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The Declaration of Independence of Independence and Natural Rights: Thomas Jefferson's Alternative Theory of American Rights (Part I).

It is has long been conventional wisdom that The *Declaration of Independence* is the official and most important American endorsement of natural rights theory. According to this view, the Declaration unequivocally endorses natural rights theory although there is substantial debate about whether it represents a specifically "Lockean view" of rights and government in particular, a point to which we return below. This reading of the Declaration provides support for the argument that natural rights are the foundation of the American tradition and the basis of rights in the Constitution and the Bill of Rights. Interestingly enough, neither of those other two critical founding documents *explicitly* endorses natural rights or provides a statement outlining a general philosophy of government.[1] The *Declaration of Independence* contrasts with these later documents, in articulating an explicit philosophy of rights and government. It also represents the culmination of American thinking for the decade leading up to the American Revolution. For all of these reasons, the Declaration has become the source par excellence justifying the view that American constitutional tradition is founded on natural rights philosophy, even though the Declaration's primary purpose was to justify American independence from Great Britain rather than to serve as a founding document for the new United States.

But against the backdrop of natural rights arguments leading up to the Revolution, this conventional view of the Declaration appears misleading in some critical and

potentially troubling ways. To begin with, it is not often realized that the primary author of the Declaration had a different view of rights than is commonly ascribed to the Declaration. Jefferson did not accept the view of rights that had been authorized by the Continental Congress a year and a half before he drafted the Declaration.[2] On two previous occasions, Jefferson had tried to get his alternative view of rights accepted by the Continental Congress but on both occasion his views were rejected. When he sat down to draft the Declaration, he still held a different view of rights and thus had to make a choice-whether to try once again to put forward his own theory of rights or revert to the more traditional theory of natural rights that the Congress had already approved nearly two years earlier. The fact that the primary author of the Declaration disagreed with Congress' official justification of American rights provides a point of departure for rethinking the Declaration's understanding of natural rights and its relationship to American rights and independence.

Jefferson was by no means the only thinker with doubts about natural rights theory or the way such theories were used to ground the rights of North American colonies. In the decade leading up to the Revolution, colonists had expressed some profound concerns about natural rights theory in general and their application to American rights in particular. There was in fact no single monolithic tradition of thinking about natural rights in the decade leading up to the Revolution. And even after the First Continental published its official version of rights in September 1774, doubts remained about the strength of natural rights arguments and about the ways those rights should be used to justify American rights.

Against this backdrop, a more tentative and equivocal reading of the Declaration's statement of rights emerges. Instead of seeing the Declaration as an un-ambivalent embrace of natural rights theory, the Declaration's position of natural rights theory appears much more ambiguous than is often assumed. Because the Declaration was attempting to state a unified colonial position about independence, its language smooths over and avoids areas of disagreement about natural rights among those favoring independence. On this view, the Declaration's language hides as much as it reveals. It is as if the Continental Congress through its revision of Jefferson's draft papered over some of the earlier doubts and disagreements about natural rights theory in an effort to state a unified American view justifying revolution when such a unified theory did not exist. In other words, the Declaration is written in a way that transcends and obfuscates some of the underlying disagreements in American rights theory that had earlier been visible in the writings leading up to the Declaration. That purpose, in fact, may then be one of its effects if not purposes: to try to find common language that could unite Americans across the colonies behind the call for independence. On this view, the Declaration's genius is not only the powerful way it stated natural rights theory but also in what it did not say and what opinions it did not take a position on. Its beauty in part is in framing a statement that seemed to justify independence, while avoiding the unresolved question about the origin of American rights. But in its ellipses and language some of that earlier ambivalence is still evident and there are major equivocations about just how natural rights justifies the American right to declare independence. On this reading of the Declaration, the foundation of American rights was not in fact completely settled and the meaning of natural rights was more contested than is typically understood. Major questions about the source of American rights vis-à-vis Parliament and the British empire were left unresolved. Peek below the general language of rights in the Declaration and an alarming number of potentially thorny issues in American political philosophy rise to the surface. The Declaration suppressed and hid these tensions, though at the same time using language that made evident that some of those issues still lay in the

background. As a political document, then, the Declaration's effect, if not ambition, was to leave aside philosophical differences and achieve a statement whereby all those who embraced some version of American rights – and the versions were in many ways radically different --- could find their voice in the document. In this way, the Declaration is a document that masks differences and complications, even as it points toward and reveals their presence. This alternative account emerges when the Declaration is set against both the background of natural rights arguments leading up to the Declaration as well as Jefferson's own particular views of American rights before the Declaration.

The interpretation of the Declaration proposed here intersects with but diverges in critical ways from recent debates that has taken place about the meaning of the Declaration and its relationship to Lockean natural rights theory. Two key questions have tended to frame that discussion of the Declaration's meaning: The first question, which interestingly enough reaches back to the early 1800's, is whether the Declaration endorses a specific Lockean view of rights? A second and related question is how central is the statement of rights to the Declaration's overall purpose. A brief look at these issues follows below.

Natural Rights, Locke and Independence

Most interpreters agree that the Declaration contains what is generally regarded as the basic assumptions of natural rights philosophy. There are two key passages of the Declaration reflecting these assumptions. The first is the Declarations most famous passage regarding inherent individual rights.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The similarity of this statement to Lockean ideas and even language has been remarked on by many interpreters.[3] In addition to this statement about inherent rights, the declaration articulates a philosophy of government based on consent.

> That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Key assumptions and language from the natural rights tradition are evident in these two famous passages: First, the idea that individuals are created equal and derive inherent rights from the equality of creation is the central contention in Locke's *Second Treatise*. Second, the Declaration clearly articulates the notion that government is instituted to secure these basic rights and third, that governments therefore derive their "just powers from the consent of the governed". Fourth, we also find present the idea that people have the right—indeed the duty—to throw off such a government if that government attempts to "reduce them under absolute

Depotism." So far all of these ideas are good natural rights concepts that as an interlocking set of views are articulated by Locke.

While there is a general agreement that the Declaration takes these ideas for granted, there is debate around whether the Declaration's statement of rights and philosophy of government should be considered specifically Lockean or whether its source of ideas lies elsewhere.

This debate about the Lockean character of the Declaration reaches back to the federalist and republican tensions in 1820's when federalist Thomas Pickering quoted a letter from John Adams to the effect that the Declaration contained no idea "but what had been hackneyed in Congress for two years before." Adams had claimed in essence that the ideas "were in the air" and that all the ideas of the Declaration had been articulated already by the Congress' *Declaration of Rights* of 1774 and by a pamphlet of James Otis.[4]

In response to Pickering and Adam's statements, Jefferson wrote to Madison acknowledging that he had never intended to say anything original but that he had not turned to any particular book or pamphlet. Jefferson also responds to the charge that he had copied from Locke:

> Pickering's observations, and Mr. Adam's in addition, that it contained no new ideas, that it is a commonplace compilation, its sentiments hacknied in Congress for two years before…may all be true. Of that I am not to be the judge. Richard Henry Lee charged it as copied from Locke's treatise on Government…I know only that I turned to neither book nor pamphlet while writing it. I did not consider it as any part of my charge to invent new ideas altogether and to offer no sentiment which had ever been expressed before.[5]

Then on May 8, 1825 Jefferson in a letter to Henry Lee, acknowledged multiple sources of inspiration for the Declaration including but not limited to Locke. The important task in writing the Declaration was:

> Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are impelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind…All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc. [6]

In many ways, the subsequent debate has merely amplified one or more of these various views represented here.

One stream of subsequent thought follows Jefferson's own perspective and argues that Jefferson's genius was in his ability to so eloquently capture the American mind or sentiments of the day. For example, Carl Becker, commenting on Adam's claim that the Declaration was hackneyed, acknowledges that this "is substantially true; but as a criticism, if it was intended as such, it is wholly irrelevant, since the strength

of the Declaration was precisely that it said what everyone was thinking. Nothing could have been more futile than an attempt to justify a revolution on principles which no one had ever heard of before."[7] Similarly Boyd writes that "When he [Adams] said that the Declaration contained only hackneyed ideas, he meant it as criticism, thereby exposing himself to the obvious response: the greatness of the Declaration lay in the very fact that it expressed what Adams himself had said was in the mind and hearts of the people."[8] Indeed, even if Jefferson had copied from Locke or elsewhere "the most that would be proved by this is that he had failed to be original in an enterprise where originality would have been fatal."[9] And Boyd in his opening thus essentially follows Jefferson by stating that "In a broad sense, the author of the Declaration of Independence was the American people…If, as Jefferson intended, the Declaration was 'an expression of the American mind' he was in this sense the inspired amanuensis of the people." And again: "The fact is that these broad concepts, familiar to any reader of Locke or Burlamaqui or Vattel, were so much a part of the air breathed by the patriots of 1776 that Jefferson could not have escaped using them and their more or less fixed phraseology even if he had desired to do so." [10] Similarly Jefferson's biographer Malone wrote that the ideas of the Declaration "belonged to no single man, but in his opinion, were the property of mankind"; and Merrill Peterson in his biography writes that -they "belonged to everyone and to no one".[11]

But if one stream of thought claimed that Jefferson's Declaration captured the ideas that were in the air, and thus represents "the American Mind", a second strand stream of thought has argued the Declaration is most properly described as a Lockean document and owes its largest debt to Locke.[12] These two views are not necessarily mutually exclusive. Jefferson's ideas can be Lockean and still be "in the air." The view that the Declaration is Lockean was put forward most articulately by Carl Becker in *The Declaration of Independence*. Becker made at least four different and not necessarily compatible claims, a fact not appreciated by all post-Becker interpreters. Becker argued that 1) Jefferson copied from Locke, 2) had read Locke so many times he had memorized Lockean language which he used in the Declaration, 3) that Lockean ideas were in the air (or as Becker so eloquently puts it: "where Jefferson got his ideas is hardly so much a question as where he could have got away from them."[13]) and 4) that natural rights were compelling to Jefferson and his cohorts because they solved a problem, namely, how to justify independence.[14]

While many have accepted or developed Becker's assumption of Lockean influence, there has been extensive debate about one or more of Becker's contentions: whether Jefferson knew or read Locke, whether Lockean ideas were in the air in general, whether Jefferson leaned literarily on other American sources of natural rights language, such as James Wilson's pamphlet *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* [15] or George Masons' *Virginia Bill of Rights*, both of which have strong linguistic similarities to Jefferson's language in the Declaration.[16]

A third and more recent stream of thought, sometimes referred to as "the republican synthesis", has taken a different tact, arguing that the emphasis on Locke has been overstated in the pre-revolutionary writings in general.[17] Emphasizing the importance of republican ideas and traditions, these writers stress how other intellectual traditions beyond that of Locke shaped American thinking, such as radical Whig thinking, republican views from antiquity or Scottish Enlightenment thinkers. In general, this line of interpretation has argued that Locke's influence has been overstated in the interpretation of the ideas of the revolutionary thinkers. When this

perspective is brought to bear on the Declaration, that document appears less like a Lockean natural rights document and instead is thought to have other influences, such the English Bill of Rights of 1688, which also grappled with the problem of removing the English King or the writing of the Scottish Enlightenment thinkers.[18]

In response to this republican synthesis which has downplayed and marginalized Locke, a recent series of important essays and books has reiterated the view that Lockean ideas were very important and influential in the period leading to the Revolution and to the Declaration itself. These responses argue that Lockean ideas were both distinctive in European thought and had themselves penetrated radical Whig thinking after the Glorious revolution. Locke's rise to dominance in Whig thinking occurred after the Glorious Revolution and came to dominate and shape Whig radical thinking which influenced the colonial writers and ultimately the Declaration. The Declaration is thus reflecting a view of rights that was new with Locke's *Second Treatises* and thus was "Lockean" whether or not Jefferson ever read Locke. The Lockean character of the Declaration thus differentiates the American Revolution, which was justified by natural rights theory, from the Glorious Revolution which rested on different assumptions. [19]

