first social compact (the formation of a nation in the Declaration) in a second, a constitution that would merely define the form of government and its powers; a principle that would be

for such an inclusion is because they are in fact incorporating the provisions of such charter on the basis of the interpretation given by the *Conseil Constitutionnel*.

¹²² This does not mean however that profound differences did not exist between the different states as to justify sociologically thirteen different nations among the former colonies. On this regard, it could be argued that the application of a notion of “one nation” contained in the Declaration, in the Constitution, and expressed by President Lincoln in the 1860s, was inevitably going to lead to a breach between the text of the law and reality. This breach would have to be mended through the imposition of this unitary notion with the presence of the federal army in the reconstruction period. For an analysis of the differences among the colonies and the lack of existence of “one nation” in the United States at least until the end of the Civil War, see 2 ADOLFO POSADA, *TRATADO DE DERECHO PUBLICO*, 44-48 (Librería General de Victoriano Suárez, 1935), ANDREW C. MCLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* (1936), BRUCE MANN, *NEIGHBORS AND STRANGERS*, (University of North Carolina, 2001), as well as Mr. Charles Pinckney’s speech during the South Carolina Convention on ratification of the Constitution in 4 ELLIOT, *DEBATES*, 323-324.

misunderstood or inapplicable for almost a century at the cost of a bloody war.¹²³

98. The fact that the first “second compact” was a confederation, more than making it a treaty between the states, what it meant in reality was only a decision on the degree of autonomy of the states and the extent of power of the national government. In this sense, the decision of a confederation or a federation is a decision made by the people in establishing the form of government, not the founding of a nation and its principles; it is an administrative division of how the sovereign power is to be divided for its exercise. On this aspect, federalism is merely a check on government: just like the separation of powers is a horizontal check, federalism is a vertical one decided by the people in the exercise of their sovereignty.¹²⁴ But even if we were to accept the concept of a primary sovereignty of the states, the Declaration of Independence of the United States is at the same time the declaration of each and everyone of the states individually, so they would

¹²³ With regard to this point, the statement of the preamble of the Articles of Confederation stating a “Confederation and perpetual Union between the states of (...)” and article II of the same, saying that: “Each state retains its sovereignty, freedom, and independence (...)” are contrary to the spirit of the Declaration; that is why the Constitution rightly had to be issued by “We the people” and not “We the peoples” nor “We the states”. But even in the ratification debates of the Constitution this seems to have been quite problematic for some representatives to understand. On the Virginia Ratifying Convention, the point came out of the mouth of Patrick Henry: “(...) but sir, give me leave to demand, what right had they to say, *We the People?* (...) instead of *We the States?* States are the characteristics and the soul of a confederation.” PATRICK HENRY, VIRGINIA RATIFYING CONVENTION, June, 4, 1788, in 3 ELLIOT, DEBATES, 22-23, cited also in PHILIP B. KURLAND and RALPH LERNER (Editors), 2 THE FOUNDERS’ CONSTITUTION, 10 (The University of Chicago Press, 1987). This statement seems clearly contradictory to what Mr. Henry proclaimed himself while being a representative of Virginia in the First Continental Congress (see *supra* note 93).

On this matter, some scholars have even questioned the nature of the U.S. Constitution, by asking what kind of federalism it really establishes. See, HENRY PAUL MONAGHAN, WE THE PEOPLE[S], ORIGINAL UNDERSTANDINGS, AND CONSTITUTIONAL AMENDMENT, 96 Colum. L. Rev. 121 (1996). But this question is in our perspective but the consequence of a misunderstood concept, since even if the Constitution was supposed to amend the Articles of Confederation, it could not have started with a notion contrary to the very essence of the political community. In 1776, a group of nations were not separated from England; a nation was formed out of a former group of colonies and broke all ties with its former ruler. Notwithstanding this, it could have chosen with respect to the form of government, to maintain a certain relation with the English Crown without questioning the independence. For example, the Queen of Great Britain is also the Queen of Australia, and Canada, and some of the former colonies as part of the British Commonwealth, but it would be nonsense to pretend at this point of history that those nations are mere provinces of the British Empire.

