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Natural Rights and The Declaration of Independence: The Continental Congress and the Attempt To Achieve Consensus (Part V).

The First Continental Congress in 1774 was the first time the colonies convened to unite for joint action since the Stamp Act Congress in 1765. The immediate catalyst was the Coercive Acts or "Intolerable Acts" as the colonists called them. The acts were intended as punishments for the Boston Tea Party of 1773 and to bring Massachusetts in line. They included the Boston Port Act which in March 1774 outlawed the use of the Boston port following the Boston Tea Party, The Massachusetts Government Act (May 1774), which unilaterally altered the government of Massachusetts to bring it under control of the British government, the Quartering Act in early June 1774, which extending earlier legislation required that British troops be housed not only in commercial and empty buildings but in occupied dwellings as well. The Quebec Act, which was intended to solidify Canadian loyalty to Great Britain, in June 1774, also alarmed the colonists in for several reasons: by enlarging Canadian territory into areas east of the Mississippi River and north of the Ohio river, by removing the oath of allegiance to the Protestant faith for public office, making it possible for Catholics, who were the majority religion to hold public office, and finally by giving Canadians a local government that did not have an elective assembly and thus seemed to Americans to be a "tyranny" on their borders. The colonists saw all of these as further ominous signs of Great Britain's larger imperial intentions.

The First Continental Congress had three objectives: to compose a statement of colonial rights, to identify specific grievances, and to provide a plan to restore those rights. The Congress met from September 5 to October 26, 1774.

On the eve of the first Congress, Thomas Jefferson had dysentery and was unable to attend. But he sent along a pamphlet that outlined his views. As we have seen in Part II, Jefferson had favored an argument from "expatriation", arguing that the colonists had natural rights to quit society and found new independent political entities modeled on the laws of Great Britain (which derived from ancient Anglo Saxon law). Present also in the Congress was Richard Bland who had beat Jefferson to the punch and made a very similar argument in 1766 nearly ten years before Jefferson put his thoughts on paper.

But the "quit society" contingent was not the only one present. There were fifty four other attendees from the colonies and many other views of rights were represented in the congress. Present from Massachusetts was Samuel Adams who had argued from a classical Lockean view of natural rights as well as Christopher Gadsden, the representative from South Carolina, who had tried and failed to convince the earlier Stamp Act Congress to base their earlier resolves on natural rights. But there were also others present who had not favored arguments from natural rights. In attendance for example was Stephen Hopkins, from Rhode Island, who had earlier avoided natural rights arguments because he considered the origin of government debatable.[1] John Dickinson, the author of the famous *Farmer's Letters*, was not yet in attendance until the end of the Congress because he had not yet been elected to

the Pennsylvania Assembly, but as we shall see, many of the delegates socialized with him and heard his views during the proceedings.

In short, there were a large number of attendees, many of whom had written about American rights already and who had developed views on the foundation of American rights. As we shall see, one area of deliberation was precisely the question of what foundation should serve as the basis of the colonies' rights.

Natural Rights, Expatriation and Naturalization: The Debates of the First Continental Congress.

On September 8, 1774 Congress debated the foundation of the colonies rights. Later in life, John Adams recalled that the committee debates revolved around two points.

> 1. Whether We should recur to the Law of Nature, as well as to the British Constitution and our American Charters and Grants. Mr. Galloway and Mr. Duane were for excluding the Law of Nature. I was very strenuous for retaining and insisting on it, as a Resource to which We might be driven, by Parliament much sooner than We were aware. The other great question was what Authority We should conceed to Parliament: whether We should deny the Authority of Parliament in all Cases: whether We should allow any Authority to it, in our internal Affairs: or whether We should allow it to regulate the Trade of the Empire, with or without any restrictions.[2]

But Adam's summary years later seems to oversimplify the debate at least when compared with his diary notes of September 8, 1774 which gives much more detail about the debate. In what follows, Adam's summary of the debate is interspersed with my comments which attempt to tease out the fuller arguments made on this day.[3]

> Septr. 8.Thursday. [1774]
> In the Committee for States Rights, Grievances and Means of Redress.
>
> Coll. Lee. The Rights are built on a fourfold foundation--on Nature, on the british Constitution, on Charters, and on immemorial Usage. The Navigation Act, a Capital Violation.

Here Richard Henry Lee, a Virginian and a colleague of Jefferson and Bland in the House of Burgesses, opens discussion with a position like that of Samuel Adams examined earlier, using Nature to complement the argument from Charters and the British Constitution, and ancient privileges or "common law". In the second Continental Congress in May 1776, Lee would be the one to make the initial proposal that the colonies declare independence. As the debate unfolded on this day in September 1774, Lee will reiterate his stance that the colonies should base rights on nature in response to some of the positions of others. What is not yet clear from Lee's comments here is precisely how he understands natural rights and their relationship to the other American rights or to the status of emigration, which remains a serious matter of dispute, as we shall see.

Lee does put a stake in the ground and say that the Navigation Act is a "capital violation." By this Lee is arguing that regulations on trade that pre-dated 1763 and were acquiesced to by the colonies before the Stamp Act constitute violations of American rights. The issue of whether Great Britain should have right to regulate trade would become one of the contentious issues as the congress did its business for the next six weeks. We have already seen various positions on trade. Jefferson had argued that Great Britain had no right to regulate trade because the colonies were independent states. Wilson had made the same claim but from a different position: that Great Britain had forfeited its sovereignty by failing to protect natural rights. Wilson doubted the economic wisdom of needing to regulate trade, but if economists felt that such was the case, then the King could play that role, not Parliament. Precisely which of these positions Lee is invoking is not clear from his comments here. But he is making an implied link between natural rights and the argument that Great Britain should not have a right to regulate American trade.

This was not the first mention of natural rights during the congress. Indeed, two days earlier Patrick Henry had already argued that the colonies were in a state of nature during a debate over how Congress should handle voting procedures among the colonies. Should each colony have equal votes or should population or property of the colonies weigh in as a factor?

> Mr. Henry. Government is dissolved. Fleets and Armies and the present State of Things shew that Government is dissolved. Where are your Land Marks? your Boundaries of Colonies. We are in a State of Nature, Sir…The Distinctions between Virginians, Pensylvanians, New Yorkers and New Englanders, are no more. I am not a Virginian, but an American.[4]

Henry invoked the state of nature to imply that the distinction between colonies was meaningless because they had reverted to a state of nature. Reverting to a state of nature implied that the colonies were no longer subject to any legitimate government and needed to implement new governments with new compacts. Henry was putting forward a more radical view than most would accept, since many were not yet ready to renounce what they still saw to be meaningful political distinctions between the various colonies, let alone claim that the colonies had entered a state of nature by leaving all political sovereignty.

> Mr. Jay. It is necessary to recur to the Law of Nature, and the british Constitution to ascertain our Rights. The Constitution of G.B. will not apply to some of the Charter Rights. A Mother Country surcharged with Inhabitants, they have a Right to emigrate. It may be said, if We leave our Country, We cannot leave our Allegiance. But there is no Allegiance without Protection. And Emigrants have a Right, to erect what Government they please.

John Jay, like Lee and Henry, also endorses the reliance on natural rights. Jay, a moderate lawyer from New York and one of the members of the Congress who would not sign the Declaration of Independence a year and a half later, nonetheless concurs that the law of Nature has to be invoked. The reliance on the laws of nature thus did not necessarily identify one as a

radical or moderate in the debates, contrary to what some assume.[5] Jay made various comments in letters written during the Congress and in debates recorded which indicated that he still had hopes for reconciliation with Great Britain although he could foresee the possibility of reconciliation failing.[6] "The Indignation of all Ranks of People is very much roused by the Boston & Canada Bills. God knows how the Contest will end. I sincerely wish it may terminate in a lasting Union with Great Britain. I am obliged to be very reserved on this Subject by the Injunction of Secrecy laid on all the Members of the Congress."[7] In the notes on the debate on Sept. 26 about how to restore American rights, Jay is quoted as saying that "Negociation, suspension of Commerce, and War are the only three things. War is by general Consent to be waived at present. I am for Negociation and suspension of Commerce." And on Sept 28th, Jay would endorse the Galloway plan discussed below which offered a plan of reconciliation.

But what precisely is Jay's position here in this debate on September 8th? The terseness of the summary makes it possible to read Jay's comments in two different ways. It seems that Jay is taking the "quit society" position like Bland and Jefferson. "A Mother Country surcharged with Inhabitants, they have a Right to emigrate." And therefore in his view "emigrants have a Right to erect what Government they please". In this case, the appeal to the law of Nature could refer to the right to quit society, just as Bland or Jefferson used it. Indeed, later in the debate Jay is quoted as making statements that seem to underscore this position: "I cant think the british Constitution inseperably attached to the Person of every Subject," and "I have always withheld my Assent from the Position that every Subject discovering Land [does so] for the State to which they belong."

Jay would then seem to be holding a view like that of Jefferson and Bland, that emigrants have a right to quit society and if they discover new lands they can erect societies and governments that they like. On this reading, Jay's appeal to natural rights could either refer to the "right to quit society" or "the right to found new governments on principles of nature". If this reading is correct, it is significant that someone like Jay could hold a view like Jefferson and Bland and still be arguing for reconciliation with Great Britain.[8] The particular view of natural rights, therefore, did not necessarily identify where one fell on the continuum favoring independence and strong measures.[9]

> Mr. J. Rutledge. An Emigrant would not have a Right to set up what constitution they please. A Subject could not alienate his Allegiance.

John Rutledge, a lawyer from Charleston South Carolina and member of the South Carolina provincial assembly, disagrees with Jay about the principle of emigration. Rutledges' response to Jay thus lends additional credence to our interpretation of Jay's position. Emigrants may not simply leave a country and set up whatever constitution they want. "A Subject could not alienate his Allegiance." Rutledge then seems to be reiterating the legal opinion anticipated in James Wilson's essay and considered by Jay that allegiance to the Crown travels with subjects wherever they go. Being "a subject" is not a quality that one can alienate through emigration. Adam's notes do not explain how Rutledge would respond to the John Jay's conclusion that "there is no allegiance without protection," that is, to the charge that allegiance is at an end because the Crown failed at its obligations. As the debate unfolds

Rutledge will take the view that American rights can be founded on the British Constitution alone and not on natural rights.

What we see so far is that there was no consensus at this point on whether to base American rights on natural rights or the precise nature and status of emigrants. The rejection of the Bland-Jefferson type position was not simply that colleagues were "in the halfway house of John Dickinson" and uncomfortable with repudiating Parliament's authority over the colonies, although that concern figured in. Jefferson was not after all at the debates in the First Continental Congress. Looking back years later or even from Virginia where he was home sick, that may be how it appeared to Jefferson. But what Adam's notes on the debates suggest is that there were substantive disagreements early in the Congress on the nature of emigrant rights and whether emigrants can leave behind their allegiance to the Crown , their subjectivity to the sovereignty of the state and whether they have the right to found new political entities. At the heart of the debate was the question of whether sovereignty and allegiance travels with emigrants and under what conditions. This was not simply a question of natural rights, although it intersected with that question. Since so many of the members of Congress were lawyers, these were serious philosophical and legal issues that played into the larger question of how much control should the colonies cede to Great Britain as a matter of right.

> Lee. Cant see why We should not lay our Rights upon the broadest Bottom, the Ground of Nature. Our Ancestors found here no Government.

Lee, from Virginia, whom later John Adam's describes as having "a horrid Opinion of Galloway, Jay, and the Rutledges"[10] responds to John Rutledge by taking up his earlier comment about relying on natural rights which Lee here calls "the broadest bottom." Later in the debate Lee will expand on this position and say that "Life and Liberty, which is necessary for the Security of Life, cannot be given up when We enter into Society." This is a good terse summary of the classical Lockean position.

Lee now goes on here to offer his view of the emigration, which he had not stated before: "our ancestors found here no government." Now what precisely is the force of Lee's comments about the ancestors? This would seem to be a response to Rutledge's claim that emigrants can't alienate their allegiance. Does Lee mean to imply, like his colleagues Bland and Jefferson before him, that the emigrants left sovereignty behind and therefore found here no governments? That is one way to read Lee's comment. But earlier in the debate Lee had said that "The Rights are built on a fourfold foundation--on Nature, on the british Constitution, on Charters, and on immemorial Usage." "If our ancestors found here no government" why should the colonies rights be founded on the British constitution and charters? Perhaps Lee also held the view like his colleagues Bland and Jefferson that the ancestors set up independent states here, founded on rights from nature, and then chose to adopt the British constitution and establish charters with the King.

> Mr. Pendleton. Consider how far We have a Right to interfere, with Regard to the Canada Constitution. If the Majority of the People there should be pleased with the new Constitution, would not the People of

> America and of England have a Right to oppose it, and prevent such a Constitution being established in our Neighbourhood.

Edmund Pendleton, another lawyer and member of the Virginia House of Burgesses, is also one of the individuals that Jefferson describes in the "half-way house of John Dickinson." Here Pendleton implies that peoples do not have an unlimited right to set up new constitutions, and may be responding to Lee's comments that had come earlier. Wouldn't the people of America and England want to have a say about any constitution set up in neighboring Canada and have a right to do so? This was no idle speculation. The colonists were deeply worried about the recent Quebec Act and the changes to government that Great Britain had recently implemented there. As John Jay noted, "The Indignation of all Ranks of People is very much roused by the Boston & Canada Bills."[11] And John Sullivan had written that "We have selected those Acts which we determine to have a Repeal of … among which Acts is the Canada Bill, in my opinion the most dangerous to American Liberties among the whole train."[12] Among the concerns with the Canada bill were the official establishment of the Roman Catholic Religion, the institution of what appeared to the colonies to be an arbitrary government, and the extension of the Colony's land by excessive limits. [13] The colonies feared that the new rules in Canada were part of broader sweeping changes afoot in the empire to take away liberties, including the liberty of Protestant religion.

Here Pendleton seems to be appealing for a consistent application of principles: Even if the French people of Canada were happy with the new constitution by having consented to it, do not the people of America and England have a right to oppose it? Adam's notes do not offer Pendleton's extrapolation of this position. But one can assume that Pendleton was making an analogy. If we and the people of England have a right to oppose the Canada Bill, even though the local population in Quebec consents, should the people of America have an unconstrained right to set up a new Constitution without input from England? Pendleton does not explain the legal or constitutional basis of his view that there is a "right to interfere" with another constitution "in our Neighbourhood." Perhaps he is invoking a theory of the empire and arguing that the relationship of the parts to one another and the parts to the whole are matters of mutual concern.

> Lee. It is contended that the Crown had no Right to grant such Charters as it has to the Colonies--and therefore We shall rest our Rights on a feeble foundation, if we rest em only on Charters--nor will it weaken our Objections to the Canada Bill.

Lee, who earlier was pressing for the importance of natural rights, now repeats doubts we have seen in earlier colonial writings about relying on charters alone. In his view, the Charters are "a feeble foundation" because the Crown never had a right to grant such charters in the first place. The view that the lands were granted to the colonies by the King alone and were never under Parliamentary control is thus a weak argument.[14] To rest on Charters alone then would be to rest on feeble foundations. Both sides, then—those favoring an argument from charters and those favoring an argument from natural rights—view the arguments of the other side as resting on "feeble foundations".

> Mr. Rutledge. Our Claims I think are well founded on the british Constitution, and not on the Law of Nature.

Rutledge, who earlier in the debate had rejected arguments based on emigration, expresses his conviction that the British constitution adequately grounds the colonies' claims, without an appeal to the Law of Nature. This view is consistent with his view of emigration. Since the émigrés cannot relinquish the sovereignty of the state, then the best way to argue for rights is from the rights that they inherited in the British Constitution.

> Coll. Dyer. Part of the Country within the Canada Bill, is a conquered Country, and part not. It is said to be a Rule that the King can give a Conquered Country what Law he pleases.

Now Colonel Eliphalet Dyer, from Connecticut, and a member of the earlier Stamp Act Congress, raises a question about the status of a conquered country and its relationship to the Canada bill. We saw in Part II of this essay that the issue of whether the colonies were discovered or conquered lands had legal ramifications. Blackstone had claimed that the colonies were conquered lands and thus under Parliament's authority for that reason. James Wilson and Jefferson had disputed this contention with Wilson arguing they were not conquered lands. Jefferson though acknowledging that they were conquered argued that they were conquered by emigrants who had a right to quit their society and found new states. Dyer here refers to the view that if a land is conquered, the King can give whatever law he pleases to it. Dyer then may be simply explaining why the Crown has the right to make the new Quebec Act. But his words may have other resonances, suggesting that the King could also give whatever laws he likes to the Americans if the colonies were thought to be conquered.

> Mr. Jay. I cant think the british Constitution inseperably attached to the Person of every Subject. Whence did the Constitution derive is Authority? From compact. Might not that Authority be given up by Compact.

Jay, perhaps in response to Dyer, further develops his view stated earlier that "Emigrants have a Right, to erect what Government they please". Now he gives a justification of this right, a justification that was never given explicitly provided by either Bland or Jefferson. If the authority of the Constitution comes from compact, then the authority may be given up by compact. This would seemingly give one account of how the right to quit society is anchored in natural rights theory.