This essay takes a different approach to the question of the Declaration's position on rights and argues that a key aspect of the Declaration's meaning and function has been missed. Instead of asking whether the Declaration is Lockean or what literary documents are the source of its ideas, this essay argues that the Declaration's position on natural rights and independence is much more equivocal than has been typically realized. The question about the source of Jefferson's ideas is less relevant and interesting than the question of what position on rights was getting articulated. The answer to that question is more equivocal than previously thought. And the equivocation is one part of the Declaration's meaning and function. Indeed, one central purpose of the Declaration was to unite the colonies behind the decision to declare independence. As such, the Declaration had to evade and sidestep any disagreements about rights that might still have lingered. In this sense, the Declaration had to speak as if "debate had ended" to use the words of Thomas Paine in *Common Sense*, when on the matter of American rights, the debate had not completely ended and there remained some significant disagreements about the foundations of and nature of natural and American rights. Jefferson himself did not agree with the view endorsed by the First Continental Congress in 1774, though that constituted the official view endorsed by the Congress on behalf of the colonies. When Jefferson sat down to write the Declaration, he had to find words to unite those who otherwise had diverging views. On this reading of the situation, Jefferson's brilliance was, not only in his powerful rhetorical performance, but to find an articulation of rights that would seemingly be amendable to as many parties as possible, including himself. In this sense, "all its authority rests then on the harmonizing sentiments of the day," to use Jefferson's own words, is more profound and ironic an interpretation than anyone has fully appreciated.[20] If Jefferson's Declaration of Independence captures the American Mind, then it does so in all the complexity and disagreement that characterized the "American Mind" at the time. There was arguably no single American Mind on the question of rights.[21] And the Declaration was harmonizing a tradition that did in fact have divergent views and loose ends. This statement on rights would have to speak not just to those who endorsed the first Congress's position, but also those who did not, including its author. This interpretation of the Declaration then takes a position that both affirms and criticizes all of the various the positions in the debate. The Declaration does endorse natural rights language and a Lockean like view but at the same time it

exhibits some of ambivalence about natural rights and the way natural rights are linked up to American rights. It thus affirms that Lockean ideas were in the air but also affirms that these ideas were contested. The American foundation of rights was not a settled matter.

In addition to rethinking the meaning and place of rights in the Declaration, this essay dovetails with the second critical question in the literature: just how central is the statement of natural rights to the Declaration's purpose? It is generally conceded by most interpreters that the purpose of the Declaration was not primarily to state a theory of rights or government but to explain to the world why the colonies were declaring independence from Great Britain and why they deserved to be recognized an independent states among the nations of the world.[22] In fact, the colonies had already declared their rights in several earlier documents, particular the *Declaration of Rights* published by the First Continental Congress in 1774. What was new in the Declaration of Independence was not a theory of rights per se, but the justification of independence. As such, the Declaration was making a statement about the rights of the colonies to be recognized as independent political entities among the nations of the world. The right to be recognized as a nation equal with other powers of the world was itself a separate but related question to the matter of the Americans' natural rights. For an individual or group of individuals could be living in a situation under which their natural rights were being violated without having thereby established a right to set up a separate state on a particular political territory and be recognized as a nation of the world. And it was one of the central purposes of the Declaration to make that latter claim. From this perspective, some interpreters emphasize that the Declaration thus appears to stand less in a natural rights tradition reaching back to Locke and more in the intellectual tradition reflecting on the Laws of Nations reaching back to thinkers such as Vattel.[23] In that tradition, key questions include when does a political entity get recognized as a state, and what rights do states have vis-à-vis each other, questions that cannot be entirely separated from the question of when do natural rights allow people to consent to the creation of a new state? As Vattel put it, for example, "we have already observed, that, in order to form this natural law of nations, it is not sufficient to simply apply to nations what the law of nature decides with respect to individuals."[24]

While most interpreters agree that justifying the independent statehood of the colonies was the overarching purpose of the Declaration, it is generally conceded that the natural rights language and philosophy of government is critical to that argument. It is the rights language and philosophy of government that provides the justification for the colonies to be recognized as independent states. Indeed, the Laws of Nation tradition was built on and extended the natural rights tradition and was often conflated with it.[25] So there is no way to extract and separate the Law of Nations intellectual tradition completely from the natural rights tradition. The rights language and philosophy of government in the Declaration thus provides the framework in which independence and the justification of statehood makes sense. Without it, the larger argument falls apart.

As we shall see, however, the exact relationship between the natural rights argument and the theory of statehood is one part of what is equivocal in the Declaration. There were two or more very different justifications for statehood among the colonists and the Declaration equivocates on which one it endorses. That equivocation is key. Jefferson himself had a view that had been rejected by his colleagues on two separate occasions. The Declaration's final language sounds more like the language of the First Continental Congress than it does Jefferson's own view.

Thus it makes sense that Adams could claim that Jefferson was saying nothing that was not already hackneyed since the First Continental Congress in 1774. From that reading of the Declaration, the very same theory of rights and statehood articulated by Congress was being articulated by the Declaration. And Adam's was one of the committee members who approved the Declaration. But at the same time the language leaves equivocal exactly how the theory of individual rights married up to the theory of the states' right. That equivocation was useful. It enabled the Declaration to include Jefferson's own theory of rights, which he tried to smuggle into the Declaration. And in this way, Jefferson produced a declaration that transcended but left unresolved some of the underlying disagreements about the natural rights tradition and the American foundation of independence.

Jefferson's Alternative Theory

When Jefferson sat down to write the *Declaration of Independence*, the colonies had already achieved a quasi-official position defining how natural rights would figure into the basis of American rights. That understanding which was embodied in the First Continental Congress' *Declaration of Rights*, however, was not the political theory that was consistent with Jefferson's own personal view.[26]

Jefferson had several times tried to put forward an alternative understanding of rights and political theory. That understanding placed the foundation of American rights on the "right to quit society", or what he latter called the right of expatriation.[27] Jefferson had argued that an individual has a natural right to quit one's country. The settlers of North America had exercised this right to quit their country of birth, find new lands and establish new political entities there that were not subject to the sovereignty of Parliament or under the authority of the King. Jefferson viewed this right to quit society as a natural right and believed it provided the foundation to justify not only the legislative independence of the colonies but the fact that they were independent states among the nations of the world. Jefferson was not the first to put forward this view. His colleague from the Virginia House of Burgesses, Richard Bland, had made an almost identical argument in March 1766 near the close of the Stamp Act Controversy. Nearly ten years later in 1774, Jefferson made almost precisely the same argument as Bland, now taking Bland's thinking a step further towards its logical conclusions.[28]

On Jefferson's theory the settlers had no rights or obligations derived from the British Constitution when they immigrated to the lands in America. They left those behind. The new settlers, therefore, were not British Americans, the way many other colonial writers thought of them. After conquering the new lands—and Jefferson did think the settlers had conquered their lands— they set up their own legislatures and freely modeled them after the laws of their mother country and the Anglo-Saxon tradition. But that decision to adopt the laws of their home country had been done freely and was not mandated by any obligation. Indeed, Jefferson does not usually use the word "colonies" because for him the new entities always were free and independent states. Jefferson did assume, like many of his contemporaries, that the Anglo-Saxon ancestors were the ones who had brought the traditions of liberty and rights with them to England in the first place.[29] In his view, the various settlers of North America had adopted those laws and tradition of common law by choice. The fact that the settlers had by right quit their country of origin and set up new political states meant that they were not subject to Parliament's authority. Parliament was simply another legislature in the empire representing its own people (the English)

which did not include the new political entities in America. In this image of a "commonwealth of nations", multiple political states had autonomy but were united by a common executive, the King, to whom each subject had allegiance.[30] The King in turn was obligated to offer protection to his subjects. In Jefferson's view, the settlers had not only chosen to adopt British constitution but had also adopted the King as their chief officer. Under Jefferson's view, the relationship of the various American states to the British Empire was less of "mother" to "child" but also something more than simply a contract between equal nations. They were a kind of "league of nations" with separate legislatures united under a common sovereign, whom they had freely chosen to adopt as their chief officer, in order to preserve ties with their country and traditions of origin. In this way, the American entities had separate legislatures not subordinate to Parliament but they were still subjects of the Crown having made that decision by choice. They were, in other words, under the executive authority of the Crown but not that of Parliament. On Jefferson's view, therefore, *there was never really a need to assert independence* as *a new state. Independence had already occurred in the past with the emigration of the settlers from England.* The states were already independent. Jefferson had outlined these views in his *Summary View* a pamphlet that he wrote as instructions to the Virginia delegates to the First Continental Congress in 1774. Jefferson himself was too ill to attend the Congress, but he sent the pamphlet to Patrick Henry and Edmund Pendleton, the latter who "laid it on the table" for perusal by the delegates to Congress. It was this pamphlet which initially gained Jefferson a reputation as a strong writer and advocate for legislative independence.[31]

Jefferson's perspective in *Summary View* could be and often is construed to be based on a Lockean view of natural rights. But that view is arguably an anachronism, projecting the views understood to be represented in the *Declaration of Independence* back onto his earlier writing which espoused different views. There are several reasons such a description is problematic at least without adding substantial nuances to the statement.

First, Jefferson's view was not the view accepted by the First Continental Congress which was the first official body to approve the use of natural rights arguments as a basis of colonial rights.[32] Congress' view was much closer to a different and what can be called a more classical natural rights argument as used by James Wilson and Samuel Adams, among others. *At the very minimum, then, there are several fundamentally different views of how natural rights arguments justify American rights and independence.* And at the heart of the disagreement between Jefferson and Congress was a number of key questions: do people have a natural right to quit society? Under what conditions? Do they have a right to create new political entities? What conditions must obtain for conquering a land to result in the right to new states? Did the settlers of North America conquer the land or find it uninhabited? We shall contrast the two views of rights below.

Second, it is at least debatable whether Locke would have agreed with the unqualified statement that people have a right to quit society, as I've discussed elsewhere.[33] Locke recognized that each individual had to consent to the social compact at maturity when the parents no longer had authority over their children. In Locke's view, however, a person who had reached maturity and had *explicitly* consented to live in society could not leave it. Thus, for Locke the right to leave society would depend on whether individuals had explicitly consented to live under the compact of a society. Once in, you couldn't leave without sufficient cause. While Jefferson's right to quit society could be linked back to Lockean natural rights,

Jefferson nowhere made any argument that would ground this view in Locke or in the natural rights tradition. He offers no recognition of the fact that Locke thought the right to quit society was lost once one explicitly consented to join the social compact. He simply assumed the existence of an unqualified natural right to quit society.

Third, Jefferson sometimes avoids the use of some classic natural rights language, a point I have developed in much more detail elsewhere.[34] While he calls the right to quit society a "natural right", there is a marked ambivalence to the use of standard natural rights language in other places where it would make the most sense. We find nothing like the explicit statement about the nature or origin of government in social compact or an account of original rights in a state of nature as found in other writers like Bland, Wilson, or Samuel Adams, to cite earlier and contemporary examples of Jefferson. Although there is a statement about "life and liberty" being created by God, there is no general statement anywhere in his earlier essay about the right to "life, liberty and property," a common refrain in the more classic statements of natural rights. There are other examples where reticence seems to guide Jefferson and a conscious avoidance of natural rights language. He emphasizes "God and the laws" rather than "God and Nature" and he emphasizes God's role in creating liberty, in a way reminiscent of Otis, discussed in more detail below. Moreover, in a passage that deals with the right of the British people to depose their King, and thus a context that would normally seem quite appropriate for a reference to Lockean natural rights, Jefferson avoids the language altogether: "A family of princes was then on the British throne, whose treasonable crimes against their people brought on them afterwards the exertion of *those sacred and sovereign rights* of punishment reserved in the hands of the people for cases of extreme necessity" [emphasis added]. The use of the terms "sacred" and "sovereign", as well as the language "inalienable" are all terms that could just as well refer to rights derived from the common law tradition, the historical tradition of rights reaching back to the Saxons which Jefferson believes the settlers adopted in America.[35] In Jefferson's *Summary View*, the emphasis is not on general natural rights, but on the right to quit one's society and set up a new political entity. Instead of an argument from general natural rights, there is still a reliance on what looks like a Whig historical argument that links American liberties back to British liberties and ultimately back to Saxons liberties. If one wants to call Jefferson's view "a natural rights" or "Lockean argument" one at least has to qualify that statement by recognizing that it diverges in fundamental ways from arguments of other colonial writers and thinkers who more explicitly rely on what is a classic Lockean argument.