¹²⁴ Take for instance the reasons why the Tenth Amendment of the Constitution was adopted; the belief was that the Federal Government without an express limitation of its powers, could annihilate the State governments and the rights of its citizens; therefore, as was done by the Articles of Confederation, a provision was included in the sense that every power not delegated expressly to the Federal Government or prohibited to the States would be reserved to the States or to the people. On this regard, see JAMES MADISON, THE FEDERALIST PAPERS, Nos. 44 and 45 as well as JOHN HART ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW, 34-35 (Harvard University Press, 1980).

still be bound by its principles regardless of the fact each and everyone of the states, individually, may have issued its own declaration of independence, since these declarations would have to be seen as complementary documents to the Declaration itself. As to newly admitted members of the Union, once they accept entering into the Union, they are understood to embrace and accept all the principles surrounding it, without being able to opt out of certain provisions. Like the Europeans would say, they have to accept the whole package of the *acquis communautaire*; especially if we were to consider in this point also, the incorporation clause of the Fourteenth Amendment which would give some additional validity to the point we are here making.

3.7.- Consequently, the Constitution ought to be interpreted through the principles of the Declaration of Independence, which gives substantive content to the Constitution.

99. Having stated all of the above, let us turn back to the Constitution which is the main focus of our work.¹²⁵ Bearing in mind the idea of the bloc, it is hard to conceive the Constitution as an isolated document and its provisions have to be understood through the principles of the Declaration. The provisions of the Declaration with respect to the ends of government, in a certain way give a substantive meaning and content to the Constitution.

100. By this we can then affirm that one of the main aims of the Constitution is to assure the pursuit of happiness of all its members, now and in the future.¹²⁶ This being one of the highest aims of government, all its actions have to be directed towards fulfilling that end, otherwise, the people may exercise their right to change the government, to change the Constitution, or even, in the case of extreme necessity, of overthrowing the

¹²⁵ For a study on the application of the pursuit of happiness to state constitutions, see JOSEPH R. GRODIN, REDISCOVERING THE STATE CONSTITUTIONAL RIGHT TO HAPPINESS AND SAFETY; Hastings Const. L.Q. 15 (1997-1998).

¹²⁶ This idea is suggested by Joseph Story when analyzing the Preamble of the Constitution: "The last clause in the preamble is to 'secure the blessings of liberty and our posterity.' And surely no object could be more worthy of the wisdom and ambition of the best men in any age. If there be any thing, which may justly challenge the admiration of all mankind, it is that sublime patriotism, which, looking beyond its own times, and its own fleeting pursuits, aims to secure the permanent happiness of posterity by laying the broad foundations of government upon immovable principles of justice." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 485-486. Also, see John Denvir, when he says:

"What are the principles that distinguish the United States as a political and legal culture? My answer, inspired by the Declaration of Independence, is that democracy requires the guarantee to all its citizens of a realistic opportunity to pursue happiness as they define it. Toward this end, government must respect the fundamental rights of its citizens. Some of these fundamental rights are negative liberties (...) from government interference; others are positive rights (...) to government assistance."
JOHN DENVIR, DEMOCRACY'S CONSTITUTION, 125-126 (University of Illinois Press, 2001).

institutions by the means of a revolution.¹²⁷ This seems to have been the understanding of the framers,¹²⁸ and certain judges have even ventured in such path,¹²⁹ being the opinion in *Davis v. Ballard*, perhaps the most clear example of the use of the pursuit of happiness as a parameter to understand the constitution, be it the federal or the state constitutions; on this regard, Judge Underwood's opinion is of the essence:

¹²⁷ "Governments are empowered by the consent of the people to protect these natural rights (life, liberty, and the pursuit of happiness), which is also to say that governments have a duty to serve the common good. Consequently, when a government acts against the will of the people or against the laws of nature, the people must act to alter or abolish it and to institute a new government that will appropriately secure their safety and happiness. In other words, the people should install a government that will protect their rights to life, liberty, and the pursuit of happiness." ROBERT W. HOFFERT, *THE DECLARATION OF INDEPENDENCE AND THE ARTICLES OF CONFEDERATION: A COMPLETED CONSTITUTIONAL COVENANT*, in *THE DECLARATION OF INDEPENDENCE, ORIGINS AND IMPACT*, 59 (CQ Press, 2002).