But there is an ambiguity in Jay's statement that goes to the heart of the question of whether the "right to quit" a society is a classical Lockean concept in the way Americans are using it. Is the renunciation of the compact an individual right or a right of the people as a whole? Neither Jefferson nor Bland adequately addressed this question. After all, according to natural rights theory, the constitution or compact derived its authority from the whole people who consented to it. Therefore "giving up the compact" could be construed as a right of the people as a collective rather than a right of the individual. Locke certainly inclined towards the former view seeing the right to end the social contract as stemming from the will of the people as a whole in

response to the abuse of power. Jefferson and Bland, for their part, emphasized the individual right to quit society in which chance not choice had placed them.

But Jay does not explicitly take note of this question just as Bland and Jefferson had not done so either. Jay's words seem to imply a collective understanding of this right. Giving up authority "by Compact" means that some sort of collective decision had occurred to end the authority of a government. The group that created the compact had ended it. But it is possible Jay has an individual right in mind, since an individual "consents to the compact" at maturity and could therefore could give up the compact, although this was not a position Locke accepted.[15]

> Mr. Wm. Livingston. A Corporation cannot make a Corporation. Charter Governments have done it. K[ing] cant appoint a Person to make a Justice of Peace. All Governors do it. Therefore it will not do for America to rest wholly on the Laws of England.
>
> Mr. Sherman. The Ministry contend, that the Colonies are only like Corporations in England, and therefore subordinate to the Legislature of the Kingdom. The Colonies not bound to the King or Crown by the Act of Settlement, but by their consent to it. There is no other Legislative over the Colonies but their respective Assemblies. The Colonies adopt the common Law, not as the common Law, but as the highest Reason.

William Livingston, a lawyer from New Jersey and member of the Essex County, NJ, committee of correspondence, and father-in-law of John Jay, is credited with a cryptic remark about corporations. The gist of the comment appears to deal with the claim by some British writers that the colonies were analogous to corporations which could pass their own bylaws but were still subordinate to parliament. Here Livingston argues "it will not do for America to rest wholly on the Laws of England" and seems to rest his conclusion on the fact that one type of legal authority (a corporation or the King) can't appoint another type of role of the same sort. Whether Livingston is endorsing charters or natural rights is not clear however from Adam's notes.

The comment of Roger Sherman, a lawyer from Connecticut and later member of the committee appointed to write the Declaration of Independence, is also of interest because he argues that the colonies are only bound to the King "*by their consent",* a position that appears to be like Jefferson's and Jay's namely, that the emigrants came here as free people. Sherman argues "The Colonies adopt the common law, not as the common Law, but as the highest Reason," a position similar to that seen in earlier writers like Samuel Adams. Thus the colonies are not subordinate corporations but independent political entities that are entitled to their own respective Assemblies and they are not subject to any other legislative body.

> Mr. Duane. Upon the whole for grounding our Rights on the Laws and Constitution of the Country from whence We sprung, and Charters, without recurring to the Law of Nature--because this will be a feeble Support. Charters are Compacts between the Crown and the People

> and I think on this foundation the Charter Governments stand firm. England is Governed by a limited Monarchy and free Constitution. Priviledges of Englishmen were inherent, their Birthright and Inheritance, and cannot be deprived of them, without their Consent.
>
> Objection. That all the Rights of Englishmen will make us independent. I hope a Line may be drawn to obviate this
>
> Objection. James was against Parliaments interfering with the Colonies. In the Reign of Charles 2d. the Sentiments of the Crown seem to have been changed. The Navigation Act was made. Massachusetts denyed the Authority--but made a Law to inforce it in the Colony.

James Duane, another lawyer from New York and colleague of John Jay, seconds the view that the rights should be founded on Charters and British rights "from whence we sprung" rather than natural rights which "will be a feeble Support". Interestingly Duane disagrees with Jay who does want to base American rights on natural rights, even though both would vote together for a moderate position in favor of the Galloway plan. As noted before, the differences over natural rights did not necessarily result in diverging positions on moderation at this stage of the game. One wishes something more was said about why Duane thought natural rights a more feeble support than the British Constitution and Charters. But in Duane's own notes of what he said on this day, it is clear he thinks he is elaborating a better more solid justification of rights.

> It is necessary that the first point, our Rights, should be fully discussed and established upon solid Principles: because it is only from hence that our Grievances can be disclosed; & from a clear View of both that proper Remedies can be suggested and applied. To ascertain the Constitutions of the Colonies has employed the Thoughts and the Pens of our ablest Politicians. But no System which has hitherto been published is solid or satisfactory.

Duane's comments suggest a view we have seen before that arguments from natural rights or emigration are not "solid or satisfactory." Instead he wants to "place our Rights on a broader & firmer Basis to advance and adhere to some solid and Constitutional Principle which will preserve Us from future Violations…Let it be founded upon Reason and Justice, and satisfy the Consciences of our Countrymen. Let it be such as we dare refer to the Virtuous and impartial part of Mankind, and we shall and must, in the issue of the Conflict, be happy & triumphant."

Though rejecting natural rights as a basis of American rights, Duane still considers his arguments from British right founded on "Reason and Justice." In his view, the emigrants brought their British rights with them and those rights are inalienable. The emigrants were

> blessed with the Priviledges which they never meant nor were supposed, nor coud forfeit, (by removing to a distant a more remote part of the English Empire) by altering their local situation within the same Empire. The priviledges of Englishmen were inherent They were

> their Birth right and of which they coud only be deprived by their free Consent. Every Institution legislative and Juridical, essential to the Exercise & Enjoyment of these Rights and priviledges in constitutional Security, were equally their Birth right and inalienable Inheritance. They coud not be with held but by lawless oppression and by lawless oppression only can they be violated.

Here Duane makes explicit the view that the emigrants never intended to give up their rights as Englishmen, and more importantly they could not forfeit them even if they had wanted to. These rights were birth right as well as "inalienable Inheritance". Thus Duane holds the view that the emigrants brought this inheritance with them, that Parliament could not take it away, but also that the colonist are subjects of the empire and cannot renounce the sovereignty of the British legislature. By "lawless oppression only can they be violated."

Duane considers two possible objections to his position. First he considers the possible objection that the argument from British rights will lead to independence. Duane's concern here suggests that it was not only arguments from natural rights that were thought to have "radical" implications.[16] Indeed, we have seen that James Wilson and Samuel Adams did start from the position that the ancestors brought British rights with them, but still ended up arguing that the colonies were independent states. Duane was worried that his position could be construed in the same way and therefore he emphasizes that his view did not have to lead in that direction. What is interesting is that even those who rejected natural rights theory were still worried and defensive that their arguments would seem like calls for independence.[17] We thus have additional evidence that the arguments for and against natural rights did not neatly align with radical and moderate leaning positions.

> Lee. Life and Liberty, which is necessary for the Security of Life, cannot be given up when We enter into Society.

Lee picks up again his earlier emphasis on natural rights but now emphasizes that basic natural rights are not alienated when we enter society. Lee's statement may be a general statement about natural rights or, given the sequential order of these notes, it could be response to Duane's emphasis on emigrants being unable to forfeit the British rights. In response, Lee makes the classical Lockean argument that natural rights are not given up when one enters society. Even if the ancestors were subject to British rights, those rights do not supersede rights of life and liberty. Therefore, the claim that the emigrants were subject to British rights does not deal with the challenge of natural rights: namely, that that sovereignty never has a right to supercede more basic rights. Here Lee sounds very much like Samuel Adams and Wilson, and less like Jefferson and Jay.

> Mr. Rutledge. The first Emigrants could not be considered as in State of Nature--they had no Right to elect a new King.
>
> Mr. Jay. I have always withheld my Assent from the Position that every Subject discovering Land [does so] for the State to which they belong.

Rutledge again reiterates the view that emigrants cannot divest themselves of all their rights and obligations. Since they are still British subjects, they cannot be in a state of nature and had no right to "elect a new King." The question of allegiance to the King and subjection to parliament's authority were two separate though related issues. Those like Jefferson who thought the emigrants had a right to quit society thought that the colonists were neither subject to Parliament's authority nor had an obligation to the King. Instead they essentially adopted or elected the King as their own. The compacts then were not gifts under the King's authority, but agreements entered into by independent states. Jay for his part reiterates the view that all emigrants do leave behind the sovereignty of the state when discovering new lands. As he said earlier, "Emigrants have a Right, to erect what Government they please." By implication this includes choosing the King they want.

The Galloway Alternative

A lengthy summary of Joseph Galloway's speech on rights, appears in this next and final section of Adam's notes for this day of debate on American rights. It worth pausing to deepen our understanding of Galloway's position both because it is somewhat cryptic here in Adam's notes but also because it represents still another important alternative view of government and rights considered during the Congress as the debate unfolded. Adams' more detailed notes on this speech in contrast to others is interesting, perhaps signaling that this was an alternative view that was less familiar or more problematic than the others he was recording. He may not yet have understood where Galloway would be going with the philosophical principles he was beginning to outline here. Indeed, it is not even clear whether on this day Galloway tipped his hand to the views that he would argue for later in the proceedings.

> Mr. Galloway. I never could find the Rights of Americans, in the Distinctions between Taxation and Legislation, nor in the Distinction between Laws for Revenue and for the Regulation of Trade. I have looked for our Rights in the Laws of Nature--but could not find them in a State of Nature, but always in a State of political Society. I have looked for them in the Constitution of the English Government, and there found them. We may draw them from this Soursce securely.

Galloway, a lawyer from Philadelphia and friend of Benjamin Franklin, was first elected to the Pennsylvania Assembly in 1757 and remained a member until after the revolution. Galloway is well known for ultimately becoming a British loyalist and leaving the country in 1778. He and Dickinson had been adversaries in local politics with Galloway favoring the abandonment of a Proprietary government in Pennsylvania, a view he shared with Benjamin Franklin, in favor of a Royal government. His growing dissatisfaction with the emerging colonial discontent is partially articulated here in the First Continental Congress.

Galloway begins his speech here by taking a swipe most of the major positions articulated by other American writers, particularly his long time Pennsylvanian opponent John Dickinson, the famous author of the Farmer's

Letters. "I never could find the Rights of Americans, in the Distinctions between Taxation and Legislation, nor in the Distinction between Laws for Revenue and for the Regulation of Trade." Recall that Dickinson in his famous Farmer's Letters had argued that Great Britain had no right to make any laws for raising revenue, whether they were aimed at external or internal laws of the colonies, but that Parliament did have a right to regulate trade. [18] These distinctions Galloway finds to be nonsensical. Either the colonies are under the sovereignty of Parliament or they are not. Parliament either has authority over all matters or it has none. All of these distinctions have the colonies half-in and half-out.

Galloway, as we have seen, was not the only one to find these distinctions as increasingly problematic. Jefferson, Wilson, Benjamin Franklin, Lee and others had by this time all come to see such distinctions as problematic. But these other men were arriving at the opposite conclusion to Galloway. Instead of arguing that the colonies should be all "out" of Parliament's sovereignty, Galloway was arguing that the colonies should be "all in."

Galloway also rejected natural rights as a source for understanding colonial rights. "I have looked for our Rights in the Laws of Nature--but could not find them in a State of Nature, but always in a State of political Society. I have looked for them in the Constitution of the English Government, and there found them." Why Galloway doesn't find them in a State of Nature is not recorded here, but it is clear that Galloway regards the sovereignty of the political entity as a key established principle of government that is being jeopardized by the theories of his colleagues.

In his later pamphlet published after the congress concluded Galloway is vicious in his characterization of the arguments used by his colonial colleagues. As he puts it there:

> In a controversy of such great moment, it is of the first importance to ascertain the standard by which it ought to be decided. This being unsettled, the merits can never be determined, nor any just decision formed. Hence it is, that we have seen all the American writers on the subject, adopting untenable principles, and thence rearing the most wild and chimerical superstructures. Some of them have fixed on, as a source from whence to draw American Right, "the laws of God and nature,", the common rights of mankind, "and the American charters." Others finding that the claims of the colonies could not be supported upon those pillars, have racked their inventions to find out distinctions, which never existed, or nor can exist in reason or common sense: A distinction between a right in parliament to legislate for the colonies and a right to tax them—between internal and external taxation—and between taxes laid for the regulation of trade, and for the purpose of revenue. And after all of them have been fully considered, even the authors themselves, finding that they have conveyed no satisfactory idea to the intelligent mind, either of the extent of parliamentary authority, or of the rights of America, have exploded them, and taken new ground, which will be found equally indefensible.[19]

Galloway is here criticizing the various emerging American theories of rights for not dealing adequately with the question of sovereignty. So what then does Galloway found his argument on?

> It is a dispute between the supreme authority of the state, and a number of its members, respecting its supremacy, and their constitutional rights. What other source to draw them from, or standard to decide them by, can reason point out, but the principles of government in general, and of that constitution in particular, where both are to be found, defined and established?[20]

What is interesting here is that Galloway appeals to "the principles of government in general" yet scoffs at others who talked about "the laws of God and nature and the common rights of mankind." He goes on to base his own theory on "the principles which are essential in the constitution of all societies, and particularly in that of the British government." Galloway thus seems to distinguish "general principles" from "natural rights" or "common rights", holding a view that there are universal principles that are not "natural rights, "at least in the way that others mean them. "Natural rights" then is only one kind of universal right founded on reason. But there are others.

Later in his essay, however, Galloway does seem to rely on the conception of natural rights as when he writes that "Protection from all manner of unjust violence, is the great object which men have in view, when they surrender up their natural rights, and enter into society."[21] By "surrender up", Galloway may be implying that the entrance into society means that one has renounced natural rights. Locke of course thought that some natural rights were also sacrificed when one entered society, such as the right to do what one pleased or to act as judge and exact punishment. Whether Galloway means the same thing here or something more is not entirely clear. But in any case, the question of natural rights is irrelevant because natural rights do not provide a justification for Americans to cast off their allegiance to Great Britain.

> We shall not find it in the "laws of nature;' the principles upon which those laws are founded, are reason and immutable justice, which require a rigid performance of every lawful contract; to suppose therefore, that a right can thence be derived to violate the most solemn and sacred of all covenants; those upon which the existence of societies, and the welfare of millions depend; is, in the highest degrees, absurd."[22]

Galloway is arguing here that the right to throw off sovereignty of Great Britain cannot be derived from natural rights. Since the laws of nature are founded on reason and immutable justice how can they be assumed to justify "violating the most solemn and sacred of all covenants" namely the original compact of a society and in particular the British constitution. It appears, therefore, that Galloway fundamentally disagrees with how some of his American thinkers understand the implication of the laws of nature. It is not that he denies the existence of natural rights per se. It is rather that natural rights do not provide the basis for the American rights.

I have looked for our Rights in the Laws of Nature -- but could not find them in a State of Nature, but always in a State of political Society."[23] In his view

"there is no position more firmly established, in the conduct of mankind, Than that there must be in every state a supreme legislative authority, universal in its extent, over every member."[24] Here Galloway seems to be appealing to "common practice" and "universal standard" to emphasize his view that there must be a supreme legislative authority over every member. Supporting this view, Galloway cites a number of authorities including Locke, Burlamaqui, and Tully.[25] Galloway cites Locke several times to justify his views. But he does so, not because he bases his own view on Locke particularly, but because he knows that Locke carries weight with his opponents. "I shall add the opinon of Mr. *Locke*, because it has been often heretofore relied on by the American advocates, as worthy of credit."[26]

There is in fact nothing controversial in Galloway's initial position that every society needs a supreme sovereignty or that the foundation of American rights was in the British Constitution. For Galloway the key issue is whether the Americans are part of the British state "or so many independent communities in a state of nature." Disagreeing with colleagues like Lee and Jay in the Congress, Galloway argues that the colonies are indeed part of the British empire and not independent states. Why?

> Power results from the Real Property, of the Society.
> The States of Greece, Macedon, Rome, were founded on this Plan…
> None but Landholders could vote in the Comitia, or stand for Offices.
>
> English Constitution founded on the same Principle. Among the Saxons the Landholders were obliged to attend and shared among them the Power. In the Norman Period the same. When the Land holders could not all attend, the Representation of the freeholders, came in. Before the Reign of H[enry] 4., an Attempt was made to give the Tenants in Capite a Right to vote. Magna Charta. Archbishops, Bishops, Abbots, Earls and Barons and Tenants in Capite held all the Lands in England.
>
> It is of the Essence of the English Constitution, that no Law shall be binding, but such as are made by the Consent of the Proprietors in England.

Underlying Galloway's arguments about sovereignty is a specific view of rights that links the source of rights to ownership of property. According to this view, landed property was thought to be the most stable source of power for the state. The State owns land and divides up representation based on ownership of land. Thus rights are founded on the ownership of property and do not inhere in individuals outside of the state. It is ownership of land that gives one a right to vote, according to Galloway's understanding of the British Constitution. The right of representation is derived not from "nature" or one's equality per se, but from ownership of land within the State's sovereignty. We recall that James Otis had earlier discussed and dismissed theories of rights founded in property.[27] Other colonial writers had rarely mentioned this theory of rights' origins. But Galloway makes this theory the basis of rights in general. Here and in his latter pamphlet, Galloway surveys how this principle developed in Anglo Saxon history and then remained firm in feudal law as the basis of representation.[28]

What, then, of the status of the American ancestors?