Even if one still wants to categorize Jefferson's views as a natural right position, it is evident that it was neither the classic natural rights position nor the one that found the most favor. In fact, the First Continental Congress had rejected Jefferson's point of view in the *Declaration of Rights and Grievances* it published in October 1774, even though it endorsed a natural rights argument. Jefferson himself was not in attendance, but views similar to his had been suggested by several of the delegates such as John Jay and possibly by Richard Henry Lee.[36] One of the key objectives of the First Continental Congress was to publish a statement of rights and this task occupied the Congress on and off for six weeks. Early during the Congress, delegates had debated whether natural arguments should be used in justifying the rights of the colonies. Despite initial disagreement about whether natural rights were a solid or feeble foundation of rights, Congress settled on the position endorsing natural rights within a matter of days. But it chose a view of rights that differed substantially from Jefferson's. Though Congress came to the conclusion that the colonies were

independent states, it arrived there by a very different route and based on very different assumptions than Jefferson, a point often overlooked or not given sufficient weight by interpreters.

Specifically, Congress adopted the position that was identical to that of Pennsylvanian lawyer James Wilson among others. According to that officially sanctioned view, the ancestors of the Americans had no right to quit society, or at least that right was not the basis of American rights. Instead they had brought their British rights and obligations with them from the mother country and were as entitled and obligated to them as natural born subjects. When they left Britain, therefore, they came as British subjects to the new colonies, obligated to all the duties and entitled to all the rights of people born there. They were British Americans when they arrived in North America. This view moreover was shared by many of the delegates to Congress such as James Duane, John Rutledge, Samuel Adams, John Adams, Richard Bland and others. Samuel Adams who endorsed a different natural rights argument than Jefferson had this to say about the subject of quitting society, "All Men have a Right to remain in a State of Nature as long as they please; And in case of intolerable Oppression, Civil or Religious, to leave the Society they belong to, and enter into another." For Adams, the right to quit society was conditional on intolerable oppression, and for Adams and many colonial writers that condition had not obtained in the initial migration. The settlers came to the lands in America as bona fide British subjects.

But a problem emerged because of the colonies' geographical distance from Great Britain. In the view of Congress, and many colonial writers, that geographical distance made it by definition impossible for Parliament to give the colonies adequate representation in Parliament. Congress, of course, took for granted that representation was a key right of the British Americans. But Congress rejected the view that adding American representation to the British Parliament would meet those requirements of consent. It also rejected attempts, like that of Galloway, to construct a new system of government that would attempt to meet this requirement of representation. At issue was a broader debate on the nature of representation.[37] Congress, like many colonial and British writers, had come to the conclusion that there was no way to satisfy the requirement of British American representation in Parliament. The geographical distance meant that the representatives "there" did not live among their constituents "here" and thus by definition could not represent them, as living among the constituents and being impacted by the same laws was one way in which representation was understood, reaching back to Locke. And Americans had rejected the British claim that representation had always been "virtual" anyway.[38] Since representation*, by definition*, could not be provided to the colonies, the colonists' natural rights were infringed. *On the view of Congress, then, it was this inherent, inevitable and irreversible infringement of natural rights that justified the separate statehood of the colonies.* Like Wilson and others, Congress therefore argued that the colonies had to be independent states with their own legislature because British American's natural rights could be protected in no other way. By this, Congress meant that the colonies should be supervised by their own legislatures, which were wholly independent of and not subordinate to Parliament.

This position taken by Congress is thus fundamentally different than that put forward by Jefferson in *Summary View*.[39] This point has often been missed or under appreciated by interpreters of Jefferson and the Declaration. In contrast to the position taken by Congress, Jefferson's position on independence did not have to depend on a theory of representation at all. He saw the initial political independence

occurring as soon as the settlers migrated from England. The migration itself was an act of independence. The whole question of representation was thus irrelevant to his theory of independence whereas the view adopted by Congress depended completely on the inherent inability of Parliament to meet the representation requirement which was inherent in natural rights theory.

It was not only the First Continental Congress that rejected Jefferson's views. Jefferson tried once again to get his view endorsed when he attended the Second Continental Congress in June 1775. On this occasion, he was called upon to develop the second draft of the *"Declaration of the Causes and Necessity for Taking Up Arms"* to explain why the colonies were going to war. In his draft of this declaration, Jefferson once again put forward his own theory of rights. But this time his view was rejected by the committee, this time led by John Dickinson and possibly William Livingston. This rejection was not simply a softening of a more radical position, as is sometimes assumed.[40] In fact, Dickinson's version was quite forceful in its own right. But Dickinson's revision was a rejection of Jefferson's theory of rights. The "Declaration of the Causes" published by the Second Continental was Dickinson's reworked version that substantially demoted if not obliterated the theory of the ancestors' rights that Jefferson had put forward. Dickinson's version was much more consistent with the rights position that the First Continental Congress had put forward, although Dickinson's version put much greater stress on the role of God and clothed the natural rights arguments in more theologically sensitive language, a point to which we return.

Rights and the Allegiance to the Crown

In addition to the fundamental disagreement about the origin of the settler's rights, Jefferson and Congress also diverged on the question of allegiance to the Crown. It is important to separate this question from the issue of subordination to Parliament. On Jefferson's view, the right to quit society implied the right to freely repudiate the allegiance to the Crown, not just the sovereignty of Parliament. The right of expatriation meant that one can leave one's country at will and also leave behind the status as a subject to the Crown. One's allegiance to the Crown and expectation of protection from the Crown do not follow one if one leaves one's country of origin.[41] In Jefferson's view, the settlers came to this country with neither an executive officer nor an inherited monarchy. But they did freely choose to adopt the King as their executive leader.

What is emerging in embryonic and undeveloped form in Jefferson is the notion that the executive officer should be the representative of the people and chosen by them, a view that became more central as the colonies moved towards independence. A year and a half after Jefferson's *Summary View*, Thomas Paine unleashed a biting critique of monarchy arguing it was an institution incompatible with natural rights. But that emerging perspective differed from the standard view. Natural rights theory, at least as formulated by Locke, had never taken that position. On the contrary, Locke, Montesquieu and many Americans following the same line of thinking, such as James Otis and others, had assumed that natural rights were compatible with three different forms of government: democracy, aristocracy and monarchy. As long as the people chose the particular form of government under which they lived, the minimum standard of government by consent had been met. As long as monarchy was not absolute and did not overstep its bounds of power, it was compatible with natural rights and consent. Indeed, many writers thought the "blended" form of British government, which combined democracy, aristocracy and

monarchy was the most perfect way of achieving and protecting liberty.[42] Jefferson initially accepted this view. But Jefferson assumed that because the settlers had left Great Britain and had a right to quit that society, they were no longer subjects of the Crown. But they freely chose to adopt the King as their executive officer. And once adopted, the King had all the rights of the executive rights of Crown such as the "exercise of his negative power" (i.e., veto power), a responsibility Jefferson initially argued that the King has underutilized in controlling the bad behavior of Parliament.[43] For Jefferson, the King's (executive role) was to mediate between the various states of the empire for the good of the whole.

What Jefferson's early position in *Summary View* never makes explicit is how does one end the relationship with an "adopted" monarch? Can one un-adopt him and if so how? Must one depose a monarch who has been adopted in a voluntary way in the same way that one deposes an inherited monarch on the throne? Or are the criteria to depose an "elected" King easier to meet in this case? English history had already established a precedent for removing a King from the throne in 1649 with the beheading of King Charles I and in 1688 with the "abdication" of James II from the throne. But those were instances in which an inherited monarch had been deposed. Was the standard the same for removing a King one had chosen by choice? In the classical understanding of the monarchy, there was a reciprocal relationship between the Crown and the people and each had its own domain of influence. The Crown was viewed as an executive body that had key roles in protecting the state and the people and by playing a key role balancing the diverse interests of society.[44] A pure democracy was in fact viewed as potentially dangerous since it lacked the kinds of checks and balances of the English constitution. Jefferson reflected this view of the Crown when he described the King as "no more than the chief officer of the people, appointed by the laws, and circumscribed with definite powers, to assist in working the great machine of government, erected for their use and consequently subject to their superintendance." Jefferson also saw the King's role "as yet the only mediatory power between the several states of the British empire."[45] This is what it meant in part to be subjects of the Crown. In return for their allegiance, the monarch was obligated to protect the people and operate the government within the limits set by the people. While natural rights theory had insisted that the Crown's power over the people was balanced by representative bodies, such as the Upper and Lower houses of Parliament, it did not initially require an elected executive branch.

When Jefferson argued that the settlers had created new political states with the King as the chief executive officer, he made allusion to the possibility that power could revert to the people. But Jefferson did not thoroughly develop his position and explain the conditions under which the King could be deposed. Thus we look in vain in Jefferson's *Summary View* for an understanding of the process to remove a chief officer who had abused his powers.

Leaving Jefferson's position and turning back to the view of Congress, a different view of allegiance is evident, more in line with the thinking of Wilson and John Adams, among others. While for Jefferson allegiance to the Crown could be severed by the right to quit society, on Congress' view the colonies came to this country with their British rights intact and as subjects to the Crown.

> 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.

The settlers were British Americans initially and came to the American continent subject to Parliament's authority and as subjects of the Crown. In Congress' view, however, Parliament could not retain its authority over the settlers, because of the failure to meet the representation standard required by natural rights. But the relationship of the settlers to the Crown was of a different nature. That relationship remained in tact unless the Crown overstepped its powers or abandoned its protection. James Wilson puts this explicitly in his essay arguing that in the case of Ireland and in the case of the Americas: "Allegiance to the king and obedience to the parliament are founded on very different principles. The former is founded on protection; the latter, on representation."[46] Wilson is here reflecting a widely shared view at the time that the issue of representation was limited to the matter of legislation, and not the monarchy.

In the view of Congress, James Duane, James Wilson, John Adams and a large number of others, the settlers of America brought their allegiance to the King and status as subjects with them to America. They were British subjects in British America. That relationship could remain in tact across geographical distance, even if representation across that geographical distance could not. While for Jefferson that relationship was a matter of choice, in the view of Congress, the relationship was already in place at the founding of the American settlements and was obligatory unless the conditions for deposing the Crown occurred. And one of the conditions for ending that relationship was the King reneging on his obligations of protection. Natural rights arguments, on this view, tended to be used to justify the independence of the legislature much more than the end of allegiance to the Crown.

Rights, Territories and Land Possession

In addition to the question of allegiance to the Crown, there was another thorny problem lurking underneath the surface: what right did settlers have to lands in America? The whole issue of how lands were acquired by states in general and by the settlers of America was a Pandora's box that no one really wanted to examine in too much detail, for good reason. Inside were a number of competing views about how land rights of political entities originated and came about. Indeed, some individuals had argued that natural rights theory was wrong precisely because governments so often were created through conquest, rather than social compact.[47] Locke himself had pondered the question of political territories in quite some detail in his *Second Treatise*, for the question of how social groups acquire land is related to the issue of how individual's consent to live in political groups and how individuals acquire property. For those who thought deeply about the issue of colonial rights, the question of how lands in America were acquired was potentially an embarrassing difficulty for the theory of American rights in general and a matter on which not everyone agreed. And it was certainly an issue relevant to the claim of the Declaration--that the political entities on the American lands deserved to be

recognized as free and independent states. But what gave the settlers rights to the land in the first place? [48]

Jefferson described the settlement of America as a conquest by the settlers, achieved through their own efforts and blood. That conquest in Jefferson's view gave the settlers the right to the lands that they occupied and thus grounded their right to create political territories on those lands. Their right to found new states thus rested not just on the right to leave their country of origin but on their legitimate claim to the land which they had conquered through their own efforts, without the help of the Crown.