¹²⁸ "The men of the founding generation were what might be referred to as teleological or telic interpretivists. That is, they looked to the overarching goals and purposes for which the Constitution was devised (...). These goals (of government) were well known: the delegates to the Philadelphia Convention knew the proper ends of government, for those ends already had been proclaimed in other constitutive documents, most notably in the ringing pronouncement of equal liberty, and of the capital purpose of government as the protection of the people's equal liberty, contained in the Declaration of Independence's first two paragraphs. In this sense Lincoln was merely, and typical of an entire antebellum tradition which read the Constitution in the light of the great goals and ends of government enshrined in the Declaration of Independence. It was read that way not just by early national and antebellum lawyers but by almost everyone who ever had occasion to give a speech attempting to explain America's role as a new republic among monarchical nations. It does not take much digging in the patriotic orations and political speeches of nineteenth-century America to discover that the Declaration, not the Constitution, was regarded as the fountainhead of our national political tradition. In short, it was Jefferson's felicitous expression of the proper goals of the civil political order that animated constitutional interpretation and rendered apparent the overarching collective intent of the Founders." JAMES ETIENNE VIATOR, *THE FOURTH AMENDMENT IN THE NINETEENTH CENTURY*, in EUGENE W. HICKOK JR., Ed., *THE BILL OF RIGHTS, ORIGINAL MEANING AND CURRENT UNDESTANDING*, 172-173 (University Press of Virginia, 1991).

A couple of examples of the former can be seen from the debates on the ratification of the Constitution in the State conventions. First of all, let's take into account Iredell's statement before the North Carolina Convention in the sense that:

"Our government is founded on much nobler principles. The people are known with certainty to have originated it themselves. Those in power are their servants and agents; and the people, without their consent, may new-model their government whenever they think proper, not merely because it is oppressively exercised, but because they think another form will be more conducive to their welfare."

4 ELLIOT, *DEBATES*, 9. Also, during the South Carolina Convention, Charles Pinckney would emphatically say: "This section I consider as the soul of the Constitution (...) (it) will teach them to cultivate those principles of public honor and private honesty which are the sure road to national character and happiness." *Id.* at 333.

¹²⁹ Like Justice David Brewer said in the majority opinion in *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U.S. 160 (1897): "It is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." Also: "Many Justices have clearly believed that the primary purpose of the Constitution is to protect the principles proclaimed in the Declaration." MARK DAVID HALL, *THE DECLARATION OF INDEPENDENCE IN THE SUPREME COURT*, in *THE DECLARATION OF INDEPENDENCE, ORIGINS AND IMPACT*, 146 (CQ Press, 2002).

101. “JUDGE UNDERWOOD delivered the opinion of the Court.

102. The present constitution of Kentucky, was adopted at a time, when the natural, civil, and political rights of men, were well understood. The object in forming the constitution, was to protect these rights from encroachment, and as declared in the preamble, ‘to secure to all the citizens of the state, the enjoyment of the right of life, liberty, and property, and of pursuing happiness.’ To preserve these great ends of all government, three distinct departments were instituted; each to consist of a separate body of magistracy, neither to be supreme in itself, but to act in its appropriate and prescribed sphere, the one wisely permitted to check the other, when that other may overleap the limits assigned to it; and the whole, together, representing the great body of the people, from whom their powers are derived, and in whom all power ultimately rests.

103. Object of the framers of the constitution, to secure the enjoyment of life, liberty and property, and the pursuit of happiness.