> How then did it stand with our Ancestors, when they came over here? They could not be bound by any Laws made by the British Parliament--excepting those made before. I never could see any Reason to allow that we are bound to any Law made since--nor could I ever make any Distinction between the Sorts of Laws.
>
> I have ever thought We might reduce our Rights to one. An Exemption from all Laws made by British Parliament, made since the Emigration of our Ancestors. It follows therefore that all the Acts of Parliament made since, are Violations of our Rights.
>
> These Claims are all defensible upon the Principles even of our Enemies -- Ld. North himself when he shall inform himself of the true Principles of the Constitution, &c.

In these notes recorded by Adams, Galloway seems to be taking a position that the Ancestors were only bound to the laws made before emigration, presumably because at that stage they were still owners of land under the power of the state. Thus Galloway here suggests that the only rules binding on the emigrants were the ones in force when they left. Any law made by Parliament afterwards was a violation. The emigration then provided a dividing line, demarcating when Parliament's authority ended. This view seems to lead in the direction of thinking of the colonies as independent entities after the migration.

> I am well aware that my Arguments tend to an Independency of the Colonies, and militate against the Maxim that there must be some absolute Power to draw together all the Wills and strength of the Empire.

This is as far as Adam's notes record Galloway's speech. We do not know whether Adam's broke off because Galloway revealed his hand of where he was really going or because Galloway had not yet fully articulated view. But from speeches later that month and from his essay written after the Congress, it is clear that Galloway came to a very different position.

Elaborating on the status of the ancestors later, he makes it clear that the only solution to the emigrants' status is either to declare independency or set up a Plan of Union that would give Americans representation in their legislature while also keeping them under British sovereignty. On September 28th, Galloway proposed a set of resolutions and a "Plan of Union" for the colonies that ironically anticipated in several respects the final constitution of the United States. In this plan, Galloway proposed the creation of a grand Council, or legislative branch, to be chosen by the representatives of the colonies. The General Council would act as a cross-colony legislature and each colony would retain its present constitution and powers under this legislature. The Grand Council would be presided over by a President-General who would be appointed by the King and would exercise all the legislative rights, powers, and authorities necessary for regulating and administering all the general policy and affairs of the colonies. This branch would be an inferior branch of the British legislature. The assent of both legislatures (the British and the

American) would be needed for any law to go into effect. When presenting his proposal, Galloway also had some forward looking things to say about the regulation of trade: "The Right of regulating Trade, from the local Circumstances of the Colonies, and their Disconnection with each other, cannot be exercised by the Colonies." The idea that the colonies could not regulate trade among themselves, without a neutral legislative body above them, was an idea central to the Constitution proposed in 1787.

In his pamphlet, Galloway admitted his plan may not be perfect

> but it is an universally prevailing opinion, that the colonies cannot be represented in parliament, I know of none other which comes so near to them; and it is most evident, upon a due consideration of it, that the rights of American would have been fully restored, and her freedom effectually secured by it. For under it, no law can be binding on America, to which the people, by their representatives, have not previously given their consent: This is the essence of liberty, and what more would her people desire?[29]

In this proposal, Galloway was attempting to address both the demands for American representation while still meeting the obligation of Parliament's sovereignty, which as we shall see, was still a requirement in his view of government. Other similar plans had been proposed both in the colonies and in Britain itself since the Stamp Act.[30] But the delegates of the Congress were not ready for such a plan, in part, because it may have been too conciliatory. Ironically, however it is likely that Galloway's plan also partly failed because the colonies were not yet ready for a "United States" legislature which superceded the authority of the independent colonies themselves. That idea was still controversial in 1787 when the debates over the Constitution were occurring. Henry Lee for example commented on Galloway's proposal that "We shall liberate our Constituents from a corrupt House of Commons, but thro them into the Arms of an American Legislature that may be bribed by that Nation which avows in the Face of the World, that Bribery is a Part of her System of Government."[31] Whether this was just a worry over British influence or also a worry about a power above the colonies is debatable.

Galloway's plan and ideas was given significant discussion during the Congress on Sept 28th but was tabled for later discussion and then reconsidered and rejected again on October 22. After the Congress concluded, Galloway would go on to further develop his views of and justification of his plan. In that context, he further developed his ideas about the status of the ancestors and their rights in land.

> The lands upon which the colonies are established must be considered, as they truly are, either discovered, or conquered territories. In either case the right of property is in the state, under the license or authority of which they were discovered or conquered. This property being vested in the state, no subject can lawfully enter upon, and appropriate any part of it for his own use, without a commission or grant from the immediate representative for that purpose. [32]

Since land confers rights, Galloway holds the position that rights travel with people if they move from one territory to another within a government. But if

people leave a government's territory for the land under control of another state, they thereby become subject to that state's sovereignty. To justify this position, Galloway argues that the American colonies were discovered by Sebatian Cabot at the behest of King Henry the 7th. Thus the people brought over their rights and duties with them since they moved from one land of the British empire to another land of the same state.[33]

From these assumptions, Galloway argues that it is an absurdity to say, as Jefferson or Wilson did, that the colonies could have an allegiance to the King and not be subject to the authority of Parliament. For the King is part of the sovereign legislature and derives his power from the fact that he represents the supreme legislature. It is an "inextricable absurdity" to claim that the Americans acknowledge the King's power but reject Parliaments'.[34]

While Galloway insists that the colonies are still subject to the sovereignty of Parliament and the King, he does acknowledge that the Americans have lost some of their rights which need to be restored to them. This loss was the result of the fact that the lands that the colonists settled were never foreseen in the original British constitution.

> America not being known or thought of when the constitution was formed, no such provision was then made. But the right to share in the supreme authority was confined to the territory at that time, intended to e governed by it. And at the time our ancestors left the mother country, it seems none was established. How this happened is not material to my subject—they came over, perhaps, without thinking of the importance of the right or their poverty…prevented their claim to it.[35]

Galloway sees the lands the ancestors settled as British lands and therefore the emigrants have a right of representation in Parliament and are bound to the laws made by that body. In the past that right was overlooked by both the emigrants and the state, but the right should be and can be restored to them under Galloway's "Plan of Union".

To sum up, Galloway recognizes the category of natural rights, but does not think natural rights have any implication for the American situation. Instead he bases his argument on "general principles" of government. Key is the principle of sovereignty. A state has ownership over land and it is the state that distributes rights in that land to the people who are part of it. Once individuals belong to a society, they are subject to its sovereignty, which is tied to land. Sovereignty cannot be thrown off by moving to another part of that same state's land. Because the ancestors of the colonies were in fact moving to another part of land under the sponsorship of the state of Great Britain, they are not entitled to deny the supreme sovereignty of the state but they are entitled to the rights of living on land owned by the state.

When Galloway presented his plan on September 28, it is not surprising that James Duane supported him. Duane as we have seen held a view that was similar to Galloway's, arguing that natural rights were irrelevant and that the emigrants could not alienate their status as subjects. But it is somewhat surprising that John Jay also endorsed the Galloway plan. After all, Jay had argued during the debate that emigrants did not bring the sovereignty of the

state with them. Jay, then, must have been willing to endorse a practical solution that would attempt to avoid war, even though he and Galloway had quite different views of rights.

It is interesting to note that John Adams was still making positive statements about Galloway even after Galloway's September 28th proposal. As late as October 10th, after Galloway had proposed his Plan of Union, Adam's still describes Galloway in as in the class of "sensible and learned but cold Speakers". The Galloway's plan did not, in John Adam's view, place Galloway out of the category of sensible speakers.

The Declaration of Rights and Grievances

The detailed look at Adam's notes on September 8 illustrates just how diverse and unresolved were the colonists' views on American rights. It would take another six weeks before Congress would finally publish its "Declaration of Rights and Grievances" in mid-October.[36] On September 9, 1774, the day after the first debate on rights, "The Comee. met, agreed to found our Rights upon the Laws of Nature, the Principles of the english Constitution & Charters & Compacts; ordered a Sub. Comee. to draw up a State of Rights".[37] In this short summary from Samuel Ward's diary, we see that Congress did begin to define a position and rule out some options. *First of all, congress did decide that natural rights would be included as one of the foundations of American rights.*[38] Those who were against relying on natural rights like Duane, Rutledge and Galloway lost the debate. At this point, the colonies had collectively agreed to specifically name natural rights as one of their founding rights. Alongside natural rights, the Congress not surprisingly listed the English constitution, charters and compacts, acknowledging those sources of rights as well. How all of these rights fit together was not yet clear.

But the endorsement of natural rights did not necessarily resolve a number of critical questions that were left open and referred to the work of committees. Conspicuously absent was any clear statement on the ancestors' status. Did the ancestors bring British rights with them to the new lands or did they set up new and independent states? In addition, Congress had not yet resolved all the thorny philosophical questions about the nature and extent of political sovereignty nor come to agreement on a theory of the British Empire. What was the nature of sovereignty of the state and empire and how did it relate to natural rights? Did British sovereignty extend to the colonies and what made one expansion of land in the empire a "colony" versus a part of the core state? Was sovereignty a characteristic of the King only or of the whole British government including the Commons and House of Lords? How did states acquire new lands and how did the right of nations relate to the rights of individuals. These were the many philosophical and political questions at stake in the debates on September 8th but not yet resolved by the decision to endorse natural rights.

It would take the Congress up to six weeks longer working in relative secrecy to finally publish its Declaration of Rights and Grievances, sometime between October 14th and 18th. During this six week period a subcommittee of twenty four (two from each colony present and almost half of the forty-five delegates present) [39] was appointed to deliberate on the colonies' rights and grievances and a separate committee of twelve (one from each colony) was appointed to consider trade

regulations. Many of the delegates who had spoken on September 8th were included in the committee of twenty four. Through the month of September, Congress heard subcommittee reports, endorsed the Suffolk resolves[40], and agreed to a non-importation and non-exportation resolution as measures to restore American rights. The Congress also debated and tabled Galloway's Plan of Union discussed above.[41]

Into October, discussion kept spilling unavoidably into philosophical and political theory. In debate over Richard Henry Lee's proposal that the colonies create militias for defensive purposes, Patrick Henry reiterated his view that the colonies were in a state of nature and therefore should take on the obligation to prepare and pay for their own defense.[42] John Adams also drafted a set of resolutions that proposed the creation of militias.[43] Others like Ed Rutledge, Harison, Low and Richard Bland argued that the creation of militias would be regarded as a provocative move on the colonies part and belie any attempts at reconciliation.[44]

There was also significant debate on the question of whether Parliament should be allowed to regulate trade. The latter question was partly tied into the philosophical and political questions left unresolved. As early as September 14th, Adams wrote that he "Visited Mr. Gadsden, Mr. Deane, Coll. Dyer, &c. at their lodgings. Gadsden is violent against allowing to Parliament any Power of regulating Trade, or allowing that they have any Thing to do with Us. Power of regulating Trade he says, is Power of ruining us -- as bad as acknowledging them a Supream Legislative, in all Cases whatsoever. A Right of regulating Trade is a Right of Legislation, and a Right of Legislation in one Case, is a Right in all. This I deny."[45] Adams' comment "This I deny", implied Adams held the view that it was possible to grant a right to regulate trade without giving up rights in all cases. As we shall see, something like this view is articulated in the final declaration of rights that would be published late in mid-October. Similarly, delegates like Samuel Ward took on and rejected various assumptions that others had invoked to justify Parliament's right to regulate trade. Among others, he noted that "The Parliamt. ought not to be allowed the Regulation of our Trade for many Reasons. 1st. Because We having no Voice in their Election they are not our Representa[tive]s & consequently have no Rights to make Laws for Us in any Case whatsoever."[46]

In contrast to Gadsden and Ward, Duane, who held that the ancestors did and could not forfeit their British rights, "has had his Heart sett upon asserting in our Bill of Rights, the Authority of Parliament to regulate the Trade of the Colonies. He is for grounding it on Compact, Acquiescence, Necessity, Protection, not merely on our Consent.."[47] " I think Justice requires that we should expressly ceed to Parliament the Right of regulating Trade." [48] Galloway appealed to "necessity" as the argument for allowing Parliament to regulate trade, adopting an argument that ultimately anticipates the need for the federal government to regulate commerce between the states:

> Is it not necessary that the Trade of the Empire should be regulated by some Power or other? Can the Empire hold together, without it. No. Who shall regulate it? Shall the Legislature of Nova Scotia, or Georgia, regulate it? Mass. or Virginia? Pensylvania or N. York. It cant be pretended. Our Legislative Powers extend no farther than the Limits of our Governments. Where then shall it be placed. There is a

> Necessity that an American Legislature should be set up, or else that We should give the Power to Parliament or King. [49]

There were also other delegates like Samuel Chase and John Adams who found a legitimate position between the two polar views. As Samuel Chase put it, "I am one of those who hold the Position, that Parliament has a Right to make Laws for us in some Cases, to regulate the Trade-and in all Cases where the good of the whole Empire requires it." [50]

Although not present for the debates, it was clear that John Dickinson was weighing in with his views as well. Visits to Dickinson are mentioned by various delegates and quite a number of times by John Adam's himself.[51] As Adam's put it, " Mr. Dickinson is a very modest Man, and very ingenious, as well as agreable. He has an excellent Heart, and the Cause of his Country lies near it. He is full and clear for allowing to Parliament, the Regulation of Trade, upon Principles of Necessity and the mutual Interest of both Countries."

In the end, the colonies were split down the middle on the question of trade: Five Colonies were for allowing regulation of trade, five against it, and two divided among themselves, that it, Massachusetts and Rhode Island.[52] The fault line on regulation of trade was even more pronounced than the disagreement about natural rights, showing that the question of trade was in some sense independent of the question of natural rights.

The American Bill of Rights

During the proceedings of the Continental Congress, the Declaration of Rights and Grievances was referred to by many delegates as an American Bill of Rights. The Bill of Rights was finally completed and published between Oct 14th and 18th.[53] Silas Deane in a letter to Thomas Mumford on Oct. 16th summarized the sentiments of many at the end of the work:

> No Resolution of any Consequence, and I dare say, you will judge, some of them so, has been pass'd in the Congress, but with an Unanimous Voice, though they have many of them taken up Days in close, & at Times, warm debate. Three capital, & ,general Objects were in View From The First -- A Bill of American Rights, -- A List of American Greivances, -- And Measures For Redress. You will easily consider the First the most important Subject that could possibly be taken up by Us, as on the Fixing them rightly, with precision, yet sufficiently explicit, & on a certain, and durable Basis, such as the Reason & Nature of things, the Natural Rights of Mankind, The Rights of British Subjects, in general, and the particular, & local privileges, Rights, & immunities of British American Subjects, considered in degree dis tinct, yet connected with the Empire at large. On This I say, all the Consistency at least, of Our future proceedings, in America depends, and in a great degree, the peace, & Liberty, of the American Colonies In doing this, We have proceeded with the Utmost Caution knowing how critical and important an undertaking it was, & how fatal a misstep must be, not to Ourselves only but to all posterity.[54]

As we now turn to the actual resolutions that were published, we find that Congress not only endorsed natural rights but now clarified the thornier question of the emigrants status as well as the related question on trade. Some historians represent these declarations as a kind of compromise position. But given the range of views that were represented, the resolutions clearly take a stand on several of the critical and debated issues. [55] Moreover, a compromise implies that the final position was not coherent in its own right. But as we shall see, the Congress did define a philosophically coherent position on natural rights, the ancestor's status, the sovereignty of Parliament, allegiance to the King and the question of trade.

Beginning first with the list of grievances that it had worked on, the declaration then provides the basis of its deliberations and rights:[56]

> The good people of the several colonies of New-Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Newcastle, Kent, and Sussex on Delaware, Maryland, Virginia, North-Carolina, and South-Carolina, justly alarmed at these arbitrary proceedings of parliament and administration, have severally elected, constituted, and appointed deputies to meet, and sit in general Congress, in the city of Philadelphia, in order to obtain such establishment, as that their religion, laws, and liberties, may not be subverted: Whereupon the deputies so appointed being now assembled, in a full and free representation of these colonies, taking into their most serious consideration, the best means of attaining the ends aforesaid, do, in the first place, as Englishmen, their ancestors in like cases have usually done, for asserting and vindicating their rights and liberties, DECLARE,

The first point to note is that the Congress makes its declaration "in the first place, as Englishmen, their ancestors in like cases have usually done". The language is somewhat equivocal as to whether the colonists are saying that they are protesting "as Englishmen" or protesting in the way that their ancestors, "who were Englishmen," traditionally have done. Whether intentional or not, the ambiguity reveals the heart of the question whether the Americans were still "Englishmen" or a new kind of people.[57]

Consistent with the earlier decision on September 9th, the Bill of Rights articulates a fourfold basis of American rights.

> That the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS:
>
> *Resolved*, N. C. D. 1. That they are entitled to life, liberty and property, and they have never ceded to any sovereign[58] power whatever, a right to dispose of either without their consent.