> America was conquered, and her settlements made, and firmly established, at the expence of individuals, and not of the British public. Their own blood was spilt in acquiring lands for their settlement, their own fortunes expended in making that settlement effectual; for themselves they fought, for themselves they conquered, and for themselves alone they have right to hold.[49]

This then provides the justification for the settlers claim to land. "From the nature and purpose of civil institutions, all the lands within the limits which any particular society has circumscribed around itself are assumed by that society, and subject to their allotment only."

Jefferson links his view back to the Anglo-Saxon notions of property to argue that the lands in America did not belong to the Crown.

> Feudal holdings were therefore but exceptions out of the Saxon laws of possession, under which all lands were held in absolute right. These, therefore, still form the basis, or ground-work, of the common law, to prevail wheresoever the exceptions have not taken place. America was not conquered by William the Norman, nor its lands surrendered to him, or any of his successors. Possessions there are undoubtedly of the allodial nature. Our ancestors, however, who migrated hither, were farmers, not lawyers. The fictitious principle that all lands belong originally to the king, they were early persuaded to believe real xxx?

Jefferson is arguing here that possession of the land belongs in the hands of the settlers and not the Crown and that this theory of property extends back to the Anglo-Saxon law which formed the basis of common law tradition. The early settlers (including his colleagues who did not share his view) were duped into believing the principle that all lands belong originally to the King.

In *Summary View*, Jefferson did not explicitly acknowledge the presence of natives in America, although at one point he describes the "settlements having been thus effected in the wilds of America" almost implying that the lands were unoccupied and thus up for grabs, according to natural rights theory. But his claim that the settlers conquered the lands belies that perspective, implying that he thought there was a right to conquest and a conquest had taken place. But the justice of this conquest, and the relationship to rights argument, was a question that Jefferson passed over in deafening silence in *Summary View*. Congress was also able to sidestep the question of whether lands in America were conquered. But others felt the need to address the question.

James Wilson, whose view was identical to Congress in other respects, took up this question in his *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, completed in 1770 and published in 1774. Wilson considered the view of William Blackstone who had pondered the status of the colonies in his *Commentaries on the Laws of England (1765-1769)*. Wilson quotes Blackstone's views on the status of the American "plantations".

> Besides these adjacent islands (Jersey, etc.), our more distant plantations in America and elsewhere are also, in some respects, subject to the English laws. Plantations, or colonies in distant countries, are either such where the lands are claimed in right of occupancy only, by finding them desart and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties…
>
> Our American plantations are principally of this latter sort; being obtained in the last century, either by right of conquest, and driving out the natives (with what natural justice I shall not at present inquire) or by treaties." 1. Bl Com. 106. 107.

In this passage quoted by Wilson, Blackstone regarded the colonies in America as settlements created through conquest and treaty and thus not necessarily subject to the laws of England. In the extended passage of Blackstone, which Wilson doesn't quote, Blackstone writes that

> And both these rights [the right to claim lands by occupancy and by conquest] are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it is held, that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws ; but, till he does actually change them, the antient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country. [50]

For Blackstone, different laws apply depending on how the colony came to be acquired. If the lands were uninhabited, then the colonization by English subjects immediately resulted in the imposition of English laws. But in conquered or ceded countries—and the lands of America fell into that category according to him—then it was up to the King to decide what laws apply. In the latter case, therefore, the lands are not under Parliament's control but they are under the control of the Crown. It is interesting to note that in passing Blackstone raises, but does not develop, the question of "with what natural justice" the settlers drove out natives.

James Wilson challenged Blackstone's understanding of the facts but not his interpretation of law.[51] In disagreeing with Blackstone, Wilson subtly shifted the discussion away from the conquest of the natives to the question of whether the colonies had been conquered. And in doing so, Wilson articulates a view that differs quite sharply from Jefferson's.

> It will be sufficient for me to show, that it is unreasonable, and injurious to the colonies, to extend that title [conquest] to them. How came the colonists to be a conquered people? By whom was the conquest over them obtained? By the house of commons? By the constituents of that house? If the idea of conquest must be taken into consideration when we examine into the title by which America is held, that idea, so far as it can operate, will operate in favour of the colonists, and not against them. Permitted and commissioned by the crown, they undertook, at their own expense, expeditions to this distant country, took possession of it, planted it, and cultivated it. Secure under the protection of their king, they grew and multiplied, and diffused British freedom and British spirit, wherever they came. Happy in the enjoyment of liberty, and in reaping the fruits of their toils;

Wilson shifts the question from conquering the natives, which Blackstone had apparently assumed, to the question of whether Britain had conquered the colonists. Far from being conquered, the colonists had come under auspices of the Crown and settled the lands peacefully. Then Wilson turns to the thorny question of how the settlers had come to have title to the land and whether that should be considered a conquest. "That idea, so far as it can operate, will operate in favour of the colonists, and not against them," since they came at their own expense, took possession of the lands and cultivated them. The language of possession and cultivation suggests, not an act of conquest, but a settlement of unoccupied lands and the rightful possession by settling and working the land. Wilson thus seems to hold the view that the natives were living in a State of Nature and that land in such an unoccupied state could be taken for use. This seems to reflect a view similar to that held by others, such as Vattel, who in 1759 wrote in the *Law of Nations*, for example, that

> There is another celebrated question, to which the discovery of the new world has principally given rise. It is asked whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations, whose scanty population is incapable of occupying the whole? We have already observed (§ 81), in establishing the obligation to cultivate the earth, that those nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies. The earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with substance: if each nation had form the beginning resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants.[52]

Here Vattel is building off a Lockean justification of property origin to justify the European entitlement to the American lands. Since God gave the earth to all humans equally each has an equal right to take possession of parts that can be put to

productive use, for their own purposes. But people are not allowed to take more than they need. Since the natives were not making any true use of the land, they cannot be said to possess it, and therefore, therefore the people of European were lawfully entitled to take possession of it.

Wilson seems to hold a similar view, though he does not make it explicit: the British settlers came to America, took possession of unoccupied land, and thereby were subject to all the English laws. He thus disagrees with Blackstone on the facts (they were uninhabited lands) but agrees with Blackstone on the law: as Blackstone put it "that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them.[53] What constitutes "an uninhabited country" of course is an interesting question in its own right, but the point here is that Blackstone had assumed that America was not "uninhabited" and that a conquest had occurred, while Wilson had assumed a rightful possession of unoccupied land, under the auspices of the Crown.

That the issue under debate about land, possession and conquest touched on and intersected with the question of natural rights was acknowledged by Blackstone in that same passage that Wilson interestingly enough skipped. As Blackstone put it: "And both these rights [i.e. conquest or taking possession of deserted land] are founded upon the law of nature, or at least upon that of nations." The equivocation of whether the right of land possession and political territory is a question of natural rights or law of nations is precisely the same equivocation that arises in the Declaration, as discussed earlier.

About the same time, John Adams, offered one of the more profound statements on the moral question at stake, in his *Two Replies of the Massachusetts House of Representatives to Governor Hutchinson*, written in 1773. [54] Adams contested Hutchinson's claim that "at the Time that our Predecessors took Possession of this Plantation or Colony, under a Grant and Charter from the Crown of England, it was *their Sense*, and the Sense of the Kingdom, that they were to remain subject to the Supreme Authority of Parliament."[55] Discussing the original possession of land for the Massachusetts colony, Adams writes that

> We would take a View of the State of the English North American Continent at the Time when and after Possession was first taken of any Part of it, by the Europeans. It was then possessed by Heathen and Barbarous People, who had nevertheless all that Right to the Soil and Sovereignty in and over the Lands they possessed, which God had originally given to Man. Whether their being Heathen, inferred any Right or Authority to Christian Princes, a Right which had long been assumed by the Pope, to dispose of their Lands to others, we will leave to your Excellency or any one of Understanding and impartial Judgment to consider. It is certain they had in no other Sense forfeited them to any Power in Europe. Should the Doctrine be admitted that the Discovery of Lands owned and possessed by Pagan People, gives to any Christian Prince a Right and Title to the Dominion and Property, still it is vested in the Crown alone. It was an Acquisition of Foreign Territory, not annexed to the Realm of England, and therefore at the absolute Disposal of the Crown. For we take it to be a settled Point, that the King has a constitutional Prerogative to dispose of and alienate any Part of his Territories not annexed to the Realm.

Adams makes two points here that differentiate his view from others. In contrast to the view of Wilson (and someone like Vattel), Adams assumes that the "Heathen and Barbarous People" had "a Right to the Soil and Sovereignty in and over the Lands they possessed, which God had originally given to Man." In contrast to Wilson (but like Blackstone and Jefferson), Adam assumes that the lands had been possessed by the natives.

Did the Europeans have the right to conquer and take away those lands? With obvious sarcasm, Adam's questions the doctrine that Christian princes have a right to take away lands from pagan peoples on religious grounds. But even if you grant that dubious principle, Adam's argues the land would nonetheless be annexed to Crown and not to the Realm of England. Therefore, the King has the right to dispose of land that he had conquered. By implication, Adam's is arguing that the King could grant this land to the settlers, and the settlers would not be subject to Parliament's authority, though they would be subjects of the Crown.

Adams here arrives at a view of a commonwealth of nations but along a different path than either Jefferson or Wilson. In his view, the King has acquired the land (whether ethically or not) and could grant those to the settlers without subjecting them to Parliamentary authority. This view differed from Wilson who argued that the settlers had peaceably settled unoccupied land and taken possession of the land themselves as British Americans. Jefferson for his part argued that the settlers had conquered the lands (they were never under Parliament or the Crown's disposition). On the moral question involved, Adams acknowledges the problem but places the blame squarely on the shoulders of the Crown, Wilson sidesteps the problem arguing the lands were unoccupied, and Jefferson simply considers the settlement a conquest, without considering the moral question at all.

What we see here is fundamental disagreements about a core and critical issue that ties directly to natural rights theory and the law of nations, and thus ultimately to the question of whether the American settlers were by right free and independent states. Some of these disagreements of course were partially settled in the First Congress' *Declaration of Rights* when it sided with the position like that James Wilson. The Congress held that the settlers settled the lands under the auspices of the British Empire. But the question of conquest and rightful occupation of land was an issue on which there was deep underlying disagreement and on which there had been no real resolution.

In the final analysis, of course, the positions of Jefferson, Congress, Wilson and Adams had ended up in very similar places. From the end game, all had argued that the colonies are independent states in the sense that they are not subject to Parliament's authority at all and should be governed only by their own legislatures. In each of these views, the settlers had an allegiance to the King who was expected to provide protection and who had executive duties. The similarities in "end state" of the various positions have led many interpreters to conflate these very different positions and assume the Declaration therefore was an expression of a monolithic American Mind and thus expressing ideas that had been hackneyed in Congress for over a year. But the underlying assumptions about rights in general, about how they relate to American rights, and the development of statehood and territory, are quite different.