104. The enjoyment of life, liberty, and property, and the right to pursue happiness, embrace all the comforts and pleasures which man's physical, intellectual, and moral nature is capable of acquiring, by the application and exercise of the various faculties with which he is endowed, and all that the world can afford him. The right to pursue happiness, includes the right to use all means necessary for its attainment, by the proper exercise of our faculties. The acquisition of property, to some extent at least, is indispensable to our most limited ideas of happiness. Food and raiment are property; and without food and raiment, existence can not be preserved many days. Whether our acquisitions shall be limited to a bare subsistence, or shall be multiplied to the accumulation of every luxury, will depend upon the degree of labor employed, and the success of the business to which it may be directed; but it equally results, whether we have much or little, that one of the objects in the formation of the constitution, was to secure the enjoyment of that which we do possess and own. ‘We, the representatives of the people of the state of Kentucky, in convention assembled, to secure to all the citizens thereof, the enjoyment of the rights of life, liberty, and property, and of pursuing happiness, do ordain and establish this constitution for its government,’ is the language of the preamble.”¹³⁰

105. Unfortunately, this has not been the general rule, all the contrary, an interpretation like the one we are suggesting has been the exception as a

¹³⁰ *Davis v. Ballard*, 24 Ky. 563 (1829). It is also interesting to see that in the opinion of the Court of Appeals of Kentucky in the case we've just quoted from, it also cites *Calder* with regard to the meaning of the *ex post facto clause*, but the most interesting thing for us is that the opinion cited to go along all the other arguments of the opinion is that of Samuel Chase. This does not necessarily make a link between the concept of “the pursuit of happiness” and Chase’s opinion of what should be the “great principles of the social compact”, but it is striking that in 1829, not that many years after the founding, both were put together.

standard for construing the Constitution, notwithstanding the apparent intent of the founding generation.

106. Nevertheless, even if the interpretation of the Declaration has not always been in the sense of considering it as giving substantive content to the Constitution, we consider that should the Declaration be considered as a frame for the Constitution, then the Declaration becomes part of a codified social compact that sets limits on the power of the government set by the Constitution.¹³¹

107. But being that unfortunately the Declaration has not been generally seen as a check for the exercise of power, or even as a the substantive content to interpret all other provisions, this leads us to the necessity of looking for other paths of reaching this result. One of them, which is the one we are suggesting, is to comprehend Justice Chase's statement of understanding the Constitution through the first great principles of the social compact as compatible to the tradition of considering the Declaration as the vehicle that contains such great principles of the social compact. It is in this line of thought that we have had a look into the general background of Samuel Chase, as well as to his thought and position *vis à vis* the Declaration of Independence as part of the social compact, to be able to link his thought to the meaning of the Declaration.

108. Hence, if Chase was not hostile to the Declaration, his social compact definition is resembling to its terms and he is not fully a natural law thinker, but someone likely to have room to pull those principles out of other written documents conforming the social compacts, it is likely that according to the beliefs of his time he would have been inclined to interpret the constitution as a compact just in the way Burlamaqui's theory seems to fit the Declaration. Consequently, this being so, it is reasonable to believe that Chase in *Calder* could have been prepared to interpret the principles of the social compact drawn from the Declaration of Independence, as a document that procures the ends and goals of government to the Constitution. Therefore, if such an idea has some credibility behind it, it becomes really interesting to see what would the full meaning be of applying the Declaration like the standard of interpretation or the content of the principles that rule and determine the social contract, as well as to discuss what would the meaning be of applying such principles to the Constitution by interpreting it as a social compact, to the point of considering such principles as a form of interpretation of the constitutionality of a certain statute when resolving a particular case.

109. Taking all that into account, a pivotal line of argument of this whole hypothesis will be to further understand what does it mean to interpret the Constitution as a social compact, by ruling out any misconceptions on the

¹³¹ *Vid. supra n. 59.*

extent of Justice Chase's dictum, and moreover, to test this reasoning through a practical and historical example by analyzing a landmark case and evaluating what its outcome would have been had it been resolved through the pursuit of happiness as an element framing the content of the written Constitution. Matters that will be dealt with in a subsequent section of this work.