Here the people are called "inhabitants of the English colonies" signaling that they still see themselves as peoples in English colonies. The use of the word colonies is significant indicating that in some sense they are still part of the empire. The first resolve presents a classic Lockean formulation of natural rights with the entitlement

to "life, liberty and property". And in line with classic natural rights theory, these rights "have never ceded to any sovereign power whatever," meaning that by entering into any social compact, individuals do not relinquish the rights to life, liberty and property. This is a point that Lee had made during the debates. But what is not yet clear is what compact these resolves are talking about? Are they referring to the British Constitution or to Compacts or Charters or both? In other words, what was the status of the ancestors who came to the colonies? Did they bring English sovereignty with them, come under the auspices of charters, or create a new compact with the British empire and King?

As we shall now see, the subsequent resolves do take a position on the thorny status of the ancestors. The Congress has sided with the view that the ancestors did not lose their British rights when they emigrated from Great Britain.

> *Resolved*, N. C. D. 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.
>
> *Resolved,* N. C. D. 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

It is clear that the Congress has taken a position on the status of the ancestors by October 12th. On that day, Samuel Ward records in his journal that Congress "Met, considered the Bill of Rights. (That relative to Statutes & that mentioning our Fathers (bringing over all the R[ights]) having not forfeited by Emigration &c, I did not like.)"[59]

Rejecting the view put forward by Jefferson, Jay, Ward, among others, Congress sided with those who held that the colonists brought their rights with them to America and did not forfeit them in their emigration. The resolves do not say whether the colonies are considered as lands that were discovered or conquered. But it is clear that the emigration is conceptualized as a migration under British auspices, not as the founding of a new set of political states.

While the foregoing statement is a clear rejection of the "expatriation" position that had been put forward by Jefferson and Jay, the resolves to this point have left unclear precisely what is the current status of British sovereignty over the colonies. If the ancestors were entitled to all their rights as natural born subjects and did not forfeit them, are they still subject to British sovereignty now?

The third resolve begins to hint at an answer to this question. The colonists are entitled to all those same rights "as their local and other circumstances enable them to exercise and enjoy." The reference to their local circumstances is an allusion to the argument that the colonies cannot, because of geographical distance, be full participants in deliberations of British Parliament. This last statement thus lays the groundwork for justifying

a critical and unavoidable limitation on Parliament's sovereignty which is spelled out in the next resolve.

> *Resolved,* 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed: But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British parliament, as are bona fide, restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation internal or external, for raising a revenue on the subjects, in America, without their consent.

This resolution, which John Adam's claims to have drafted, is in some sense the punch line of the whole set.[60] The resolution essentially declares the colonies to be independent states and draws that conclusion from the implications of natural rights theory. The logic is as follows: The ancestors were British subjects and entitled to British rights when they emigrated. But they can no longer be subject to Parliament's authority because they lack representation in Parliament and "from their local and other circumstances, cannot properly be represented in the British parliament." The key claim here is that the requirement of representation is impossible to fulfill. Not only was Congress rejecting the solution of sending representatives to England's Parliament, it was also rejecting Galloway's alternative plan which tried to solve the problem of representation with a local legislature. Because the key requirement of natural rights could not by definition be fulfilled, so the resolutions argue, the colonies must be independent states. In other words, the protection of natural rights requires representation. And since that requirement cannot be met, the colonies are in fact by necessity independent states. This is a view of the colonies that was very similar to the one developed by Samuel Adams and James Wilson discussed earlier and differed substantially from that of Jefferson and Jay.

While the right to representation applies to Parliament's sovereignty, the same issue does not here extend to the King's authority. Conceptually, the right of representation as the colonists understood it at the time was linked to the activity of the legislative branch and the house of commons which embodied the will of the people. Natural rights granted people the right to be represented in their body of government. But natural rights theory as articulated by Locke and others had not yet taken the next step of questioning the election of the executive branch. In many of the debates on the nature of government, colonists agreed with their European counterparts that natural rights and liberty could be equally protected in one of three forms: democracy, aristocracy or a monarchy. And the colonists for the most part agreed with European writers like Montesquieu that the British

government as a blended mix of all three forms of government was viewed as one of the best forms supporting liberty.

The colonists like their British counterparts did not yet see the presence of a King as a threat to liberty and rights. And so the question of the King's sovereignty was a separate question from the question of Parliament's authority. In this regard, the bill of rights recognizes a concession to "the negative of their sovereign," meaning that the colonists legislative acts are still subject to the King's executive veto. This view of the King as holding an executive veto was similar in principle to the absolute veto granted later in the American Constitution to the President. The key difference, of course, was that the President was an elected official and the King was not. And by the time the colonies had declared independence, questions about having hereditary offices in government had been raised in profound ways. In this respect, the resolves do not claim that the King was "chosen," as Jefferson had claimed in his Summary View, leaving the implication that emigrants were still subjects of the King and had not forfeited their allegiance.[61]

In the end the Bill of Rights puts forward a federated view of the empire that we have seen before in Hopkins, Samuel Adams and most fully developed in Wilson.[62] The King is the head of the empire, with the colonies as independent states that are not subject to Parliament's authority. This view was thus thought consistent with natural rights theory, because the representation of the people in their local legislative bodies was thought to fulfill the requirements of representation.

What about the question of trade? The resolutions also make a clear cut decision on trade. Since the colonies cannot be represented in Parliament because of geographic distance, the resolutions clearly imply that Parliament also lacks *the right* to regulate trade. The colonies do "cheerfully consent" to acts of Parliament regarding trade that are "bona fide" and whose purpose is for securing the commercial advantages of the mother country and the benefits of the empire. The use of the word "cheerfully consent" is critical here. Since the colonies are now conceptualized as independent entities with their own legislatures, Parliament lacks the right to regulate their own trade. Trade is thus thought to be a right that inheres in independent states. At the same time, the colonies can agree to allow Parliament to regulate trade for the benefit of the empire as a whole without giving Parliament *the right* to do so. The concept here is very much like a trade agreement executed between two independent states. It is done so for necessity and for mutual benefit. While this position still gives Parliament control over trade regulations and thus offers tremendous commercial benefits to Great Britain, it implies that the colonies are independent entities that have consented to that agreement. The clear implication is that the colonies can consent to relinquish control over trade without sacrificing the natural rights of their individual members. Individuals, then, do not have a right of free trade. Natural rights implies only that the right to trade reside at the collective body of a political entity governed by consent and representation.

Some commentators imply that the resolves were a kind of compromise position, not conservative enough for Duane and Galloway, but not radical enough for Ward, Lee and others. But if compromise position means a lack of philosophical coherence about the position these are not compromise

positions. The resolves rest on a coherent philosophical position that accounts for natural rights, sovereignty, the status of emigration, and the role of trade as a right of states.

It is not surprising that later in life Jefferson characterized the First Congress as landing in the "half-way house" of John Dickinson. By then Dickinson had in fact refused to sign the Declaration of Independence and thus in retrospect seems to represent the more conservative element. But here in 1774, Dickinson was in fact the radical Pennsylvanian alternative to Galloway. Dickinson was not in attendance throughout most of the Congress because he had not been elected to the Pennsylvania Assembly. But that delegates to the Congress were regularly dining with him and hearing his views is evident from the diaries of Adams and others.

While it is true that the Congress did offer Parliament control of trade and to recognize the King as the head of government, this was hardly the "half-way" house of Dickinson. Jefferson's characterization is misleading for several reasons. Most importantly, Dickinson had earlier argued that Parliament had the *right* to regulate trade, whereas the resolves go further and argue that the colonies only *consented* to give Parliament the control over trade but that Parliament did not have the right to do so. There was a significant philosophical difference between these two positions. To say that Parliament had no right to regulate trade was a good as declaring the colonies independent states within a federated empire, a point recognized and criticized by emerging loyalists like Galloway. It was also further than Dickinson had been prepared to go in his earlier Farmers Letters.

Furthermore, the position that Congress did endorse was not that far from Jefferson's own position in a *Summary View*. Jefferson had also implied that the colonies could allow Parliament to regulate some aspects of trade in return for the benefits that the colonies had received. What Jefferson envisions is a kind of trade agreement between independent entities of one federated empire. Speaking of the assistance Britain gave the colonies, Jefferson writes that

> We do not however mean to underrate those aids, which to us were doubtless valuable, on whatever principles granted: but we would shew that they cannot give a title to that authority which the British parliament would arrogate over us; and that they may amply be repaid, by our giving to the inhabitants of Great Britain such exclusive privileges in trade as may be advantageous to them, and at the same time not too restrictive to ourselves.[63]
>
> And again Jefferson:
>
> It is neither our wish, nor our interest, to separate from her. We are willing, on our part to sacrifice every thing which reason can ask to the restoration of that tranquility for which all must wish. On their part, let them be ready to establish union and a generous plan. Let them name their terms, but let them be just. Accept of every commercial preference it is in our power to give for such things as we can raise for their use, or they make for ours. But let them not think to exclude us

> from going to other markets to dispose of those commodities which they cannot use, or to supply those wants which they cannot supply.[64]

In point of fact the Congress had articulated a view that was surprisingly close to what Jefferson had himself espoused. Consent was the basis of granting Parliament the regulation of trade. The congress had indicated consent would only be given for "bona fide" laws. Jefferson had spelled out one set of criteria for constituted "bona fide" regulations. If anything, Jefferson looking on from afar in Virginia might have been disappointed for another reason. His pet philosophical and political theory of expatriation had been completely rejected by his colleagues. Not only did Congress endorse natural rights, which we have seen Jefferson was ambivalent about, it had rejected his pet view that the ancestors left behind their rights and sovereignty when they emigrated to this country. The Congress had arrived at a pragmatic position that was not so different from Jefferson's in the end: the colonies were independent, they had the right to regulate their own trade, and they had the right to make their own laws. But the congress arrived there from quite different philosophical and legal suppositions. Indeed, Jefferson's legal and philosophical foundations of American rights had been rejected, even while the Congress moved surprisingly close to the position that Jefferson had advocated. We shall see that by the second Continental Congress, Jefferson had not given up his theory of expatriation which he was still promoting to his colleagues who had already once rejected it.

Reactions to the Bill of Rights and the Debated Use of Natural Rights

It was not lost on other Americans that the Bill of Rights put out by Congress represented a quasi-official version of Americans' views of rights. This was not just a statement of an individual writer but a statement that had approval of representatives from all the colonies. As a result, the resolutions provoked responses by some colonists who felt that First Congress had been too bold in its resolves and who disagreed with the articulated views of liberty and rights contained in the document. Galloway, as we discussed earlier, published his criticisms of the First Congress, arguing that the Congress by its actions had actually forfeited American rights by rejecting the supreme authority of society in which their rights were grounded.[65] Galloway insisted that the actions of Congress would result in the loss of freedom rather than the gain of liberty. Other writers, such as Daniel Leonard, the author of a series of letters entitled "Maassachusettensis" argued that natural rights arguments are and have been used to perverted purposes. It is not that he doubted the existence of natural rights per se, but that natural rights inflame people and lead them to licentiousness.

> The bulk of the people are generally but little versed in matters of state. Want of inclination or opportunity to figure in public life, makes them content to rest the affairs of government in the hands, where accident or merit has placed them.…There is a latent spark however, in their breasts, capable of being kindled into a flame; to do this has always been the employment of the disaffected. They begin by reminding the people of the elevated rank they hold in the universe, as

> men; that all men by nature are equal; that kings are but the ministers of the people; that their authority is delegated to them by the people for their good, and they have a right to resume it, and place it in other hands, or keep it themselves, whenever it is made use of to oppress them. Doubtless there have been instances where these principles have been inculcated to obtain a redress of real grievance, but they have been much oftener perverted to the worse of purposes. No government, however perfect in theory, is administered in perfection; the frailty of man does not admit of it. A small mistake, in point of policy, often furnishes a pretence to libel government, and persuade the people that their rulers are tyrants, and the whole government a system of oppression. Thus the seeds of sedition are usually sown, and the people are led to sacrifice real liberty to licentiousness, which gradually ripens into rebellion and civil war. What is still more to be lamented, the generality of the people, who are thus made the dupes of artifice, and there mere stilts of ambition, are sure to be losers in the end. [66]

Leonard proposes that arguments from natural rights can be abused for ulterior motives. Since all people are imperfect, there are always mistakes. But natural rights are to be appealed to only under real abuse of power, not to be used as a pretence to stir up naïve people by those who have ambition to power. At issue, then, was the question of how one determines what constitutes a real infringement of natural rights versus one that is not so serious. Leonard was arguing that the infringements on the rights of the colonists were not serious enough to warrant the appeal to natural rights.

John Adams replied to this particular claim in one of his letters published under the title Novanglus on January 23, 1775. Referring to Leonard's claims that natural rights were used inappropriately and for ulterior motives, Adams chides him for essentially arguing that natural rights have no applicability in the real world.

> Those are what called revolution principles. They are the principles of Aristotle and Plato, of Livy and Cicero, and Sydney, Harrington and Locke. The principles of nature and eternal reason. The principles on which the whole government over us, now stands. It is therefore astonishing, if any thing can be so, that writers who call themselves friends of government, should in this age and country, be so inconsistent with themselves, so indiscreet, so immodest, as to insinuate a doubt concerning them.
>
> Yet we find that these principles stand in the way of Massachusettensis, and all the writers of his class. …How they can be in general true, and not applicable to particular cases, I cannot comprehend. I thought their being true in general, was because they were applicable in most particular cases.[67]

Another interesting debate that touched on the question of natural rights was that between Reverend Thomas Seabury and Alexander Hamilton. Seabury, born in 1729 and a graduate of Yale, went to the University of Edinburgh where he studied medicine before switching to theology. He was ordained (1753) as a priest in the Church of England, before returning to America as a missionary in New Brunswick. Seabury published a series of letters "from a Westchester farmer" attacking the

Congress on several grounds.[68] The first of Seabury's letters, "Free Thoughts on the Proceedings of the Continental Congress" appeared on Nov. 16, 1774 within a month after the First Congress had ended. His first letter was primarily economic in tone, arguing that the non-importation and non-exportation resolves would hurt the farmers of New York. But towards the end of the first letter he begins to shift his argument to the question of liberty and suggests that the non-importation laws actually undermine the rights of farmers. Farmers who take their sheep to market are met by a mob and turned back. "Are these the rights, is this the liberty, these men are contending for? It is vile, abject slavery, and I will have none of it."

In his second letter "The Congress Canvassed or an Examination into the Conduct of the Delegates at Their Grand Convention" dated November 28, 1774 addressed to the merchants of New York, Seabury lets loose with a hard hitting, all-out attack on both the legitimacy and the results of the Congress. "Did you expect that they would endeavour, upon the true principles of legislation, to mark out the bounds of parliamentary authority over the colonies; on the one side ascertaining and securing the liberties of the colonists, and on the other giving full weight and force to the supreme authority of the nation over all its dominions?" In fact, the Congress did not. Instead, Congress' writings tend "under cover of strong and lamentable cries about liberty, and the rights of Englishmen, to degrade and contravene the authority of the British Parliament over the British dominions; on which authority the rights of Englishmen are, in a great measure, founded." "But alas! the labour of the congress produced, not a silly mouse, to make us laugh, but a venomous brood of scorpions, to sting us to death." Seabury argues that that the colonies have been essentially duped by the people of Massachusetts, who shaped events through "premeditated design." He argues that Massachusetts radicals staged events during Congress to shape opinion, such as starting the rumor early in Congress that military action had begun in Boston and the Suffolk resolves that inflamed Congress in the middle of September.[69]

Seabury goes beyond arguing that the Congress paid insufficient attention to the supreme authority of Parliament. He accuses the Congress of being an illegal body. Since delegates to Congress were appointed by the assemblies of the colonies, "The assemblies have but a delegated authority themselves. They are but the representatives of the people; they cannot therefore have even the shadow of right, to delegate that authority to three or four persons" The Congress therefore had exercised a power it never received from the people. Speaking of the New York delegates in particular, Seabury says that "I am confident, your Delegates had not the voice of an hundreth part of the people in their favour.." When, therefore, the delegates at Philadelphia, in the preamble to their Bill of rights, and in their letter to his Excellency General Gage, "stiled their body 'a full and free representation of—' 'all the colonies from Nova-Scotia to Georgia,' they were guilty of a piece of impudence which was never equalled since the world began, and never will be exceeded while it shall continue."The Congress is no better than the "papish Inquisition".

> That you, who refuse submission to the Parliament, should tamely give up your liberty and property to an illegal, tyrannical Congress: For shame, gentlemen, act more consistently. You have blustered, and bellowed, and swaggered, and bragged, that no British Parliament should dispose of a penny of your money without your leave, and now

> you suffer yourselves to be bullied by a Congress, and cowed by a COMMITTEE,…

This attack on Congress' legitimacy sets the stage for Seabury's repeated contrast of freedom under British rule versus under Congress. Far from achieving liberty as Congress declares, the people are now at risk of having the property and liberty subject to the will of an illegal body. "No, if I must be enslaved, let it be by a KING at least, and not by a parcel of upstart lawless Committee-men. If I must be devoured, let me be devoured by the jaws of a lion, and not gnawed to death by rats and vermin.

> But how, on this principle, you will keep your money out of the harpy-claws of the congress, I cannot conceive. They have shewn you already what they can do: And power is apt to be encroaching: the next congress may go farther: they have taxed you but lightly now; only the profits arising from goods imported in two months. But the same power that now takes the profits, may next take the goods too.