General Ambivalence About Natural Rights

Jefferson was not was not the only colonial writer who had doubts about the more classic natural rights position, at least in the version adopted by the First Continental Congress. During the First Congress in 1774, only a year and a half before the *Declaration of Independence*, there was still substantial debate on whether natural rights provided a solid or feeble foundation for American rights. Reading retrospectively backward from the *Declaration of Independence*, these doubts about natural rights are often forgotten and portrayed as the opinion of "conservatives" or moderates resisting the momentum towards independence. The story that is often told is that the movement towards independence was tied into an inexorable shift towards natural rights arguments. [56]

But the various positions on natural rights were much more complicated than that story suggests. Not all thinkers who turned to natural rights language agreed on basic assumptions and principles of what natural rights meant. Furthermore, many including the Congress felt that natural rights simply complemented the argument from British rights (the position of the Congress and James Wilson), but that natural rights arguments did not stand on their own. In addition, the embrace or rejection of natural rights did not neatly align with moderate or radical position. For example, some moderates such as John Jay endorsed natural rights arguments quite forcefully, though ultimately siding with those like Galloway who wanted to try to preserve the union with Great Britain.

As late as 1774, several delegates were still expressing serious reservations that natural rights arguments constituted a "feeble foundation." This was by no means the first time that doubts had been raised about natural rights as a foundation for American rights. In the decade leading up to revolution there were various doubts about the social contract theory and theory of government's origin upon which classical natural rights theory seemed to rest. Elsewhere I have detailed various objections and doubts about natural rights theory by several leading colonial thinkers in the period leading up to the First Continental Congress.[57] Writers like Massachusetts lawyer James Otis, Rhode Island governor Stephen Hopkins, Maryland lawyer Daniel Dulany, and Massachusetts radical Samuel Adams had all expressed serious doubts about some of the critical assumptions of the natural rights tradition. They felt that one of critical and central assumptions of the natural rights tradition was problematic, namely, the idea that government was itself founded in social compact. This of course was a central part of Locke's argument in explaining how individuals consent to give up some of their natural liberties so as reap the benefits of joining society. It was not that these writers doubted the idea that government *should* be governed by consent of the people or that representation was a critical requirement of a just government. No one doubted that proposition. But they doubted that most historical governments actually were founded that way and they were not convinced that the original institution of government in general originated that way. They may even have found evidence of such a doubt in the story of how the British American settlers acquired their own lands, as we have already seen.

A careful reading of Locke's *Second Treatise* would actually have shown that Locke had in fact anticipated this criticism and had made clear that he was arguing, at least at times, that government *should* be founded in natural rights, not that it always was founded that way. [58] But the American writers attributed to the natural rights tradition both convictions and assumed that one grounded the other: governments actually did and therefore should arise from real actual social compacts. The two

propositions were linked together in the way they understood the natural rights tradition. The claim that government should be founded on consent was based on the claim that governments did arise that way. If therefore that assertion was false then the conclusions of natural rights philosophy-that government should attend to the people's happiness and protect their rights --was theoretically shaky. At the very least, other grounds for these truths would have to be found outside of the natural rights tradition.

Noted colonial writers expressed precisely such doubts about the natural rights tradition. Looking back into history, it appeared that governments had often been founded on conquest and colonization and there were few examples of governments that were actually created by people coming together and creating a social compact. To be sure, there were examples of republics in antiquity, and these provided inspiration to the colonial writers. But there were many--indeed possibly a preponderance of existing and historical governments-- that had risen by other means than social compact and were ruled by tyranny. On what basis, then, could one argue that the ideal state of society was consent of the governed?

A second and related issue was the purported origin of government as a human institution in general. Natural rights theory seemed to imply that the very beginning of government as a human institution had arisen when some individuals left the State of Nature and made a social compact. But that account raised various kinds of difficulties as well. For more religiously oriented individuals, this account of government's origin seemed to downplay God's role in the creation of government, and appear to ascribe an inappropriate preponderance of responsibility to the human role in the development of government. This bothered some more religiously and theologically minded writers who thought that the emphasis on the human role in government's origin flew in the face of standard covenantal assumptions. An alternative theory of government's origin thus attributed the creation of government much more explicitly to God. On that theory, at least the way some writers explained it, government was not a matter of social compact—there was no choice about it. It had been ordained as part of creation itself. [59]

By moving the origin of government back into creation such thinkers risked undermining the very foundations of the natural rights arguments. After all, Locke understood the individual decision to submit to government to involve a renunciation of some natural liberties. There was a trade-off, some of the freedoms in the State of Nature for the benefits of social life. Indeed, it was precisely the view of government as founded in creation that had justified monarchists such as Filmer and from whom Locke had differentiated his views. Other writers left the choice of government up to individuals but argued that the state outside of government was not "natural liberty", but a "state of sin". The choice between living under political arrangements and living outside of such arrangements was cast in religious-theological terms. Only by joining a social system one acted in accordance with God's will.

Stephen Hopkins, the governor of Rhode Island, succinctly expressed the circulating doubts about natural rights theory this way in his pamphlet entitled , *The Rights of the Colonies Considered* (Dec. 1764).[60]

> The safety resulting from society, and the advantage of just and equal laws, hath caused men to forego some part of their natural liberty, and submit to government. This appears to be the most rational account of its beginning, although, it must be confessed, mankind have by no

> means been agreed about it. Some have found its origin in the divine appointment; others have thought it took its rise from power; enthusiasts have dreamed that dominion was founded in grace. Leaving these points to be settled by the descendants of Filmer, Cromwell and Venner, we will consider the British constitution, as it at present stands, on Revolution principles, and from thence endeavor to find the measure of the magistrates' power and the people's obedience.[61]

Similar doubts were expressed in much more detail by James Otis whose pamphlet *The Rights of the British Colonies Asserted and Proved* (July 1764) was widely read in the colonies. Otis called attention to three different theories of government's origins, each of which he found inadequate:

> What shall we say then? Is not government founded on *grace*? No. Nor on *force*? No. Nor on compact? Nor *property*? Not altogether on either. Has it *any* solid foundation, any chief cornerstone but what accident, chance, or confusion may lay one moment and destroy the next? I think it has an everlasting foundation in the *uncheageable will* of God, the author of nature, whose laws never vary. [62]

After rejecting the standard known theories of government origins, including the theory of social compact, Otis endorses the more theological and religious view that government is founded in God's will at creation. While various passages in Locke could actually support this same point, Otis and others who inclined to more religious language thought that natural rights theory put too much emphasis on human decision and choice in the creation of government.[63] Thus Otis shifts the creation of government back into creation itself and therefore denies that there was any social compact at all that was initiated by human actions. Government originated with creation. It was not a decision entered into by choice by human beings after creation. Other religiously and theologically oriented writers would follow suit, not just clothing natural rights language in covenantal and theological language, but changing some of the basic assumptions of the tradition.[64]

Otis records many more circulating reservations about natural rights theory than simply the prominence of human choice in the creation of government.

> On the other hand, the gentlemen in favor of the *original compact* have been often told that *their* system is chimerical and unsupported by reason or experience. Questions like the following have been frequently asked them, and may be again.
>
> "When and where was the original compact for introducing government into any society, or for creating a society, made? Who were present and parties to such compact? Who acted for infants and women, or who appointed guardians for them? Had these guardians power to bind both infants and women during life and their posterity after them? ….Is it possible for a man to have a natural right to make a slave of himself or of his posterity? ..What will there be to distinguish the next generation of men from their forefathers, that they should not have the same right to make original compacts as their ancestors had? If every man has such right, may there not be as many original compacts as there are men and women born or to be born? Are not

> women born as free as men? Would it not be infamous to assert that the ladies are all salves by nature? If every man and woman born or to be born has an will have a right to be consulted and must accede to the original compact before they can with any kind of justice be said to be bound by it, will not the compact be ever forming and never finished, ever making but never done?…"
>
> I hope the reader will consider that I am at present only mentioning such questions as have been put by highfliers and others in church and state who would exclude all compact between a sovereign and his people without offering my own sentiments upon them; …Those who want a full answer to them may consult Mr. Locke's discourse on government, M. De Vattel's law of nature and nations, and their own consciences. [65]

Otis concludes:

> And say the opposers of the original compact and of the natural equality and liberty of mankind, will not those answers infallibly show that the doctrine is a piece of metaphysical jargon and systematical nonsense?" Perhaps not. [66]

Otis' conclusion, "perhaps not", surely is not a ringing endorsement of natural rights theory and the theory of social compact, coming as it does after a long series of known objections against the theory of "original compact." The system is thought to be "chimerical" , "metaphysical jargon", and "systematical nonsense." It also is "unsupported by reason or experience." Otis then lists a series of probing objections that could be posed to the theory. What kind of force does the law have for those who were not at the original compact and are descended from those who were? Do they have the same rights and obligations? Can they go off and make a new social compact? Why not? What about children and women? Were they included in the social compact? These questions raise important philosophical and moral questions at the heart of social contract theory. To be fair, Locke had thought about and many of these questions and tried to address them in the *Second Treatise*, as Otis himself noted. But clearly these objections were still important enough that Otis thought necessary to review them and to claim that he was basing his argument on a different theory altogether. That social compact theory had such theoretical problems was not lost on many colonial writers.

As late as 1774, doubts about natural rights arguments were still clearly visible in the debate among delegates at the First Continental Congress. Some of the delegates still argued that natural rights arguments presented a "feeble foundation" and preferred to argue from the British Constitution and from Compacts and Charters. In the end, Congress decided to make a safe decision and base colonial rights on natural rights as well as the British Constitution, charters and Compacts. But as we have seen above there were still serious doubts and open fissures left unresolved in those who adopted some version of natural rights argument.

Jefferson's own theory of rights, as expressed in *Summary View*, sits comfortably within this tradition of political thinking that has doubts about the classic theory of natural rights. To be sure, Jefferson calls the right to quit society a natural right. And while one still might want to call Jefferson's position a "natural rights" argument, it was fundamentally different than that of others such as Wilson and Adams and the

position endorsed by the Congress. Indeed, he never invokes a general theory of government, or social compact, the way others like James Wilson and Samuel Adams did. Nor does he argue for American rights based on the right of representation. When he does talk about the origin of liberty, Jefferson's language seems much more like that of James Otis and others in the theological sub-tradition, emphasizing God's creation of liberty, rather than an original compact. At times, his language seems to emphasize that knowledge of liberty was intuitive and innate, based on human feelings, rather than discerned through reason the way John Locke had implied.[67] Indeed, Jefferson's right to quit society enables him to argue, not from a general theory of political consent, but like Hopkins and Dulany before him, from a specific compact that was created between the settlers and the Crown of England. Jefferson appeals to a concrete historical compact made between the settlers and Crown, when they chose to adopt British laws and the King as their elective head. But if one wants still wants to say that Jefferson belongs to the natural rights tradition, one at least has to recognize that that tradition was not monolithic, and that there was substantial debate on key aspects of American rights: whether settlers brought British rights with them, whether representation was relevant to the argument, whether government was founded in social compact, whether allegiance to the Crown and subordination to Parliament followed the same principles, and how rights to the land were acquired. At the very least, Jefferson held an alternative view of rights from that endorsed by the First Continental Congress. Having now situated Jefferson's own thinking in the context of debates on American rights, we can turn back to the moment in time when he sat down to write the Declaration of Independence and see how these same issues were still on Jefferson's mind.

Jefferson Clings To An Alternative Theory

To understand Jefferson's frame of mind when he sat down to write the Declaration it is helpful to briefly back up to the moment after the Second Continental Congress rejected his draft *Declaration of the Causes* and adopted Dickinson's reworked version. After writing this draft, Jefferson remained at the Second Continental Congress in Philadelphia working on committees until December 1775 when he returned home. He did not arrive back to the Congress until May 14, 1776. In the intervening months, Thomas Paine has published his *Common Sense* (January 1776), John Adam's had published his *Thoughts on Government (Spring 1776)*, and several colonies were now ready to declare independence.