Seabury is criticizing Congress from a view of government that is in fact shared with his opponents.

> Government was intended for the security of those who live under it;--to protect the weak against the strong;--the good against the bad;--to preserve order and decency among men, preventing every one from injuring his neighbour. Every person, then, owes obedience to the laws of the government under which he lives, and is obliged in honour and duty to support them. Because, if one has a right to disregard the laws of the society to which he belongs, all have the same right; and then government is at an end. Your honour was therefore previously engaged to the government under which you live, before you promised to abide by the determinations of the congress. You had no right to make a promise implicitly to obey all their regulations, before you knew what they were, and whether they would interfere with the public laws of the government, or not.

This is a good statement of natural rights theory. Based on it, Seabury argues that those who follow Congress are abandoning the British law which governs them. And by doing so, they are violating the law. "You introduce a foreign power, and make it an instrument of injustice and oppression." Thus a farmer in " importing the goods he has transgressed no law of God, of nature, nor of the province. On the contrary, the laws of God, of nature, and of the province, forbid you to molest him in the prosecution of his business. But you are introducing a regulation of the congress superior to the laws of God, of nature, and of the province:--A regulation that supersedes and vacates them all."

At the heart of the issue is the question of where the boundary between natural rights and Parliamentary authority sits. Seabury recognized that the state was designed for the people's protection and happiness. At issue was the situation in which the struggle for liberty should take place within or outside the law.

> A struggle for liberty, however necessary it may be, which can be carried on consistently with the laws, and in due subordination to government, will never justify the breach of any one law, nor

> opposition to government in any instance.--To speak directly to our own case.

In sum, Seabury in effect makes a natural rights argument. He argues that government is to protect the people. But Congress is an illegal body precisely because it does not meet the criterion of representation and therefore has no right to set laws of commerce.

In response to Seabury, Alexander Hamilton, a young man of eighteen, published his first essay "A Full Vindication of the Measures of Congress…" establishing his early strengths as a writer and thinker.[70] In his first salvo on Dec 15, 1774, Hamilton accuses Seabury of being an enemy to the natural rights of mankind and to common sense and common modesty.

> And first, let me ask these restless spirits, Whence arises that violent antipathy they seem to entertain, not only to the natural rights of mankind, but to common-sense and common modesty? That they are enemies to the natural rights of mankind is manifest, because they wish to see one part of their species enslaved by another. That they have an invincible aversion to common-sense is apparent in many respects: they endeavor to persuade us that the absolute sovereignty of Parliament does not imply our absolute slavery; that it is a Christian duty to submit to be plundered of all we have, merely because some of our fellow-subjects are wicked enough to require it of us; that slavery, so far from being a great evil, is a great blessing; and even that our contest with Britain is founded entirely upon the petty duty of three pence per pound on East India tea, whereas the whole world knows it is built upon this interesting question, whether the inhabitants of Great Britain have a right to dispose of the lives and properties of the inhabitants of America, or not.[71]

Hamilton's attack is of interest on several accounts. Like Adam's response to Leonard, Hamilton responds to Seabury by accusing him of rejecting natural rights theory, even though in fact Seabury's comments are arguably within the natural rights tradition. Moreover, we also see that natural rights theory was considered by Hamilton to be only one strand of the argument. The attack by critics like Galloway, Leonard, and Seabury on the use of the natural rights arguments may have made the use of additional grounds for American rights important. Common sense and common modesty were thought to be distinctive modes of reasoning that complemented arguments from natural rights. Hamilton argues that Seabury not only repudiates natural rights, but common sense and modesty as well. Hamilton also takes on Seabury's other claims, arguing that in fact Congress is a representation of the people, and that its rulings should be treated as law.

Seabury responded to Hamilton in his letter of December 24, 1774.

> I wish you had explicitly declared to the public your ideas of the natural rights of mankind. Man in a state of nature may be considered as perfectly free from all restraints of law and government: And then the weak must submit to the strong. From such a state, I confess, I have a violent aversion. I think the form of government we lately enjoyed a much more eligible state to live in: And cannot help regretting our having lost it, by the equity, wisdom, and authority of

> the Congress, who have introduced in the room of it, confusion and violence; where all must submit to the power of a mob.

It is interesting to see here how Seabury responds to the charge that he is against natural rights. He does so by seemingly confusing the state of nature with natural rights philosophy. He has a "violent aversion" to the "state of nature" which "may be considered free from all restraints of law of government." Seabury much prefers the government "we lately enjoyed." In other words, he argues that life under British rule is preferable to the state of nature, which has no law to govern it. But Seabury is mischaracterizing the natural rights argument in two different ways: first, by assuming that life in the state of nature had no rules to live by. Yet on the classically Lockean view of natural rights, this is not the case. There is a Law of Nature that governs humans in the state of nature even before society and that Law is known by Reason and given by God. Second, Seabury mischaracterizes the defenders of natural rights. They did not say they prefer a state of nature to life under British rule. They argued about the kind of the society under which natural rights are best protected and they felt that life under British rule is a state of slavery. Perhaps Seabury's mischaracterization was intentional, essentially arguing that the Congress was returning the people to a state of nature, as Patrick Henry had claimed, not to a better social life.

In his response to Seabury, Hamilton in his *The Framer Refuted*, seizes on the apparent misunderstanding of natural rights in Seabury's letters, ridicules him for his lack of knowledge and wastes no time turning the tables.

> Man, in a state of nature (you say), may be considered as perfectly free from all restraint of *law* and *government;* and then, the weak must submit to the strong.
>
> I shall, henceforth, begin to make some allowance for that enmity you have discovered to the *natural rights* of mankind. For, though ignorance of them, in this enlightened age, cannot be admitted as a sufficient excuse for you, yet it ought, in some measure, to extenuate your guilt. If you will follow my advice, there still may be hopes of your reformation. Apply yourself, without delay, to the study of the law of nature. I would recommend to your perusal, Grotius, Puffendorf, Locke, Montesquieu, and Burlemaqui. I might mention other excellent writers on this subject; but if you attend diligently to these, you will not require any others.
>
> There is so strong a similitude between your political principles and those maintained by Mr. Hobbes, that, in judging from them, a person might very easily mistake you for a disciple of his. His opinion was exactly coincident with yours, relative to man in a state of nature. He held, as you do, that he was then perfectly free from all restraint of law and government. Moral obligation, according to him, is derived from the introduction of civil society; and there is no virtue but what is purely artificial, the mere contrivance of politicians for the maintenance of social intercourse. But the reason he ran into this absurd and impious doctrine was, that he disbelieved the existence of an intelligent, superintending principle, who is the governor, and will be the final judge, of the universe.[72]

Hamilton argues that Seabury misunderstands natural rights and ends up with a Hobbesian position that presupposes aetheism. Hobbes, claims Hamilton, held that the state of nature had no laws because he didn't believe in God. But Locke and all others who believe in God understand that there is a law of nature that governs the state of nature. But since Seabury obviously does believe in God, then he should hold a view of natural rights that is more consistent with Locke and Blackstone.

> As you sometimes swear *by Him that made you,* I conclude your sentiments do not correspond with his in that which is the basis of the doctrine you both agree in; and this makes it impossible to imagine whence this congruity between you arises. To grant that there is a Supreme Intelligence who rules the world and has established laws to regulate the actions of His creatures, and still to assert that man, in a state of nature, may be considered as perfectly free from all restraints of *law* and *government,* appears, to a common understanding, altogether irreconcilable. Good and wise men, in all ages, have embraced a very dissimilar theory. They have supposed that the Deity, from the relations we stand in to Himself and to each other, has constituted an eternal and immutable law, which is indispensably obligatory upon all mankind, prior to any human institution whatever. This is what is called the law of nature.[73]

But Seabury rests his argument on more than this mistaken view of natural rights. In his view, the argument for remaining within British rule and under British sovereignty *is an argument for liberty*.

But as Seabury's expounds his theory of government other differences come into view. What we see again is that the key issue was not whether one was for or against natural rights per se, but how natural rights was understood in relation to other questions, such as the interpretation of Parliament's sovereignty, the status of colonies and the relationship of the King to the whole question of sovereignty. Seabury reiterating the common view that every government needs a supreme authority.

> In every government there must be a supreme, absolute authority lodged somewhere. In arbitrary governments this power is in the monarch; in aristocratical governments, in the nobles; in democratical, in the people; or the deputies of their electing. Our own government being a mixture of all these kinds, the supreme authority is vested in the King, Nobles and People, i. e. the King, House of Lords, and House of Commons elected by the people. This supreme authority extends as far as the British dominions extend.

At issue then is what is the nature of representation: Seabury returns to arguments made earlier during the debates of the Stamp Act:

> The position that we are bound by no laws to which we have not consented, either by ourselves, or our representatives, is a novel position, unsupported by any authoratative record of the British constitution, ancient or modern. It is republican in its very nature, and tends to the utter subversion of the English monarchy.

> This position has arisen from an artful change of terms. To say that an Englishman is not bound by any laws, but those to which the representatives of the nation have given their consent, is to say what is true: But to say that an Englishman is bound by no laws but those to which he hath consented in person, or by his representative, is saying what never was true, and never can be true. A great part of the people in England have no vote in the choice of representatives, and therefore are governed by laws to which they never consented either by themselves or by their representatives.

At issue is the status of the colonies and whether the colonies should be granted a right of representation. Seabury thus concludes that "The right of colonists to exercise a legislative power, is no natural right. They derive it not from nature, but from the indulgence or grant of the parent state, whose subjects they were when the colony was settled, and by whose permission and assistance they made the settlement."

> Upon supposition that every English colony enjoyed a legislative power independent of the parliament; and that the parliament has no just authority to make laws to bind them, this absurdity will follow--that there is no power in the British empire, which has authority to make laws for the whole empire; i. e. we have an empire, without government; or which amounts to the same thing, we have a government which has no supreme power. All our colonies are independent of each other: Suppose them independent of the British parliament,--what power do you leave to govern the whole? None at all. You split and divide the empire into a number of petty insignificant states.

Invoking arguments that would in fact later be used to justify the formation of a United States, Seabury argues that the colonies need a superintending power.

What we see in these debates between Leonard and John Adams, between Seabury and Hamilton, and in the writing of Galloway, is a continuing debate over the meaning of natural rights and its relationship to other critical concepts such as sovereignty, the status of colonies, the legitimate ways in which the pursuit of natural rights can be pursued. With the publication of the Congressional resolves, and the statement regarding natural rights, the debate has shifted. Congress has put a public stake in the ground resting American claims to independent legislatures on the basis of natural rights. Those who felt that Congress went too far, did not dispute that natural rights were rights of all men. But they did dispute how far natural rights extended, whether they applied to the colonies, whether they were used in inappropriate situations to inflame passions. Those who thought Congress had gone too far thought that the concept of natural rights was being abused and misinterpreted. They did not reject the value of natural rights, just its meaning, interpretation and conditions of applicability. In their view, natural rights did not change the status of the colonies. From their perspective, those who argued that natural rights did have these implications were just trying to use philosophical concepts to inflame people who were not very sophisticated.

While these debates show that natural rights had by this point become at least officially recognized justifications for resistance to Great Britain, it was a still a particular understanding of natural rights. The Jefferson-Bland argument that there

was a natural right to quit society and establish new political entities was neither adopted by Congress. But that argument was not quite dead as we shall now see.

Necessity and Causes of Taking Up Arms

By the time the Second Continental Congress reconvened as planned on May 10 1775, fighting had broken out at Lexington and Concord only a short time earlier. On June 14th, Congress would vote to create a Continental Army out of militias around Boston and appointed George Washington as commander in chief. On July 6, 1775, the Congress published a "A Declaration by the Representatives of the United Colonies of North-America..setting forth the causes and necessity of their taking up Arms." This declaration was to be read by George Washington at his arrival in the camp in Boston.[74] For many, the fighting was not yet conceptualized as a fight for independence but was thought more like a kind "civil war" between two parties that belong to a larger whole. Although some like Jefferson and Wilson already thought of the colonies as independent states, there still was a consensus among most that colonies at least owed allegiance to the King and were part of the British empire. For most, the war was to protect colonial rights and establish the colonies' rights to independent legislatures, not yet a war to throw off complete British rule or abandon the empire.[75]

This time Thomas Jefferson was able to attend the congress and was chosen to draft an early version of what became the "Declaration of the Causes and Necessity for Taking Up Arms".[76] An earlier version which no longer exists was reported to Congress on June 24th, supposedly drafted by Rutledge, was debated both on the 24th and 26th, and then referred back to committee with Jefferson and Dickinson added to the committee. Jefferson wrote two versions of the Declaration, the first of which he likely shared with Dickinson and on which he made some revisions and the second which he submitted to the committee. This later version, however, was not approved in part because Dickinson and possibly William Livingston did not agree with it. Dickinson therefore made a revision, substantially rewording parts of Jefferson's earlier draft. The Congress made some minor revisions on the Dickinson draft and finally published the Declaration. [77]

For our purposes what is interesting is to see both Jefferson's statement on rights (now only a year away from his Declaration of Independence) and to see Dickinson's revision that was edited and accepted. The oft-told story is that Dickinson softened Jefferson's draft. But there was more than softening going on.[78] There was in fact a shift from one version of rights arguments to a different form of rights arguments.

Jefferson's preamble anticipates the Declaration of Independence in the sense that he begins by explaining that the goal is to make known to the world that the cause is "approved before supreme reason."

> The large ~~advances~~ strides of late taken by the legislature of Great Britain towards establishing ~~in~~ over the colonies their absolute rule, and the hardiness of their present attempt to effect by force of arms what by law or right they could never effect, render~~s~~ it necessary for us also to ~~shift~~ change the ground of opposition and to close with their last appeal from reason to arms. And as it behoves those who are called to this great decision to be assured that their cause is approved before supreme reason, so is it of great avail that it's justice be made

known to the world whose ~~prayers cannot be wanting intercessions~~ affections will ever ~~be favorable to a people~~ take part with those encountring oppression. [79]

But after this preamble the similarity to the Declaration of Independence is lost. Jefferson now turns to the discussion of the ancestors and tries to revive the line of thinking that he has proposed in his *Summary View* a year earlier but which had been considered and rejected in the First Congress. One can sense here that Jefferson had not yet reconciled himself to the position that the First Congress had taken, namely, that the ancestors brought their rights with them to the colonies. Jefferson wanted to revive his view that the ancestors had quit society, left their rights behind and established new political entities.

Jefferson's Composition Draft:

our forefathers, inhabitants of the island of Gr. Britn. ~~harrassed~~ having ~~vainly there~~ long endeavored to bear up against the evils of misrule, left their native land to seek on these shores a residence for civil and religious freedom. at the expense of their blood, ~~with~~ to the ~~loss~~ ruin of their fortunes, with the relinquishment of everything a quiet and comfortable in life, they effected settlements in the inhospitable wilds of America; they there established civil societies ~~under~~ with various forms of constitution, but possessing all, what is inherent in all, the full and perfect powers of legislation. to continue their connection with ~~those~~ the friends whom they had left ~~& loved~~ ~~but~~ they arranged themsevles by charters of compact under ~~the same~~ one common king ~~who became the thro whom a union was ensured to the now multiplied~~ who thus became the link ~~uniting~~ of union between the several parts of the empire.

Jefferson's Fair Copy for the Committee (after input from John Dickinson)

Our forefathers, inhabitants of the island of Great Britain <~~having long endeavored to bear up under the evils of misrule~~> left their native land~~s~~ to seek on these shores a residence for civil & religious freedom. at the expense of their blood, ~~with~~ to the ruin of their fortunes, with the relinquishment of every thing quiet & comfortable in life, they effected settlements in the hospitable wilds of America; ~~they~~ and there established civil societies with various forms of constitution~~s <but possessing all what is inherent in all, the full and perfect powers of legistlation~~> to continue their connection with the friends whom they had left they arranged themselves by charters of compact under ~~one~~ the same common king, who thus completed their powers of full and prefect legislation and became the link of union between the several parts of the empire.

Jefferson does not explicitly refer to a natural right to quit society this time in either version. But in his first version he does provide a more explicit justification for emigration: The ancestors left their native land because of the "evils of misrule" and established "at the expense of their blood, to the ruin of their fortunes" they created "civil societies with various forms of constitution but possessing all, what is inherent

in all, the full and perfect powers of legislation. Here the right to emigrate does not sound like a "generic individual right" but appears justified by the abuse of the then government's power. Indeed, Jefferson's position here sounds much closer to a classically Lockean view of the conditions under which a person can quit a society than the view he expressed in his "Summary View". [80] Here the abuse of government power is what generates and justifies the emigration. We also see here in this first version a reiteration of Jefferson's view that the colonies are independent political entities: the colonies "established civil societies with various forms of constitution, but possessing all, what is inherent in all, the full and perfect powers of legislation." As in his *Summary View* almost a year earlier, we see Jefferson's disinclination to use the language of "natural rights" and "consent", although his language could be presupposing such assumptions. Why Jefferson thinks that "full and perfect powers of legislation" are "inherent in all" he does not say. And while that language could be construed as natural rights language, his avoidance of such language underscores that Jefferson did not resonate with such language, and continued to have some reservations about natural rights theory in some respect.