We know that in the intervening period since he left the Continental Congress in December 1775, Jefferson had not yet given up his pet theory about the ancestor's rights. In the period back at home, he was again trying once more to support his theory that the ancestors were entitled to found new states. In an essay that was never published, entitled *Refutation of the Argument that the Colonies Were Established at the Expense of the British Nation*, Jefferson this time turns to a detailed historical argument to prove that the colony of Virginia had no obligation to Parliament.[68] He surveys the various charters that the Crown had made with Sir Walter Raleigh and his predecessors, showing how the lands were granted by the Crown to these early settlers. After surveying the role of Sir Walter Raleigh in founding of Virginia, Jefferson concludes

> This short narration of facts, extracted principally from Hakluyt's voyages, may enable us to judge of the effect which the charter to Sr.

> Walter Ralegh may have on our own constitution and also on those of other colonies within it's limits, to which it is of equal concernment. It serves also to expose the distress of those ministerial writers, who, in order to prove that the British parliament may of right legislate for the colonies, are driven to the necessity of advancing this palpable untruth that "the colonies were planted and nursed at the expence of the British nation": an untruth which even majesty itself, descending from it's dignity, has lately been induced to utter from the throne. Kings are much to be pitied, who, misled by weak ministers, and deceived by wicked favourites, run into political errors, which involve their families in ruin: and it might prove some solace to his present majesty, when, fallen from the head of the greatest empire the world has seen, he shall again exhibit in the political system of Europe the original character of a petty king of Britain, could he impute his fall to error alone.[69]

This historical essay was provoked by the King's speech at the start of Parliament in October 1775 when the King declared that the colonies were in a state of rebellion and that too much was at stake "to give up so many colonies which she has planted with great industry, nursed with great tenderness, encouraged with many commercial advantage, and protected and defended at much expence and treasure"[70]Jefferson apparently read the King's speech on January 19, 1776 and likely wrote his response at that point after that time.[71] In this essay, we find Jefferson providing a historical justification for the argument he had earlier made in *Summary View* and *Declaration of the Causes*. It is a "palpable untruth" that the British nation planted and nurtured the colonies. Therefore there are no grounds for arguing that the Parliament has authority over the colonies.

What is new here is Jefferson' criticism of the King for being misled and deceived by "weak and favorite" ministers into adopting this erroneous political view. Jefferson argues that the consequences will be devastating for the King. His mistaken judgment will cost the leader his empire and he will end up being nothing more than a mere petty king of Britain. Jefferson is clearly implying and threatening that the colonies (and perhaps other British dominions) will no longer recognize the King as their sovereign, with the result that he will rule over England only and no longer be the recognized King of a larger British empire that included the American states. The empire in other words will be reduced to just a single state.

By implication, Jefferson is suggesting that the colonies will no longer have any ties left to Great Britain, a clear vision of independence. In *Summary View*, Jefferson had already argued that the colonies were independent states that had essentially chosen or selected the King as their elected leader. Now he is anticipating the colonies ending that relationship as well. The league of nations would be dissolved. Jefferson still does not say here how he envisions putting an end to the relationship with an elected King. But by the time he sat down to write the *Declaration of Independence* he had given the question some thought and come up with an answer. The answer is contained in a draft constitution Jefferson wrote for the State of Virginia shortly before he had actually drafted the Declaration of Independence. This document, which was reworked and incorporated into the Declaration of Independence, arguably constitutes Jefferson's *Original Declaration of Independence* and more authentically reflects Jefferson's own views than the Declaration he drafted for Congress, as we shall now see.

Jefferson's Original Declaration of Independence

In June 1776, only weeks before he wrote the *Declaration of Independence*, Jefferson had written several drafts of a constitution for Virginia. Jefferson's home colony was in the process of responding to the Congress' call for colonies to produce their own Constitutions. On May 10th four days before Jefferson arrived back in Philadelphia, Congress had approved a resolution recommending the colonies assume all powers of government.

> Resolved, That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs have been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.[72]

The resolve essentially recognized the end of all local British authority and that local colonial assemblies now had the authority to establish governments that would "best conduce to the happiness and safety of their constituents." [73] On May 15th, Congress in a divided vote approved a preamble written by John Adams as an introduction to the resolution of May 10th resolution. The preamble was more explicitly radical than the resolution making it explicit that "his Britannic Majesty, in conjunction with the lords and commons of Great Britain, has, by a late act of Parliament, excluded the inhabitants of these United Colonies from the protection of his crown;" and therefore that

> it is necessary that the exercise of every kind of authority under the said crown should be totally suppressed, and all the powers of government exerted, under the authority of the people of the colonies, for the preservation of internal peace, virtue, and good order, as well as for the defence of their lives, liberties, and properties, against the hostile invasions and cruel depredations of their enemies; therefore, resolved, &c.

In essence, Adam's preamble is announcing the end of the colonies allegiance to the Crown, which according to Congress was the only remaining tie left to Great Britain. Adam's recognized Congress' approval of his preamble as an endorsement of independence. [74] That same day, May 15th, Virginia adopted its resolution calling on Congress to declare the colonies free and independent states.

Jefferson arrived back in Congress on May 15th, one day before both the Virginia resolution and approval of John Adam's preamble. It must have been before or shortly after that date that Jefferson began writing his drafts of the Virginia Constitution, for several drafts were written by June 13th, when he sent a copy with George Wythe who was going back to Virginia.[75] Based on letters Jefferson wrote at the time, it is clear that he actually thought the activity of drafting a Virginia Constitution more important than the activity in Philadelphia at Congress and he expressed the wish to be recalled. But since he had only recently arrived at Congress, his home colony did not recall him. The result was that Jefferson's drafts of the Virginia Constitution arrived back in Virginia after the shape of the Constitution had been decided but the Committee did alter some of the laws in light of Jefferson's

own draft .[76] Jefferson's preamble listing all the various infractions of King George III was incorporated into the Virginia Constitution.

With some revisions, Jefferson's draft of the Virginia Constitution became the basis for the list of charges against King George that appears in Jefferson's first draft of the Declaration of Independence as well.[77] Jefferson took one of his earlier Virginia drafts and made some improvements in style thus reworking it into one part of the Declaration of Independence. Thus the draft of the Virginia Constitution is an early draft of one part of the Declaration of Independence. But the draft of the Virginia Constitution is more than just a *first draft* of one part of the Declaration. It arguably *actually is* Jefferson's *Original Declaration of Independence*. By this I mean that the significance of this document is not simply that it was incorporated into the Declaration of Independence, but that standing on its own it represents Jefferson's first and original Declaration of Independence. For Jefferson understood the draft Constitution as a document declaring independence for the State of Virginia.[78] He was writing this document, moreover, as an individual and not part of a committee, as he would have to do when drafting the Declaration of Independence for Congress. Jefferson's first draft of the Virginia Constitution, then, more than the Congressional one which he wrote for the colonies as a group, represents Jefferson's own views about how to frame independence and could be properly called Jefferson's *Original Declaration of Independence*.

Jefferson's first draft of the Virginia Constitution is of interest, therefore, because it provides a window into Jefferson's own political philosophy and conception of independence on the eve of drafting the Declaration. It is thus illuminating to see what assumptions from the Virginia Declaration made it into the Declaration of Independence and which assumptions did not. While the Virginia Declaration is consistent with Jefferson's own theory of rights, he had to adopt a position with which he did not fully agree in writing the Declaration of Independence. Thus the Declaration of Independence holds a position on rights that appeared more consistent with the language of the First Continental Congress' Bill of Rights, at least after the revisions by the Committee of Five and Congress. Understanding that Jefferson had to promote a position on rights with which he did not fully approve provides a new context by which to understand some of the wording he chose and some of the interesting changes he arguably made to the classic formulation of natural rights language.[79]

No Natural Rights In Jefferson's Original Virginia Declaration Of Independence

One of the most obvious and important differences between what I am calling Jefferson's *Original Declaration of Independence* for Virginia and the one Jefferson would shortly write for Congress is the noticeable absence of any natural rights preamble or language. The significance of this difference seems to have been missed by most commentators who have focused instead on how charges against the King were revised and reused in the Congressional Declaration of Independence.[80] But the absence of any natural rights statement in Jefferson's first draft of the Virginia Constitution is illuminating, indicating once again that Jefferson's political philosophy is operating in the background. Since in Jefferson's view the colonies never were under the sovereignty of Parliament, there was no reason to invoke natural rights to justify the colonies' legislative independence. The only tie that Jefferson believed remained was between the colonies and the King whom the colonies had voluntarily adopted. The problem of independence as Jefferson framed it was how to remove an

elected king. In looking for a model for that process, Jefferson arguably turned to the English Declaration of Rights of 1689 which formally ended the reign of James II.[81]

The focus of Jefferson's Virginia Declaration, therefore, is almost exclusively on the King's misdeeds, consistent with Jefferson's view that the relationship with the King was the only remaining connection to the British empire. Jefferson charges that the King who was "entrusted with the exercise of the kingly office in this government, hath endeavored to pervert the same into a detestable and insupportable tyranny…" As evidence of this intention, Jefferson cites sixteen violations of his office that included: vetoing laws of the legislature that were for the common good, by stalling the wheels of government by preventing his appointed officials to approve the legislatures laws, by dissolving legislative assemblies and not calling another for a long period of time, for making naturalization of foreigners difficult and thereby preventing population growth, by keeping standing armies in a time of war, by cutting off American trade to the rest of the world, by imposing taxes without consent, by depriving the right to trial by jury, and finally by abandoning the helm of government and declaring "us" out of his allegiance & protection.

Jefferson then provides the theoretical framework for deposing the elected King.

> by which several acts of misrule the sd. George Guelf has forfeited the kingly office, and has rendered it necessary for the preservation of the people that he should be immediately deposed from the same, and divested of all its privileges, powers, & prerogatives
>
> And forasmuch as the public liberty may be more certainly secured by abolishing an office which all experience hath shewn to be inveterately inimical thereto and it will thereupon become further necessary to re-establish such ancient principles as are friendly to the rights of the people and to declare certain others which may co-operate with and fortify the same in future…

And then in the second draft of the Virginia Constitution, Jefferson begins with this shortened introduction which then appears with slight revision in the third draft as well.

> Be it therefore enacted by the authority of the people that the said, George the third, King of Great Britain and elector of Hanover be & he is hereby deposed from the kingly office within ys. Government. & absolutely divested of all it's rights & powers, & that he and his descendants and all persons claiming. by or through him & all other persons whatsoever shall be & for ever remain incapable of the same; & that the sd. office shall henceforth cease & be never more erected within this colony.[82]

Jefferson here fills out the theoretical position left unclear in his earlier *Summary View*: explaining how an elected King can forfeit his office by turning it into a tyranny and abusing the prerogatives the people had given him. When this happens, he forfeits his office and the people therefore should depose him. But Jefferson goes further and argues that the very institution of monarchy should cease within the colony. Thomas Paine had already made an eloquent argument to the same effect in his *Common Sense* and here Jefferson follows in the same path and recognizes monarchy is "inimical to" the public liberty.

Consistent with his view in *Summary View*, Jefferson here appeals, not to natural rights in general, but notes that "it will thereupon become further necessary to re-establish such ancient principles as are friendly to the rights of the people and to declare certain others which may co-operate with and fortify the same in future." Jefferson thus appeals once again to the common law tradition reaching back to the Anglo-Saxons. The settlers came to and conquered new lands, set up new political entities, and chose to adopt the British Constitution and the ancient principles of rights inherited from the Anglo-Saxons. They are preserving the tradition of liberty that reached back to the Saxon ancestors. In Jefferson's Virginia Declaration of Independence there is no appeal needed to natural rights. On Jefferson's conception of Independence, the American states are like the House of Commons removing their King. Only in this case, the intent is never to accept a future King as an officer over the State of Virginia.

Having now shown that Jefferson's Virginia Declaration of Independence does not depend on a theory of classic theory natural rights per se, but on ancient principles and the natural right to quit society, we can turn back to the Congressional Declaration of Independence and drafting of that document.

Jefferson's Second Declaration of Independence

The story of the official Declaration of Independence has been told by many othe writers in some detail and doesn't need to be repeated here. Briefly, on June 7, 1776 Richard Henry Lee of Virginia introduced a resolution in the Continental Congress proposing a Declaration of independence.