Jefferson's revised version, after input from John Dickinson, changes the tone and implications to a certain degree. In the revised version, Jefferson has taken out the reference to "evils of misrule" although the statement the ancestors left to find "civil and religious freedom" still implies that the emigration had a moral justification and was not simply the result of individuals seeking happiness. But in this revised version Jefferson softens the criticism of the mother country. In this version the colonies are still presented as their own political entities. They still created various forms of constitution. But this time Jefferson has made two significant changes that make obvious the connection to Great Britain. The emigrants wanted to continue their connection with friends they had left and therefore they arranged themselves under charters of compact under the same common King. The political entities they created did not by themselves have the full and perfect powers of legislation. It was the King who "thus completed their powers of full and prefect legislation and became the link of union." In this version, Jefferson has still retained his emphasis on the the emigrant's freedom to set up new political entities and to their choose to enter into compacts with the King.

Jefferson does make one allusion to a general theory of liberty well into the body of his essay. "We do then most solemnly ~~before in the presence of~~ before God and the world declare, that, regardless of every consequence at the risk of every distress, ~~that~~ the arms we have been compelled to assume we will wage with ~~bitter~~ perseverance, exerting to their utmost energies all those powers ~~with~~ which our creator hath ~~invested~~ given us to ~~guard~~ preserve that ~~sacred~~ Liberty which He committed to us in sacred deposit, and to protect from every hostile hand our lives and our properties." This language of "sacred deposit" moves within the natural rights tradition as does the reference to protecting "our lives and our properties." But the language has much more of the religious and theological overtones as we have seen in writers like Otis, Shute and Jefferson's own earlier pamphlet. As noted in the discussion of his *Summary View* Jefferson still avoids the explicit language of the natural rights tradition and favors a more religious description of liberty's origin that seems to resonate more with Jefferson's notion that moral sentiments are known self-evidently. We see here too the use of the word "sacred" to describe liberty, a term that Jefferson uses again in his first Draft of the Declaration of Independence a year later.

Compare now Dickinson's equivalent version of the ancestor story with Jefferson's.

> Our forefathers, inhabitants of the Island of GB. left their native Land, to seek ~~<in the distant & inhospitable wilds of American>~~ on these shores a Residence for civil and religious ~~Liberty~~ freedom. To describe the Dangers, Difficulties & Distresses ~~<the Expence of Blood &><Fortun><Treasure>~~ they were obliged to encounter in executing their generous Resolutions, would require volumes. It may suffice to observe, that, at the Expence of their Blood, to the Ruin of their Fortunes, (~~& every Prospect of advantages in their native Country)~~ without the least Charge to the Country from which they removed, ~~with~~ by unceasing Labor and unconquerable Spirit, they effected Settlements in the distant and inhospitable wilds of America, then fill'd with numerous & warlike Nations of Barbarians. Societies or Governments, vested with perfect legislatures ~~within them~~, were formed under Charters from the Crown, and ~~such~~ an harmonious Intercourse ~~*and Union*~~ was established between the colonies & the Kingdom from which they derived their origin.[81]

Dickinson's version of the emigration softens the implication that the colonies are independent political entities.[82] They are vested with perfect legislatures "formed under Charters from the crown". Dickinson's language lacks Jefferson's emphasis on the choice of the colonies. The colonies did not first form legislatures and then choose to establish relations with Great Britain. They were formed at the moment of their formation "under charters" as part of Great Britain. Dickinson's language implies then that the colonies received their "perfect legislatures" as part of a grant from the Crown "from which they derived their origin." Dickinson's language, of course, still suggests that the colonies have independent legislatures from Parliament. But the origin of those legislatures was an act of the King who granted Charters, not the outcome of the colonists' emigration and subsequent decision to enter into compacts. This softening of Jefferson's language was not the only change that Dickinson made to the first part of Jefferson's pamphlet.

The differences continue in the body of the Declaration between the two men's versions. Writing about Parliament's usurpation of powers, Jefferson writes:

> they have attempted fundamentally to alter the form of government in one of these colonies, a form established by acts of it's own legislature, and further secured ~~to them~~ by **charters** ~~of compact with and grants from~~ on the part of the crown;[83]

In this first version, Jefferson emphasizes that charters only "further secure" their rights that were already established by their own legislature. Here is Jefferson's revised version after comments from colleaques:

> they have attempted fundamentally to alter the form of government in one of these colonies, a form ~~established~~ secured by charters on the part of the Crown and confirmed by acts of it's own legislature~~, and further secured by **charters** on the part of the crown;~~[84]

Here Jefferson is pressured to treat the form of government as arising from charters from the Crown with the local legislature playing only a supporting role.

Dickinson makes a change like Jefferson's but broadens it to all the colonies (instead of just Massachusetts). More importantly he stresses that the form of government is not just "secured" as Jefferson wrote but "established" by Charter, reiterating that the colonies were founded under auspices of the King and as part of the empire:

> and for altering fundamentally the Form of Government ~~in one of the Colonies, a Form secured~~ established by Charter and ~~confirmed~~ secured by Acts of its own Legislature solemnly ~~and assented to~~ confirmed by the Crown.[85]

It is also clear that Dickinson did not like using the "emigration of the ancestors" as the preamble and justification of colonial rights. While Jefferson opened with the emigration as a justification of rights, Dickinson inserted a long preamble before the paragraph that Jefferson had written about the sacrifice of the ancestors. By inserting a long preamble first, Dickinson's version gives a quite different justification of the armed resistance and makes the "story of ancestors" much less critical in the overall justification.[86]

> If it was possible for ~~Beings endued with Reason to believe, that the Divine Author of their Existence~~ who ~~entert feel a proper Reverence for~~ Men, who exercise their Reason in contemplating the works of Creation, to believe, that the Divine Author of our Existence, intended a Part of the human Race to hold an absolute property in & an unbounded Power over others mark'd out by his infinite ~~Mercy~~ Goodness & Wisdom, as the legal Objects of a Domination never rightfully ~~to be~~ resistable, however severe & oppressive, the Inhabitants of these Colonies ~~would~~ might ~~at least with propriety with~~ at least require from the Parliament of Great Britain some Evidence, that this dreadful ~~Authority was vested in that Body~~ authority over them has been granted to that Body. But since ~~Reflecti Considerations drawn a due Reverence~~ a Reverence for our great Creator, ~~Sentiments~~ Principles of Humanity ~~and the Dictates of Reason have convinced the wise and good~~ and the Dictates of Common Sense, ~~have~~ must convince all those who will reflect upon the Subject, that Government was instituted to promote the Welfare of Mankind, and ought to be administered for the Attainment of that End, ~~since these generous and noble Principles have on no Part of the Earth been so well vindicated asserted and enforced as in Great Britain, the Legislature of that Kingdom hurried on by an inordinate passion for Power, of Ambition for a Power which their own most admired Writers and their very Constitution, demonstrate to be unjust; and which they know to be inconsistent with their own political Constitution~~ …The Legislature of Great Britain stimulated by an inordinate ~~Passion for a Power manifestly unjust and which)~~ Passion for a Power not only ~~generally pronounc'd held to be~~ unjust, but unjustifiable, but which they know to be peculiarly reprobated by the very Constitution of that Kingdom, and desperate of Success ~~in a Mode of Contest~~ in any Mode of Contest, where a~~ny~~ Regard should be had to Truth, ~~Justice, or~~

> ~~Reason, have at last appeal'd length~~ Law or Right, have at length attempted to effect their cruel and impolitic Purpose by Violence, and have thereby rendered it necessary for US to ~~change~~ close with their last Appeal from Reason to Arms. Yet however blinded ~~they~~ that Assembly may be by their intemperate Rage, ~~yet~~ we esteem ourselves bound by Obligations of Respect to the rest of the World, to make known the Justice of our Cause.[87]

This statement authored by Dickinson and approved essentially in this form by the Second Continental Congress, fundamentally changes the tone of Jefferson's original draft. And it differs in a couple of significant ways. Unlike Jefferson's version, the appeal to the emigration as the foundation of rights is no longer the opening justification for rights. Instead, this preamble certainly alludes to ideas that move in the natural rights philosophy tradition, which was noticeably downplayed if not almost absent in Jefferson's version.

Dickinson's somewhat convoluted language essentially argues the following: If it was possible for men who exercise their reason to believe that God intended for one people to hold absolute power over another, then the Parliament should at least show evidence that they were granted that authority. But a "reverence" for "our Creator, Principles of Humanity, and the Dictates of Common Sense," (Dickinson scratched out "Dictates of Reason" which is interesting) will convince all that Government was instituted to promote the welfare of Mankind. Therefore there is no need to ask Parliament what justifies their authority.

There are several interesting aspects of this language. First, Dickinson has shifted the justification of American rights from Jefferson's emphasis on migration of the ancestors to broader principles. Second, the interplay of "reason", "reverence" "common sense" and "principles of humanity" shows that more than just reason is being invoked, as we have seen before in Hamilton and others in the wake of the First Continental Congress. And while Dickinson here articulates good natural rights ideas it is clearly a version of natural rights that evokes and moves within the religious and theological sub-tradition that we have seen before. No mention is made of "natural rights" specifically. Instead, allusion is made to the divine author's "infinite Goodness and Wisdom" as the ground for believing that no people should be able to subjugate one another. This could be presupposing the classical Lockean view that people are equal because they are God's property. Yet, the language of "reverence for our great Creator, principles of Humanity, and Dictates of Common Sense" suggests the foundation of rights in more than simply natural rights founded on reason. At the very least there is no statement here about how people were created equal or as the workmanship of God that was found in Locke. This language would almost have made James Otis happy in its emphasis on the theological and religious origins of freedom. The emphasis is on God, the Creator and divine Author. This language thus avoids the question of whether government is founded at creation or created subsequently by human decision, a claim of the natural rights tradition that bothered some thinkers like Otis and Shute, as we have seen earlier in Part I and II. To be sure, allusions to "principles of humanity" and "dictates of common sense" could be construed as references to natural rights. But they may also suggest a source of rights in some inherent moral sense that is self-evident to "common sense". The avoidance of specific allusions to rights from nature suggests Dickinson, and the Congress adopters, were avoiding the question of whether they were relying

only on a "classic" natural rights philosophy. Perhaps the intervening debates after the First Continental Congress suggested that natural rights alone was not a sufficient basis for justifying American rights. And at any rate the Declaration would appeal to more theologically minded individuals who may not have been as satisfied with the Bill of Rights from the First Congress.

The religious overtones of the document are reiterated at the end of Dickinson's version in what is powerful language that once attributed to Jefferson is now known to be Dickinson's.[88]

> Our cause is just. Our union is perfect. Our internal resources are great, and, if necessary, foreign assistance is undoubtedly attainable. -- We gratefully acknowledge, as signal instances of the Divine favour towards us, that his Providence would not permit us to be called into this severe controversy, until we were grown up to our present strength, had been previously exercised in warlike operation, and possessed of the means of defending ourselves. With hearts fortified with these animating reflections, we most solemnly, before God and the world, declare, that, exerting the utmost energy of those powers, which our beneficent Creator hath graciously bestowed upon us, the arms we have been compelled by our enemies to assume, we will, in defiance of every hazard, with unabating firmness and perseverence, employ for the preservation of our liberties; being with one mind resolved to die freemen rather than to live slaves.

To summarize, we have seen that within a year of Jefferson's writing the *Declaration of Independence*, Jefferson and Dickinson offer their Congressional colleagues two different versions of American rights. Neither of these versions of rights are what would be called a classical natural rights theory, like that adopted by the First Continental Congress and put forward by thinkers like Samuel Adams, James Wilson, or even more recently by Alexander Hamilton. Jefferson is still avoiding natural rights language and putting emphasis on the emigration of the ancestors as a justification for American rights. When he does allude to a broader conception of rights, which is buried in the body of his essay, he alludes to the "sacred deposit" provided by God and makes no allusion to reason or rights of nature. Dickinson's language moves much closer to the natural rights tradition, though he evokes the religious and theological sub-tradition that places emphasis on God's role in founding liberty. But Dickinson also appeals to common sense and reverence for the creator as justifications and foundation for liberty. It is arguable that Congress preferred Dickinson's version not simply because it toned down the view of the colonies as "independent" entities, but also because it provided a broader justification of rights than did Jefferson's, one closer to the Bill of Rights they had already fought so hard to achieve consensus on.

In any case, the point here is that while others at this time were appealing to a classic version of a natural rights philosophy to justify American rights, Jefferson himself had not abandoned his argument based on emigration. Once again, Jefferson's view was essentially rejected. Instead, the Congress endorsed a quasi-religious statement of rights, influenced by the natural rights thinking to be sure, but not quite Lockean in the way that some American writers including the First Congress would have articulated it.

Common Sense And Natural Rights

With the War underway. and a continental army in place under General Washington, Thomas Paine's *Common Sense* in January 1776 marked a noticeable turn in the nature of the rhetoric and in the use of natural rights argument.

Volumes have been written on the subject of the struggle between England and America. Men of all ranks have embarked in the controversy, from different motives, and with various designs, but all have been ineffectual, and the period of debate is closed. Arms as the last resort decide the contest;[89]

Paine essentially declares an end to reasoned debate. Previously, Paine argued, the debates involved how best to reconcile with Great Britain. But now rational debate is beside the point and armed combat will decide who is right.

By referring the matter from argument to arms, a new era for politics is struck—a new method of thinking has arisen. All plans, proposals &c., prior to the 19th of April, i.e. to the commencement of hostilities, are like the almanacks of the last year; which tho' proper then, are superceded and usefuless now. Whatever was advanced by the advocates on either side of the question then, terminated in one and the same point; viz. a union with Great-Britain; the only difference between the parties, was the method of effecting it; the one proposing force, the other friendship;…As much hath been said of the advantages of reconciliation, which like an agreeable dream, hath passed away and left us as were …[90]

Although Paine has declared the intellectual debate over, and previous publications outdated like almanacs, he somewhat paradoxically introduces his essay with a lengthy discussion on the theory of government's origins. If the debate was over, why did Paine feel the need to reflect on the origin and purpose of government? Isn't the theory of government now beside the point? The answer is both yes and no. From Paine's perspective the discussion about the nature of American rights with respect to Great Britain was over and would be settled by arms rather than reasoned discussion. But the prospect of independence now brings a new question of government to the fore. What forms of government should Americans adopt? Paine's reflection on government's origin and purpose essentially has this new question in focus. What kind of governments should Americans put in place? Should they be like the government of Great Britain? What should be the model?

What we see in *Common Sense* is a transition starting to occur in the manner of political thinking and theorizing. While previously most writing was focused on the nature of American rights vis-à-vis Great Britain, political theory is beginning to shift towards the question of how to best frame a new government. Looking forward, Paine therefore includes in his essay a plan for the new government. Galloway, of course, had already laid out a plan of government but the end game in his case was to keep the colonies part of Great Britain. Now Paine puts forward a plan of government assuming American Independence. Partly in response to Paine's picture of the new government, and partly at the request of various states beginning to think about their own constitutions, John Adams would draft his own *Thoughts on Government*, shifting debate to the nature of the new government. [91]

It is in this context that we should understand Paine's use of natural rights theory. Paine is essentially invoking natural rights for a new purpose: to envision the

relationship of government to individual rights in a new government. In several ways, Paine's assumptions about natural rights differ from many of the writings about natural rights that we have examined thus far. While Paine's view of government can be construed as within the natural rights tradition reaching back to John Locke, Paine offers a pointedly pessimistic and darker view of government than the other thinkers we have examined so far.

Paine begins by drawing a sharp distinction between society and government. Whereas there is a natural inclination to society, which is good, government is a necessary evil.

> Some writers have so confounded society with government, as to leave little or no distinction between them; whereas, they are not only different, but have different origins. Society is produced by our wants, and government by our wickedness; the former promotes our happiness *possitively* by uniting our affections, the latter negatively by restraining our vices. The one encourages intercourse, the other creates distinctions. The first is a patron, the last a punisher.[92]

In Paine's view society or sociability is a natural inclination, like gravitational pull, people come together and work together. But government is a necessary evil and compensates for men's weak moral beings. "Here then is the origin and rise of government; namely, a mode rendered necessary by the inability of moral virtue to govern the world; here too is the design and end of government, viz., Freedom and security."[93]

Because Pain has such a negative view of government he espouses a minimalist view of government, articulating one of the most libertarian leaning views of government made before Declaration. "Wherefore, security being the true design and end of government, it unanswerably follows, that whatever form therefore appears most likely to ensure it to us, with the least expence and greatest benefit, is preferable to all others."[94]

This is one of the more libertarian sounding statements in the literature before the Declaration of Independence. Paine's libertarian leaning description was tied in to his view that "security" was the true end of government. But we have seen that many colonial writers such as Jefferson, Wilson, Otis and others did not have so negative a view of government and emphasized instead the happiness and public welfare as the end of government, and not just security. By narrowing down the end of government to security, and thereby abandoning the more positive vision of government put forward by Locke and others in that tradition, Paine sees government as only a necessary evil, rather than a positive force for good. The key principle of government is thus "that the more simple any thing is, the less liable it is to be disordered and the easier repaired when disordered." [95]

Contrast for example Paine's description of government purpose with John Adam's definition on government written partly in response to Paine's *Common Sense*:

> We ought to consider what is the end of government, before we determine which is the best form. Upon this point all speculative politicians will agree, that the happiness of society is the end of

> government, as all divines and moral philosophers will agree that the happiness of the individual is the end of man. From this principle it will follow, that the form of government which communicates ease, comfort, security, or, in one word, happiness, to the greatest number of persons, and in the greatest degree, is the best.
>
> All sober inquirers after truth, ancient and modern, pagan and Christian, have declared that the happiness of man, as well as his dignity, consists in virtue. Confucius, Zoroaster, Socrates, Mahomet, not to mention authorities really sacred, have agreed in this.[96]

Paine also much more than many other writers emphasizes the moral failure of human beings and the need of government to address their moral depravity. There is almost a religious and moral tone in Paine's description that reminds one of the theological sermons about man's fallen state and the need for govern. But Paine differs from some of those writers in not explicitly seeing government as the fulfillment of God's plan. Government here is remedial only, not part of the fulfillment of God's will, as it was in Shute and others. In addition, Paine does not hold the view like Otis and Shute, for example, that government itself was founded in the act of creation. Paine sees it otherwise. Instead, people have a natural inclination to sociability. But their moral flailing leads them to take advantage of one another and government arises to address this moral defect.