> *Resolved*, That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved. That it is expedient forthwith to take the most effectual measures for forming foreign Alliances. That a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.[83]

On June 10, 1776 Congress decided to delay the vote on independence until July 1, with the hope of achieving a greater consensus from the colonies. On June 11, 1776, Congress appointed a committee "in the meantime" to draft a declaration so "that no time be lost, in case the Congress agree thereto" on the next vote. The committee was comprised of Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert Livingston and Jefferson was selected, for various reasons, to write the first draft.[84] By June 28th, the first draft from the Committee of Five was ready and ordered to lie on table for review. This draft already contained some revisions made by Jefferson himself and some recommended by Adams and Franklin.

Based on the preceding discussion, we are now in a position to see that the official published Declaration of Independence did not represent the way that Jefferson himself thought about independence. Had he had his druthers he never would have put in the classic statements about natural rights for which the Declaration is so famous. On three other occasions he had passed over the opportunity to insert explicit statements of natural rights in his writing, first in his *Summary View*, again in his *Declaration of the Causes*, and then again in his *Original*

Declaration of Independence for Virginia. It is reasonable to conclude that Jefferson himself would have happily published a Declaration of Independence with no such statement of rights (as in fact he did in his Virginia Declaration). On his view, a statement of natural rights simply was not needed, and he may have had doubts about natural rights theory anyway, as discussed earlier. What was needed was simply a way to depose the King.

But Jefferson had on each of these earlier occasions seen his peers reject his view of rights. The First Congress rejected his view of rights in its Declaration of Rights which it published in early 1774. Then about a year before he wrote the Declaration of Independence, Jefferson watched his own draft of the *Declaration of the Causes* be rewritten by John Dickinson. Among other changes, Dickinson inserting a statement of natural rights before Jefferson's own statement of the ancestor's rights essentially obliterating and reinterpreting Jefferson's own theory.

It is not surprising then that Jefferson would try a different tact on his third attempt to draft a document that would be acceptable to his colleagues in the Congress. This time he had learned his lesson. And indeed there was no time to waste since this declaration had to be drafted and approved in haste. Indeed, there is some likelihood that the committee itself gave Jefferson some instructions about what to say and would likely have instructed him to include a statement of rights, given that two of the members were John Adams and Benjamin Franklin.[85] But even had not done so, Jefferson by this time knew that his own theory would not pass muster. Jefferson already probably seen the Virginia Bill of Rights by George Mason on June 6 in a Pennsylvania newspaper.[86] Some have argued that in fact George Mason's language influenced Jefferson, as perhaps it did. But the important point about that influence is often missed. Jefferson would never have added such language to the Declaration of Independence on his own initiative. Wherever he got such language, whether he had Mason or Wilson's language in mind or whether he drafted the language from his own muse or remembered language from Locke, he would only have put such language in the Declaration because he was adopting a model of declaration that he did not fully agree with. On this interpretation, what we have is young man writing a Declaration that did not accurately represent his own view.

If this line of interpretation is correct, might we not find some linguistic evidence of Jefferson's continued ambivalence towards the classical theory of rights now embodied in the Declaration? Indeed, Jefferson did in fact try "to smuggle" in his own theory into his draft of the Declaration.[87] But the very core of Jefferson's theory was deleted by Congress at large in its review of the document. Here is Jefferson's original passage with the words deleted by Congress marked by square brackets and underscored while the words Congress added are marked in bold.

> Nor we have been wanting in attentions to our British brethren. we have warned them for time to time of attempts by their legislature to extend a jurisdiction over [<u>these our states</u>] **us**. we have reminded them of the circumstances of our emigration & settlement here. [,<u>no one of which could warrant so strange a pretention: that these were effected at the expence of our own blood and treasure, unassisted by the wealth or the strength of Great Britain: that in constituting indeed our several forms of government, we had adopted one common king, thereby laying a foundation for perpetual league & amity with them: but that submission to their parliament was no part of our constitution, nor ever in idea, if history may be credited: and</u>] we **have** appealed

> to their native justice & magnanimity, [as well as to] **and we have conjured them by** the ties of our common kindred to disavow these usurpations which were likely to interrupt our correspondence and connection. They too have been deaf to [our] **the** voice of justice & of consanguinity,[& when occasions have been given them, by the regular course of their laws, of removing from their councils the disturbers of our harmony, the have by their free election re-established them in power, at this very time too they are permitting their chief magistrate to send over not only soldiers of our common blood. These facts have given the last stab to agonizing affection, and manly spirit bids us to renounce for ever these unfeeling brethren.] We must [endeavor to forget our former love for them, and to], **therefore, acquiesce in the necessity, which denounces our Separation, and** hold them as we hold the rest of mankind, enemies in war, in peace friends.[88]

Even in this paragraph buried well towards the end of the Declaration, Jefferson was unable to get his theory by Congress on this his third attempt. Congress deleted the very sections dealing with the settlers constituting several forms of government and adopting one King. One can now understand part of the reason why Jefferson found the editing process by Congress so painful, and regarded the changes as "mutilations" as he reported. [89] Indeed, this likely explains why Jefferson forwarded copies of the original with the changes underscored but not struck out to colleagues shortly after the adoption. Jefferson in fact wrote that "the sentiments of men are known not only by what they receive, but what they reject also." [90] The changes in the Declaration were, from one perspective, not really that extensive, at least for anyone who has gone through a strong editing process before. And many commentators praise the changes of congress as improving the document. [91] But from the point of view of Jefferson's own commitments, they were "mutilations" and once again obliterated his own understanding of rights. With the removal of this paragraph, Jefferson's pet theory of rights was nearly obliterated from the Declaration. Becker and Boyd both miss the significance of this deletion. Becker writes that "In cutting out the greater part of the next to last paragraph, Congress omitted, among other things, the sentence in which Jefferson formulated, not directly indeed but by allusion, that theory of the constitutional relation of the colonies to Great Britain which is elsewhere taken for granted." [92] Becker assumes that after this deletion occurred, Jefferson's constitutional theory remained in tact and "is elsewhere taken for granted." Boyd passes over this deletion in silence and simply summarizes at the end that "The Declaration implied all the way through, the colonies acknowledged a constitutional tie only with the King and that was the only tie that needed to be severed in so solemn a proclamation." [93]

But by omitting this passage of Jefferson's, Congress in fact threw open the whole question of what theory of rights the Constitution was endorsing. By which of the various theories that we have examined, was the Declaration justifying its independence from Parliament? We simply do not know because the Declaration does not tell us. The declaration leaves the question ambiguous. Thus, Becker can still think the Declaration reflects Jefferson's theory of rights and thus contradicts the views of the First Continental Congress..[94] But Adams at least thought the Declaration was expressing "but what had been hackneyed in Congress for two years before" implying that the view of the Declaration and the First Continental Congress' view were aligned. What we see evident here is precisely the ambiguity which this essay argues was left in the Declaration. For those who held views like Congress,

and Wilson, the Declaration after its editing seemed to speak for them. While much of Jefferson's own theory was obliterated in the editing, the Declaration at least does not explicitly contradict Jefferson's view either. It thus could speak for and to individuals who held very different views of rights. It explains only why the colonies are rejecting the King as executive officer, but it offers no explicit theory of why Parliament did not hold sovereignty.

A similar set of deletions occurred towards the very conclusion of the Declaration. Again Jefferson's deleted language appears between brackets and is underscored with the additions by Congress marked in bold.

> We therefore the representatives of the United states of America in General Congress assembled **appealing to the supreme judge of the world for the rectitude of our intentions** do, in the name & by authority of the good people of these **colonies** [states,] **solemly** publish and declare **that these united colonies are and of right ought to be free and independent states; that they are absolved from all allegiance to the British Crown, and that** [reject and renounce all allegiance & subjection to the kings of Great Britain & all others who may hereafter claim by, through, or under them; we utterly dissolve-] all political connection [which may have heretofore have subsisted]between **them** [us] & the **state** [people or parliament] of Great Britain **is & ought to be totally dissolved**; [and finally we do assert and declare these colonies to be free and independent states], & that as free & independent states they have full power to levy war, conclude peace, contract alliances, establish commerce, & to do all other acts and things which independent states may of right do. And for the support of this declaration **with a firm reliance on the protection of divine providence**, we mutually pledge to each other our lives, our fortunes, & our sacred honour.[95]

Congress revises Jefferson's language in a couple of significant ways. Congress adds in an additional religious reference to God, one that could speak more directly to those who might have liked a more personal notion of God invoked. Such religious language was added by John Dickinson, for example, at the start of Jefferson's Declaration of Causes in the start of the Second Continental Congress.

Second, Congress reverts Jefferson's language back to language of the earlier Lee resolution: **"**that these united colonies are and of right ought to be free and independent states; that they are absolved from all allegiance to the British Crown," This language of the original resolution however softens Jefferson's strong language towards monarchy: Instead of "rejecting and renouncing all allegiance" the people "are absolved" from an allegiance for which they were previously obligated. Absolved implies that a responsibility that was previously obligatory is subsequently lifted and may have religious overtones as well. Congress also rewrote his language on the connection to the people and Parliament. Jefferson had written "we utterly dissolve and break off all political connection which *may have heretofore* subsisted between us & the people or parliament of Great Britain" [emphasis added]. The language "which may have heretofore subsisted" was definitely an equivocation on whether any relationship had ever existed between the settlers and Parliament and the people of Great Britain, a view consistent with Jefferson's own position that the ties had only been established voluntarily by the settlers. Had there been any previous relationship with Parliament, we utterly dissolve it. But in the language of Congress

resolution, the language shifts meaning. Now "in the name & by authority of the good people of these *colonies*," all political connection between them & the state of Great Britain *is & ought to be totally dissolved* [emphasis added] ;" Perhaps Congress was being sensitive to the feelings of people of Great Britain, as Jefferson noted in his own account.[96] But there is another significant shift in meaning too: Congress' language "*is and ought to be*" indicates *that going forward* the relationship should be dissolved, as opposed to Jefferson's language ("which may have heretoforward") is more equivocal reflected doubts that any relationship ever existed at all. Congress' language suggests a connection had been established but now needed to be dissolved. Jefferson's underscores the doubt that any relationship ever existed. Congress' language also substitutes the word "colonies" for "states" the first time the terms appears in this paragraph. On Congress' rendition, these united colonies "are, and of right out to be, free and independent states." The language of Congress and the Lee resolution permits the reading that in the past these political entities were colonies but now are and ought to be free states, a view that was consistent with Congress' view.[97] In Jefferson's language the states (already in existence) repudiate the monarchy and any relationship which may have existed with the people or Parliament. If there is any remaining doubt about the relationship between the American states and Parliament, we "utterly dissolve" it. Congress eliminates the reference to "the people or Parliament" and refers instead to the abstract relationship "with the State." Jefferson was trying to leave no doubt that the relationship with Parliament had ended. On Congress' rendition it is not clear at all what theory of rights ended the control of Parliament.