There is another significantly new strand in Paine's discussion. Paine launches one of, if not the, most explicit criticisms of the institution of monarchy and the British constitution found in the literature leading up to independence. While all writers in the liberty tradition had argued that the concentration of power in a single monarch was unacceptable, most accepted the view that a blended government that balanced power between the monarchy, the aristocracy and the people was not only an acceptable form of government but possibly even the best that could be achieved. Some writers, including Locke himself, as well as American writers like Otis, had hinted although did not say explicitly that pure democracy and republican values were preferable to a blended government with monarchy. But though hints appeared in their writing, most writers did not explicitly take on the institution of the monarchy. The existence of the monarchy was taken for granted as compatible with a system of liberty.

Ironically, as the debate unfolded, the force of colonial criticism and protest as we have seen was aimed at the British parliament which was the body that was supposed to represent the people but which the colonists believed had overstepped the bounds of their power. Even in the more radical responses to Great Britain in Jefferson and Wilson as examples, the assumption was that the colonies would retain a link to the King. We have seen this federated view of the empire, in which the colonies were independent states with their own legislatures but with the King still as their executive head. Colonial pamphlets to this point for the most did not challenge the very notion of hereditary Kingship or claim that it the monarchy incompatible with liberty. Perhaps until this point of time making such as a statement was considered too radical.

Paine dispenses with any caution at all on this point and puts forward an explicit attack on all forms of hereditary succession and on the very notion of a blended government. Paine calls the blended form of government "farsical", asking why the King should be empowered to make decisions even though isolated from the people.

"The only reason Englishmen favor their balanced government is because they are used to it." "And as a man who is attached to a prostitute is unfitted to choose or judge of a wife, so any prepossession in favour of a rotten constitution of government will disable us from discerning a good one." [97]

Paine argues that since all people were created equal that there never should have arisen a distinction between Kings, aristocracy and commons. Making his argument from logic and Scripture, Paine argues that monarchy should never have developed in the first place and was "one of the sins of the Jews." To anyone familiar with Locke's argument against Filmer and Filmer's justification of absolute monarchy, Paine's argument sounds very similar. But Paine goes further and makes explicit what Locke never did: equality means there should never have been a hereditary monarchy or aristocracy at all.

After arguing that monarchy is essentially an evil institution, Paine turns to consider the American situation and the recent arguments some were making about the need for reconciliation. "In the following pages, I offer nothing more than simple facts, plain arguments, and common sense." Here Paine is picking up on that other tradition of argument that did not base American rights simply on the philosophical tradition of natural rights. At this point, Paine offers various pragmatic arguments like those made already in the First Continental Congress, challenging the various pragmatic arguments by moderates about why the colonies by necessity and for their well-being need to stay attached to the mother country.[98]

Interesting enough, Paine offers a very different view of the emigrants' status than we have seen before. Paine himself was a recent emigrant himself and this may have affected his view of who the American ancestors were. But it may also have been that the argument had shifted and the need to prove that the ancestor were Anglo-Saxons or their descendants had come to an end. Rejecting the view that Great Britain is the parent state, Paine writes that "not one third of the inhabitants, even of this Province, are of English descent. Wherefore, I reprobate the phrase of Parent or Mother country applied to England only, as being false, selfish, narrow and ungenerous"[99]

> Europe and not England is the parent country of America. This new World hath been the asylum for the persecuted lovers of civil and religious liberty from *every part* of Europe. Hither have they fled, not from the tender embraces of the mother, but from the cruelty of the monster; and it is so far true of England, that the same tyranny which drove the first emigrants from home, pursues their descendants still.[100]

Paine sees America independence as a fulfillment of a divine plan. "'Tis Time to Part," writes Paine. "Even the distance at which the Almighty hath placed England and America, is a strong and natural proof, that the authority of the one over the other, was never the design of Heaven." Seeing a kind of Protestant significance in America's discovery, Paine argues that "The Reformation was preceded by the discovery of America as if the Almighty graciously meant to open a sanctuary to the persecuted in future years, when home should afford neither friendship nor safety." And with some of the biting whit for which he is famous and perhaps an example of what he considers common sense, Paine writes that "there is something very absurd, in supposing a Continent to be perpetually governed by an Island." [101]

Paine rejects the one last connection to Great Britain that the First Continental Congress had left in tact: the connection to the King.

But the King you will say, has a negative in England; the people there can make no laws without his consent. In point of right and good order, there is something very ridiculous that a youth of twenty-one (which hath often happened) shall say to several millions of people older and wider than himself, "I forbid this or that act of your's to be law." But in this place I decline this sort of reply, though I will never cease to expose the absurdity of it, and only answer that England being the King's residence, and America not so, makes quite another case. The king's negative here is ten times more dangerous and fatal than it can be in England.[102]

"But where say some is the King of America? I'll tell you friend, he reigns above." And let the world know that "in America THE LAW IS KING." [103]

Others such as Galloway had argued that if the colonies declared independence it would lead to civil wars between the colonies themselves. The claim was that without a superintending government above the colonies, their differences would lead to conflict and war. Paine ironically enough agrees with Galloway: a Continental government will prevent civil war between the colonies and argues that the colonies are already in effect being governed by such a government. But while Galloway had presented a cross-colony government under Parliament, Paine speaks of one that is the highest governmental authority. Paine thus concludes his essay with a few short recommendations on how such a government could be initially put together, how it could represent the colonies as well as some miscellaneous reflections on issues that should be addressed by the new government such as the importance of a debt and the building of a military fleet. In this Paine has shifted attention away from the question of independence to the next question of nation building.

Conclusion

We have seen that between September 1774 and January 1776, the arguments about natural rights had changed. The First Continental Congress had made a clear decision to base American rights on natural rights as well as the British Constitution, charters and compacts. It had also essentially declared the colonies independent states that were no longer subject to parliament on any issues whatsoever. But it had left two relationships in tact. It consented to allow Parliament to regulate trade although it had not acknowledged Parliament's right to do so. And it still envisioned a relationship with the King who still had a veto power over their legislature (just as he did with Parliament) and was still recognized as the head of the empire of which the colonies were still envisioned as part. Rejected completely was the view of Jefferson and Jay that the ancestors had left their rights behind when they left the mother country. The first Congress had instead argued that the ancestor brought their British rights with them and that parliament had lost its authority because it could not fulfill its obligation of natural rights, namely, by providing the right of representation.

By the Second Continental Congress, armed combat had broken out and the country was at war. Congress was busy preparing instructions for managing a military force. Congress again rejected Jefferson's view of emigrants' rights and instead published John Dickinson's religiously toned version of natural rights. By January 1776, now within seven months of the Declaration of Independence, Paine had severed the last thread between the colonies and Great Britain. He had argued that natural rights led inevitably to a republican form of government and to the rejection of monarchy altogether. The very notion of the federated empire, held together by a common sovereign who inherited office, was denounced. America was no longer conceptualized as the offspring of Great Britain at all. The emigrants were no longer Englishmen who brought their rights with them or descendants of Anglo-Saxons who quit their society. They were descendants of Europeans in general who had fled persecution and come to the Americas to find liberty. Having now looked at the way natural rights figured in American writings in the decade before Revolution, we are now in a position to consider in what sense we can say that the Declaration of Independence embraces natural rights or is a Lockean document. We are also in a position to evaluate whether the Declaration represents Jefferson's own view of rights.

[1] See Part I of this essay for a discussion of Hopkins.

[2]The Adams Papers are published electronically online by the Massachusetts Historical society. Extracts from Adam's autobiography can also be found in Charles Francis Adams, *The Works*, 374 and in Butterfield, *Diary*, 3:309. Letters of the Delegates to Congress are published online as well by the Library of Congress and by the University of Virginia. Adam's Notes on the Debates are published there as well. An excellent overview of the First Congress can be found in York, "The First Continental Congress". See also Taylor, *Papers*, 144-150 for a good summary of John Adam's role during the Congress.

[3] John Adam's Notes on the Debates are available online at Library of Congress or at Adam's historical records. Also available in Charles Francis Adams, *The Works of John Adams*, 370. I have been unable to find any other detailed commentary on Adam's notes for this day that tries to explicate the positions of the speakers.

[4] Letters of Delegates, Letter 9, Sept. 6.

[5] Becker, *Declaration*, tends to associate the turn to natural rights with the radicalization of the positions towards Great Britain. Similarly Jensen, *Tracts*, liii-lvi, writes that "The Congress was deadlocked for weeks over a declaration of rights. The popular leaders insisted that it should be based on the "law of nature." The conservatives quite understandably opposed a foundation which had never been defined and which would allow every man to interpret its meaning for himself. They argued that American rights should be based on the colonial charters and the English constitution."

While some of the delegates who favored more outspoken positions did favor natural rights (such as Lee), others embraced natural rights but were not as radical (e.g. Jay who was present and Wilson who was not). The position on natural rights did not perfectly align with the position on the continuum between conservative, moderate and radical. See also note 16.

[6]According to Adam's *Notes of Debates*, on September 6 (Letters of Delegates, Letter 9), during the debate on how the colonies should vote in the Congress, Jay said that "Could I suppose, that We came to frame an American Constitution, instead of indeavouring to correct the faults in an old one--I cant yet think that all Government is at an End. The Measure of arbitrary Power is not full, and I think it must run over, before We undertake to frame a new Constitution." And again in a letter on Sept 24th Jay to John Vardill (Letters of Delegates, Letter 90) Jay hopes for a good end but clearly has doubts. For background on John Jay see Morris, *John Jay*. I have not yet been able to find anyone who is surprised that Jay holds a natural rights view and one like Jefferson but is a moderate in the convention with regard to taking steps towards war, separation and on issues like the Galloway plan.

[7] In a letter on September 24th from Jay to John Vardill, see Letters of Delegates, (Letter 90).

[8] There is at least one difficulty with this reading of Jay's position. First, if he thinks emigrants have a right to quit society, then why does he say it is necessary to recur to the British Constitution at all? Wouldn't the British Constitution be irrelevant? It is conceivable that he holds a position like Jefferson that the ancestors chose to model the new society after the old one and entered into compacts with the King and adopted the British Constitution by choice. On this view, the constitution is endorsed by consent, but is not mandated by the fact that the colonists are born subjects. But that view is not stated here and would have to be inferred. And second, on this reading, Jay would be understood to be arguing that the states are already independent entities, which would make it somewhat surprising that he favored reconciliation by supporting the Galloway Plan.

Another possible but, in my view, less plausible reading suggests Jay is taking a position more like that of James Wilson examined earlier. On this understanding, Jay is saying that the ancestors like all people have rights both from nature (life, liberty and property) and as subjects of the British empire. As emigrating subjects they brought those British rights with them. Now Jay considers a possible objection. "It may be said We leave our Country, We cannot leave our Allegiance." On this view, the ancestors carry their status as subjects with them and still owe allegiance to the King, if not the common law. But Jay reasons in a way similar to Wilson: "there is no Allegiance without Protection." Allegiance is only an obligation when the Crown offers protection. Since by implication the Crown did not offer sufficient protection, the obligation of allegiance is terminated. Therefore "emigrants have a Right, to erect what Government they please." On this reading, then, the ancestors do not have a natural right to quit society and leave behind the sovereignty of that country. Instead they bring their rights and duties with them when they emigrate. But because the Crown has not protected them, their obligations to their mother country are ended and they have a right to set up governments as they see fit. The later right is not a "natural right" of emigration per se, like Jefferson and Bland suggest, but the outcome of the Crown's failure to offer protection. The failure of the sovereign power to adhere to its obligations ends its jurisdiction over the ancestors and puts them in a state of nature. Since the Crown fell short of its duties, the obligations of the colonies to the Crown are suspended.

Either of these readings are possible, although the first reading seems to fit better with Jay's emphasis on the rights of the emigrants. What is interesting is that on either of these readings Jay endorses natural rights and seems to hold the view that the colonies are independent states, though he clearly held out the hope of reconciliation with Great Britain. We shall see a similar ambiguity in the interpretation of other delegates statements who favor natural rights. The ambiguity in the natural rights camp meant there was a least two different and not necessarily compatible natural rights arguments being invoked.

[9] York, "First Continental Congress," 365 note 32 makes this point as well. Interestingly, Bland himself who was at the Congress, but is not quoted that often in the notes of the debates, voted against Henry's amendment calling for the colonies to develop militias. See Silas Deane's Diary of October 3rd, Letters of Delegates, Letter 122.

[10]See John Adam's Diary for Oct 11th, Letters of Delegates, Letter 156 and Butterfield, *Diary*, 2:151.

[11]See John Jay's letter to John Vardill on September 24th, Letters of Delegates, Letter 90.

[12]See John Sullivan to John Langdon, October 5th, Letters of Delegates, Letter 132.

[13] John Sullivan to John Langdon, October 5th, Letters of Delegates, Letter 132

[14]For a version of this argument, see for example John Adam's argument in his response to Thomas Hutchinson in 177xxx

[15] See Part II and my discussion of Bland and his relationship to Locke.

[16] Becker, *Declaration*, is a writer who implies by his narrative that the turn to natural rights occurred as a way to justify independence. But this is misleading in a couple of respects. Not only were there more than one flavor of natural rights arguments, but some like Jay invoked natural rights and were still moderates in the debates and others like Jefferson did not particularly endorse a straightforward natural rights argument but argued that colonies were independent states. And finally there were those like Duane (discussed below) who argued from the constitution and the charters and still worried that those arguments led to independence. There was no perfect correspondence at this point between natural rights arguments and various degrees of radicalism.

[17] Duane explicitly says that he is concerned that his view will lead towards independence.

[18] Dickinson was not present at the First Continental Congress until October 17th when after he was elected to the Pennsylvania Assembly. See Samuel Ward's Diary for October 17th, Letters of Delegates Letter 184, and Silas Deane on October 16th, Letter 180. But Dickinson met with and socialized with many of the delegates during the convention (See note 51 below).

[19] Galloway, "Candid Examination" 352.

[20] Galloway, "Candid Examination," 353.

[21] Galloway, "Candid Examination" 377.

[22] Galloway, "Candid Examination" 365-6.

[23] See Adams Notes on the Debates, Letters of Delegates, Letter 23 and in Butterfield, Diary, 2:128-31.

[24] Jensen, *Tracts*, 353

[25] Galloway cites this list in his speech in congress on Sept 28th Letters of Delegates, Letter 105 (also in Butterfield, *Diary*, 2:141-44) and in his "Candid Examination", ,353-355. Citations of Locke appear in "Candid Examination," 362, 364, 368.

[26] Galloway, "Candid Examination" 362

[27] See Part I of this essay.

[28] Galloway, "Candid Examination," 378ff.

[29] Galloway, "Candid Examination," 393

[30] On other plans proposed before Galloway's, see R. G. Adams, *Political Ideas*.

[31] Letters of Delegates, Letter 105

[32] Galloway, "Candid Examination," 358.

[33] Galloway, "Candid Examination," 360.

[34] Galloway, "Candid Examination," 371.

[35] Galloway, "Candid Examination" in Jensen, *Tracts*, 382.

[36] Between Oct 14-18th. According to JCC I:63 on October 14th the resolutions were published on that day. But based on notes of Joh Adams and Samuel Ward it appears discussion continued beyond October 14th. See York, "First Congress," 359.

[37] See Samuel Ward's Diary on September 9th, Letters of Delegates (Letter 33).

[38] Jensen, *Tracts*, liii-lv, imakes it seem like the debate over natural rights continued throughout the congress, which is not correct. That issue was resolved on September 9th after the first debate.

[39] North Carolina delegates arrived late on September 14th (York, 358). Georgia had decided not to send delegates because of unrest on its borders with Creek tribes and fear of losing British support.

[40] The Suffolk resolves were a set of resolutions put together by Suffolk County which contained the city of Boston. These resolves were fairly inflammatory and took a position that was arguably more radical than the resolves which the Congress published. See York, "First Congress," 367 who notes that the Suffolk resolves seemed to presuppose that the colonies had "elected" the king but that it was not clear that all in Congress were endorsing that implication of the resolves.

[41] A nice overview of the events and unfolding debate is provided in York, First Congress. An account of Adam's role is Taylor, Papers, vol 2, 144-150. Accounts of John Jay's activity is provided in John Jay, although no notice is made here of the fact that Jay holds a view like Jefferson but is a moderate.

To provide a brief overview, during this six weeks, Congress appointed a sub committee of twenty four (i.e., two from each colony) to "to ascertain Our Rights, enumerate the Violations of them, & recommend a proper mode of Redress" (Silas Deane to Elizabeth Deanne, Letters of Delegates, Letter 29). On this committee were many of those who had spoken on September 8, including the two Adams cousins (Massachusetts) Hopkins and Ward (Rhode Island) Jay and Duane (New York), Galloway (Pennsylvania), Lee (South Carolina), Lynch and J Rutledge (Virginia). Another subcommittee was appointed of twelve delegates "to examine & report the several statutes, which affect the trade and manufactures of the colonies." (Silas Deane, Letter 29). The larger committee on rights reported back to the general committee on September 14th. The smaller committee on trade provided its report on Sept 17th (JCC 1:29, 40-41).

On Sept 16th, a day John Adam's referred to as one of the "happiest day of his life", (Letters of Delegates, Letter 56, Butterfield, Diary, 2:134-35). Congress expressed unanimous support of the Massachusetts colony by endorsing the Suffolk resolves, a set of strong statements made against the Intolerable Acts by the leaders of Suffolk county in which Boston is the major city. The resolves promised to boycott British imports and curtail exports, support a colonial government in Massachusetts free of royal authority until the Intolerable acts were repealed and urged the colonies to raise a militia of their own.

Through the end of September the committee continued to meet and carried on deliberation of the specific grievances it wanted to declare. It first decided to limit consideration of grievances about regulations made since 1763 rather than revisit the more troublesome question of regulations that the colonies had acquiesced to prior to that date (See JCC for Sept 24th). Then on September 26, Congress approved the non-importation of goods from Britain and Ireland as one means to restore American rights. And on Sept 30th Congress voted against exporting raw goods for manufacture.

On September 28th, in the midst of considering the ways to restore American rights, Galloway introduced his Plan of Union discussed earlier. Galloway's plan offered both an alternative philosophical position but also a supplemental course of action to the non-importation agreement. After substantial debate, Galloway's plan was ordered to "lie on table" and to be discussed at a later point and Congress carried on with heated discussion regarding non-exportation. More detail on the deliberations of Congress can be found in York, "First Congress", and in Taylor, Papers, 2: 144ff.

[42] Oct. 3, Letters of Delegates, Letter 122.

[43] Letters of Delegates, Letter 113.

[44] Oct. 3, Letters of Delegates, Letter 122.

[45] See John Adam's diary, Letters of Delegates, Letter 46 and in Butterfield, *Diary*, 2:133-34. My interpretation is consistent with Taylor's, *Papers*, 2: 147 interpretation of Adam's comment.

[46] See Samuel Ward's Notes for a Speech in Congress on Oct 12, 1774, Letters of Delegates, Letter 165.

[47] See John Adam's Diary, Oct 13, Letters of Delegates, Letter 166, and Butterfield, *Diary*, 2:151-52.

[48]See John Adam's Notes of Debates on September 28th. Letters of Delegates, Letter 135 and Butterfield, *Diary*, 2:141-44.

[49] See Adam's Notes of Debates on September 28th, Letters of Delegates, Letter 105. Butterfield, *Diary*, 2:141-44.

[50] See Adam's Notes of Debates on October 6, Letters of Delegates, Letter 134.

[51] A visit by John Adam with Dickinson is recorded on Sept. 12 (Letter 39) (Butterfield, 2:132-33), as does Treat Paine on the same occasion (Letter 41). On this occasion Adams reports that "Mr. Dickinson is a very modest Man, and very ingenious, as well as agreable. He has an excellent Heart, and the Cause of his Country lies near it. He is full and clear for allowing to Parliament, the Regulation of Trade, upon Principles of Necessity and the mutual Interest of both Countries."

On Sept. 20th (Letter 75), after dinner Adams group went and found a group of colleagues including Dickinson and notes that "Mr. Dickenson was very agreeable." And that "Our Regret at the Loss of this Company was very great." Adams notes dining with Dickinson on Sept 21st (Letter 80). On Sept 24 (Letter 87) Adams writes that: "Mr. Dickinson gave us his thoughts and his Correspondence very freely." On Sept. 25. (Letter 95), Adams writes: "I spent yesterday Afternoon and Evening with Mr. Dickinson. He is a true Bostonian." On Sept. 28, (Letter 104), Adams comments that Mr. Dickinson was present at dinner that evening. On Oct. 1st (Letter 115b) Adams notes being present at the election of the State House when Mr. Dickinson was chosen as a representative. Adams notes on Oct. 3 (Letter 121) that "Mr Dickinson…will make a great Weight in favour of the American Cause." On Oct. 7th (Letter 138, see also Butterfield, *Diary*, 2:149), Adams writes to his wife about the elections in the Pennsylvania Assembly and the election of Dickinson, along with Mifflin and Thompson, "as a most compleat and decisive Victory in favour of the American Cause. And it [is] said it will change the Ballance in the Legislature here against Mr. Galloway who has been supposed to sit on the Skirts of the American Advocates." On Oct. 13th (Letter 166), Adam's notes dining with Dickinson. Interestingly, he also makes some notes that day about the debates on regulating trade.

Adams was not the only one to visit with Dickinson. Thomas Cushing (Letter 127) on Oct. 4 writes to his wife that he has passed her letters to Dickinson. On Sept. 19th (Letter 70) Silas Deane dined with Dickinson. On Sept. 23rd (Letter 85) Silas Deanne "dined with Celebrated Pensylvania Famer alias Mr. Dickinson." George Read writes to his wife that he dined with Dickinson a second time.

[52] Oct 12, Letters of Delegates, Letter 166

[53] See note 36.

[54] Letters of Delegates, Letter 180.

[55]Jefferson himself looking back retrospectively presents the declarations of Congress as a compromise in the "half-way" house of John Dickinson. John Adams for his part later in life claimed in contrast to Jefferson that the declarations of the First Congress anticipated everything in the Declaration. I believe John Adam's view is more accurate as well shall see.

Becker, *Declaration*, 115-116, 119, follows Jefferson and views the results of the Congress as a compromise and takes Jefferson's view that the Congress could not take the leap far enough. "The Congress, in framing its declaration, was in the nature of the case less concerned with the logical coherence and validity of the statement which it made, than with making such a statement as would be acceptable to the greatest number of Americans, and at the same time best adapted to win concessions from Great Britain. If therefore the first Continental Congress did not adopt the theory of British American relations which we find in the Declaration of Independence, it was not because the theory was a novel one." And then again " If the first Continental Congress did not, in respect to the theory of American rights, occupy the lofty ground of Mr. Jefferson, neither did it take the lower ground of Mr. Dickinson; it seems, on the contrary, to have stood midway between these two positions, inviting every man to take which of them he found most comfortable."

There are two points to be made about Becker's characterization. First, Becker is wrong that the statement of the First Congress "did not adopt the theory of British American relations which we find in the Declaration of Independence" as we shall see when we discuss that document. Ironically he turns to Jefferson's *Summary View* to prove that the view of the empire embodied in the Declaration of Independence was well known by 1774, implying that Jefferson's view in *Summary View* is the one shared by the Declaration of Independence, which it is not. On the contrary, we shall see that the First Congress Declaration does hold the same theory as the Declaration of Independence but that neither are the same as Jefferson's in *Summary View*. The first Congress unequivocally rejected Jefferson's (and Jay's) view that the ancestors left their rights behind when they emigrated. And by doing so, it favored the view of natural rights like that put forward by Samuel Adams and James Wilson, among others. It was this later view that was reflected in the Declaration of Independence and not Jefferson's pet theory.

What about Becker's second assertion that the resolutions of the First Continental Congress "compromise?" It depends what one means by a "compromise"? There are at least two different meanings of a compromise: 1) a something intermediate between different things or 2) a settlement of differences by mutual concessions; There are different implications of both views of a compromise and t he statement that the Congress was a compromise is thus misleading.

It is true that the position articulated by Congress did not represent the views of either extreme and therefore did not satisfy everyone. But it did represent the views of some (such as John Adams). And the Congress did go quite a ways in defining a position on American rights that saw the colonies as independent states. The Congress adopted a natural rights argument (against those who were against using natural rights), the Congress rejected the argument of Jefferson and Jay that emigrants had left their rights behind ; the Congress argued that Parliament had no

rights to make any legislation whatsoever including trade regulations. The Congress implied that the colonies were independent states.

I tend to agree, therefore, with Jensen, Tracts, lv that what he calls the "popular leaders" won a sweeping victory. York "First Congress" 355 also offers a helpful perspective, a that delegates were trying to figure out what they could say without being backed into a rhetorical corner and precipitating the war they were trying to avoid.

[56] See JCC I :64-73 for Oct. 14th.

[57] The word "Englishmen" interestingly enough appears to have been absent in an earlier draft (the so-called Sullivan Draught). The earlier draft reads "And whereas the good people of these Colonies, justly alarmed…., do, in the first place, (as their ancestors in like cases have usually done,) for vindicating and asserting their rights and liberties, declare—…" Note that the same sentence in the draft is without the word "Englishmen" inserted. The insertion now makes the resolutions appear to be emphasizing that the delegates are not just following their ancestors but acting "as Englishmen"

This draft was originally identified as the work of John Sullivan but was later identified to be in the handwriting of John Dickinson and may have been his work. Dickinson did not appear in Congress until October 17th. For a discussion see the notes in Letters of Delegates (Letter 171, notes).

[58] There are some versions published on the Web that have the word "foreign" instead of "sovereign." As far as I can tell these are simply interesting mistakes. "Foreign" would imply that the colonists viewed Parliament as a "foreign" government, which some delegates may have felt, but likely would not have voiced in such a way. The official versions published by JCC has the word "sovereign" as does the official Library of Congress publication Hutson, *A Decent Respect*, 53. For examples of this mistake see The University of Chicago "The Founder's Constitution" (incorrect on September 14, 2007) the Yale University Avalon Project (incorrect on September 14, 2007) and Carl Becker, *Declaration*, 122.

[59] Oct. 12th, Letters of Delegates, Letter 164.

[60] On Oct. 13th there was substantial debate on the question of trade as noted by John Adams in his diary for that date Letters of Delegates (Letter 166). This may be in relationship to the fourth resolve that was specifically debated on October 14th. Samuel Ward in his Diary Letters of Delegates (Letter 174) writes "Met, pursued the Subject, adopted a Plan founded on Consent." Though the editorial notes there suggest that this was a statement about the declaration of rights in general it seems to me to be a particular statement about the fourth resolution on trade, namely, that they reached agreement to take a position on trade based on consent, which is what the resolve essentially says. Thus, it is possible that by the 14th the decision to base trade on consent was already made.

In his autobiography, John Adam's reminisces that he was asked by Rutledge to try his hand at this resolution to attempt a compromise between the disputing parties. He writes that after he drafted a version "I believe not one of the committee was fully satisfied with it; but they all soon acknowledged that there was no hope of hitting on any thing in which we could all agree with more satisfaction." Congress then reviewed it and "the difficult article was again attacked and defended. Congress rejected all amendments to it, and the general sense of the members was, that the article demanded as little as could be demanded, and conceded as much as could be conceded with safety, and certainly as little as would be accepted by Great Britain; and that the country must take its fate, in consequence of it." See Charles Francis Adams, *Works*, Vol. 2, 373-377.

The position of this resolution is consistent with Adam's own view that he expressed when jotting down notes about Gadsden's view of trade, with which he disagreed. For Adam's view on Gadsden's comment, see Letters of Delegates, Letter 46 and in Butterfield, *Diary*, 2:133-34.

If my interpretation of Ward's comment is correct, Congress reached consensus on October 14th about taking the position that they "consent" to trade. It is also interesting and suggestive that Adams says nothing about drafting this resolution in his Diary where he is typically pretty open. Indeed, oddly enough on October 14th, he doesn't even mention being in Congress and instead talks about his visit to see Dr. Chevott and his "Skelletons and Wax Work." One might have thought had he drafted the resolution and it was presented on the 14th, he might have mentioned it. On Oct 16th, Adams does mention that he "staid at Home all day. Very busy in the necessary Business of putting the Proceedings of the Congress into Order." Letters of Delegates, Letter 179. On October 16th, the same day that Adam's is at home putting finishing touches on the resolves, Silas Deane writes to Thomas Mumford (Letter 180) that "the General Heads are agreed on".

For other discussions of Adam's role, see York, "First Congress", Charles Francis Adams, *Works*; Becker, *Declaration*. Taylor, *Papers*, 149 notes that the view that the colonies were independent states is not a new position for Adams and was reflected in Adam's response to Governor Hutchinson in early 1773. There Adams was articulating the view that the colonies were annexed lands, and that as annexed lands, the authority over them was at most given to the Crown, not to Parliament, Through Charters, the Crown had given authority over those provinces to local governments and did not hold any executive or legislative power over them. The colonies were then under the allegiance to the Crown but not within the realm. For Adam's essay, see "Two Replies", 121.

[61] See also John Dickinson's Draft Address to the King Oct. 22nd, Letters of Delegates, Letter 195 which affirms the American's loyalty and faithfulness to the King.

[62] Discussion of a federated view of empire in R. G. Adams, *Political Ideas*.

[63] Boyd, *Papers*, vol. 1, 122.

[64] Boyd, *Papers*, vol. 1, 135

[65] Galloway, "Candid Examination," 369.

[66] Leonard "Massachusettensis" December 26, 1775 287.

[67] Adams, "Novanglus", 301.

[68] Seabury's Letters can be viewed online. A useful overview of Seabury's life can be found in Hertz "Bishop Seabury" with a short summary of Seabury's arguments.

[69] That Boston delegates like Samuel Adams were coordinating with Massachusetts Committees was in fact the case as is evident from letters that traveled back and forth.

[70] Hamilton, "A Vindication," 19-49.

[71] Hamilton, "A Vindication," 19.

[72] Hamilton, "The Farmer Refuted," 54.

[73] Hamilton, "The Farmer Refuted," 55.

[74] For background on the Declaration, see JCC Vol. 2: 128 note 1 for July 6, 1775.

[75] See for example Maier, *American Scripture*, 3-46.

[76] The official declaration was debated paragraph by paragraph and approved on July 6, 1775. See JCC 2:128. See also Boyd, *Papers*, Vol 1, 187-192 for background on the writing of this document.

[77] See the analysis of Boyd, Papers, vol. 1: 190-191.

[78] Boyd, *Papers*, I:191 does a good job of bringing out some of the differences and contesting the view that Dickinson simply softened Jefferson's essay. Boyd 191 notes that Jefferson's view here is a forthright statement of the view from *Summary View*. Boyd however fails to note the irony that Jefferson would be putting forward this view after the First Continental Congress had rejected it in its Bill of Rights.

[79] Boyd, *Papers*, I: 193

[80] See discussion of Bland and Jefferson in Part II of this essay.

[81] Boyd, *Papers*, I:205-206

[82] I disagree somewhat with Boyd, *Papers*, (I:191) who suggests that "it would be too much to say that Dickinson categorically rejected Jefferson's theory of imperial relations ;it appears to be closer to the truth to say that he softened the blunt expression of it, partially obscuring the meaning in doing so." I don't believe Boyd has gone quite far enough. On my reading, Dickinson rejected Jefferson's "quit society" theory and reverted back to a position much closer to that of the First Congress when he said "Societies or Governments, vested with perfect legislatures within them, were formed under Charters from the Crown, and such an harmonious

Intercourse and Union was established between the colonies & the Kingdom from which they derived their origin."

[83] Boyd, *Papers*, I: 195.

[84] Boyd, *Papers*, I: 200.

[85] Boyd, *Papers*, I: 207

[86]See Boyd's account.

[87] Boyd, *Papers*, I:205.

[88] Boyd, *Papers*, I:190.

[89]Paine, "Common Sense," 418.

[90]*Paine, "Common Sense," 419.*

[91] See Thompson, *Revolutionary Writings*, 286. John Adams had first drafted a short form of government at the request of Richard Henry Lee on November 15, 1775 (Boyd, *Papers*, 1:333).

[92] *Paine, "Common Sense,"* 402-403.

[93] *Paine, "Common Sense,"* 405.

[94] *Paine, "Common Sense,"* 403.

[95] *Paine, "Common Sense,"* 403.

[96] Adams "Thoughts on Government", 287.

[97] *Paine, "Common Sense,"* 406, 408.

[98]*Paine, "Common Sense,"* 418, 420ff

[99] *Paine, "Common Sense,"* 422

[100] *Paine, "Common Sense,"* 421

[101] *Paine, "Common Sense,"* 423, 424, 427.

[102] *Paine, "Common Sense*,"429.

[103] Paine*, "Common Sense*,"434.

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