In another section, Jefferson had written, "he has erected a multitude of new offices by a self-assumed power…" and Congress cut out the phrase "by a self-assumed power".[98] For Jefferson, the King had overstepped the powers given him by the people. For Congress, the King's powers had been already in existence by virtue of the settlers having emigrated under sponsorship of the Crown. They were not "self-assumed" powers. Becker tends to take many of these changes as "stylistic" and claims that the phraseology is "more incisive, and does it not thus add something to that very effect which Jefferson himself wished to produce?" Clearly Jefferson did not think so and viewed the various changes as mutilations to the very theory of rights that Jefferson had wanted to put across. No wonder that Jefferson sent a copy of his original draft to Robert H. Lee showing what Congress had done to it. He wanted the world to have a record of the original. As he wrote to Lee on July 8th, "I inclose you a copy of the Declaration of Independence as agreed to by the house, & also as originally framed. you will judge whether it is better or worse for the critics."[99]

When In The Course Of Human Events

Having shown that Jefferson was still attempting to reiterate his own theory in his early draft of the Declaration that passed through Committee, we can turn back to the most famous passages of the Declaration and now detect some of the ambivalence that Jefferson may have had about the classical understanding of natural rights and its application to American right. Here is the opening paragraph as originally drafted by Jefferson and as revised by the Committee of Five. [100]

Jefferson's Original Rough Draft	Rough Draft Presented to Congress as Representing the Committee of Five

When in the course of human events it becomes necessary for a people to advance from that subordination in which they have hitherto remained, & to assume among the powers of the earth the *equal & independent station* to which the laws of nature & of nature's god entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the change.[emphasis added]	When in the course of human events it becomes necessary for [a] **one** people to ~~advance from that subordinateion in which they have hitherto remained, & to~~ [**dissolve the political bands which have connected them with another,**] and to assume among the powers of the earth the ~~equal & independent~~ separate and equal station to which the laws, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to ~~the change~~ the separation.

In the preamble to the original draft, Jefferson is explaining why the settlers are throwing off subordination and assuming the "equal and independent" status as a nation. They never were under the law of Parliament but had been subordinated without right, as he has argued in *Summary View*. But in the revision which likely reflects the committee's view, "one people" are not just throwing off subordination but are dissolving political bands which had connected them with another. [101] This revision recognizes that that the colonies and British people had had political connections and were "one people". In his first draft, Jefferson describes the new status as "equal and independent", whereas after the revision the status is viewed as "separate but equal." In my view, these are not just stylistic improvements as Becker suggests.[102] On the contrary, these are substantive changes that change the theoretical understanding. In Jefferson's draft, they were "a" people asserting their independent status, in the revision they are "one people" (British people) who had to split apart and become separate but equal. A decent respect to the opinions of mankind, concluded Jefferson, require that they "declare the causes which impel them to the change." The Committee, by contrast, felt the need to explain causes which impel them "to the separation." This revision emphasizes that the colonies had to separate themselves, whereas Jefferson's first draft implies they already were separate from the start and were simply reasserting their already existing rights.[103] Independence for Jefferson meant return to a rightful earlier state, whereas for others in Congress it meant the culmination of an act of separation that had not been inevitable.

This line of interpretation also accounts for why in the grievances against the King, Jefferson sometimes uses the word "states" as in "he has endeavored to prevent the population [growth] of these states;" implying that they were already independent states, a sentence which incidentally was deleted by Congress in its revision.[104] He also writes that "he has combined with others to subject us to a jurisdiction foreign to our constitutions" again assuming the existence of multiple state constitutions. Congress changed the word "constitutions" in the plural to "constitution" in the singular. The new meaning is that the King has subjected the settlements to a jurisdiction "foreign to our constitution"-which could just as easily refer to the British constitution, a theory in line with Congress view of rights.

This introductory passage of Jefferson's draft Declaration, of course, does clearly evoke natural rights language, much more so than in *Summary View* or his earlier *Declaration of the Causes*. As argued earlier, although Jefferson was still trying to

assert his own views, he was also writing for the Committee and ultimately Congress and thus felt compelled to put natural rights language more boldly in the declaration this time around. The language of rights in Jefferson's first draft is very close to that of his *Summary View*, but with a small but significant difference. There in *Summary View* Jefferson is detailing "many unwarrantable encroachments and usurpations, attempted to be made by the legislature of one part of the empire, upon those rights which God and the laws have given equally and independently to all." The language of "God and the laws" there becomes in his draft Declaration "the laws of nature & of nature's god".[105] His earlier avoidance of the word "nature" is overcome.[106] The same language of "equal and independent" is interestingly used in *Summary View* to talk about the relationship of the Parliament and the states in America. "To all" in that context may refer to the rights of individuals but in its context it could just as easily also refer to the relationship of the rights of all independent states vis-à-vis one another. In other words, Jefferson may be referring to natural rights to justify the right of states rather than individuals, just as he may be doing here.

The appeal to "the laws of nature & of nature's god" in the original draft of the Declaration is thus clearly a reference to a natural rights conception of God to justify the "equal and independent station" to which a people are entitled. But what theory is Jefferson here appealing to? The language can certainly fit with Jefferson's own view that the "right to quit society" provides the foundation for the "equal and independent station" of the states. Of course John Adams reading the same language, as he did in fact do, could easily see Congress' view embodied there. On that reading, the British subjects had natural and British rights when they settled in America but because their natural rights by definition could not be met by representation in Parliament, the colonies became independent states with their own separate legislatures. Thus Jefferson could be using language that supported his own view, while Adams could easily see Jefferson as repeating ideas that had been "hackneyed" in Congress for two years already. Both would be true because the language can embrace both views. The Declaration thus leaves equivocal precisely which theory of rights American independence is based on. The addition of the word "separation" moves the language more towards the Congressional understanding (based on the Wilson/ Adams) type of view, but the alternative Jefferson theory was initially implied by the language before these changes were made and before Congress has deleted the other crucial statement of Jefferson's position at the end of the Declaration. In the end, the final language leaves unresolved which theory of rights is being endorsed. There is no way from the final language of the Declaration itself to determine whether the official First Congress view of rights is endorsed or whether Jefferson's own view of rights is endorsed. But that ambiguity at least served its purpose. The Congress could find its theories of rights reflected in the language, as could Jefferson, though the latter obviously would have been happier had some of his language not being obliterated.

The ambiguity about which theory of rights the Declaration endorses is also consistent with the notable fact that Parliament is scarcely mentioned in the Declaration, as Carl Becker and others have noted.[107] This omission is striking given the ten years of debate in which colonial writers argued against subordination to Parliament. Instead, the focus is almost entirely on the grievous acts by the King. Some interpreters like Becker conclude that this absence of Parliament means that the Declaration is already assuming a theory of a league of nations that had been embraced for some time. In other words, the Declaration is assuming that the settlements were already states under the Crown but not subject to Parliament.[108] And that is a reasonable conclusion. But what this argument misses is the fact that

the Declaration never explains which theory of rights it is embracing. Is it assuming a view on the basis of Jefferson's views, Wilson's or John Adam's? Did the ancestors have a right to quit society or did they become independent states because they couldn't be represented in Parliament or because the Crown owned the land and could make charters with them? How did they acquire rightful ownership of the land? Was it through conquest by the settlers, by Great Britain, or through peaceful occupation of uninhabited lands? If the Declaration is justifying to the world the right of the colonies to be independent states, then surely a decent respect to the opinion of mankind would appreciate answers to those questions. Indeed, as we have seen, the Law of Nations tradition and the constitutional law tradition did ask the question of how a people came by rightful occupation of its lands. But the declaration does not answer those questions. Jefferson's earlier draft did emphasize the right of the settlers to quit their land of origin. But after the revision of Congress that theory of rights was suppressed making the Declaration sound more "hackneyed" like the original Declaration of Rights of 1774.

Because other interpreters do not recognize or make anything of this ambiguity, they simply assume that the Declaration is stating "The American Mind" or reiterating a hackneyed view of Congress. Thus Becker writes that that

> Accordingly, the idea around which Jefferson built the Declaration was that the colonists were not rebels against established political authority, but a free people maintaining long established and imprescriptible rights against a usurping king. The effect which he wished to produce was to leave a candid world wondering why the colonies had so long submitted to the oppressions of this king.
>
> The major premise from which this conclusion is derived is that every 'people' has a natural right to make and unmake its own government; the minor premise is that the Americans are a 'people' in this sense. In establishing themselves in America, the people of the colonies exercised their natural rights to frame governments suited to their ideas and conditions; but at the same time they voluntarily retained a union with the people of Great Britain by professing allegiance to the same King. From this allegiance they might at any time have withdrawn; … The minor premise of the argument is easily overlooked because it is not explicitly stated in the Declaration—at least not in its final form. To have stated it explicitly would perhaps have been to bring into too glaring a light certain incongruities between the assumed premise and the known historical facts [emphasis added].[109]

Becker is right that Jefferson built the Declaration around his theory of rights. But he misses the point when he recognizes that the minor premise that the Americans were a free people from the start is "easily overlooked because it is not explicitly stated in the Declaration –at least not in its final form. " Becker suggests that it was not stated to avoid the incongruity between the premise and the historical facts. But as I have now suggested the "minor premise" was eliminated precisely because it was not a view on which there was consensus. Becker by contrast assumes that Congress agrees with that view, when in fact it did not. When it eliminated Jefferson's theory of rights, therefore, it simply left no statement in the Declaration that made clear which of the two or three different theory of rights it embraced. The effect is that the Declaration thus eliminates the specific link or connection between the theory of natural rights the foundation of American rights.

We Hold These Truths

Turning now to the most famous passage of the declaration dealing with natural rights, we find that some of the wording possibly hints at Jefferson's ambivalence about the natural rights traditions. Here on the left is the wording as it likely was presented to Franklin and on the right the "fair copy" as it likely looked when presented to Congress.[110]

Draft as likely presented to Franklin	Rough Draft "fair copy" as it likely looked when presented to Congress.
We hold these truths to be ~~sacred and undeniable~~ self-evident that all men are created equal & independent; that from that equal creation they derive in rights inherent & inalienable (Adam's copy reads unalienable), among which are the preservation of life, & liberty, & the pursuit of happiness; that to secure these ends, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government shall become destructive of these ends, it is the right of the people to alter or abolish it, & to institute new government, laying it's foundation on such principles & organizing it's power in such form, as to them shall seem most likely to effect their safety and happiness.	We hold these truths to be ~~sacred and undeniable~~ **self-evident** that all men are created equal ~~& independent;~~ that ~~from that equal creation they derive in rights~~ they are endowed by their creator with ~~equal rights, some of which are i~~nherent & inalienable rights (Adam's copy reads unalienable), among ~~which~~ these are ~~the preservation of~~ life, ~~&~~ liberty, & the pursuit of happiness; that to secure these rights ~~ends~~, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government ~~shall~~ becomes destructive of these ends, it is the right of the people to alter or abolish it, & to institute new government, laying it's foundation on such principles & organizing it's power in such form, as to them shall seem most likely to effect their safety and happiness.

This is one of the most powerful statements of natural rights philosophy found in the literature leading up to the revolution. But Jefferson's ambivalence about more classical natural rights language is arguably still in evidence. Jefferson regularly prefers the word "sacred" to describe basic rights. Not only does he use the term here in his first composition draft, but also in *Summary View*. Referring to what are classically thought to be natural rights, Jefferson writes that "A family of princes was then on the British throne, whose treasonable crimes against their people brought on them afterwards the exertion of those sacred and sovereign rights of punishment reserved in the hands of the people for cases of extreme necessity, and judged by the constitution unsafe to be delegated to any other judicature." There Jefferson is referring to the rights to throw off a government that is tyrannical, a classic natural right. But Jefferson calls them "sacred and sovereign" rights. He also uses the term sacred rights in his draft of the Declaration to describe the rights of slaves when

castigating King George for the slave trade in America, a paragraph that was deleted by Congress.[111] And in *Summary View* he calls slavery a violation of "to the rights of human nature" another turn of phrase that seems to diverge from more traditional language of "natural rights." While such language of "sacred" and "sovereign" is used by some to refer to natural rights, the language was also used by some to refer to the common law tradition and the rights extending back into the past to the Saxons. The same ambiguous meaning was true of the word "inalienable" which Jefferson also uses here. That term was used at times equivocally to refer to either rights inherited from the common law tradition or natural rights.[112] At times such language seems to intentionally obfuscate whether the rights referred to are "original British rights" or "natural rights". Both were thought to be "inalienable".[113] Indeed, Jefferson's use of the term sacred and his emphasis on God is reminiscent of James Otis' attempt to anchor rights in the act of creation and to avoid any reference to social compact theory at all, which was considered theoretically problematic. Jefferson uses language in *Summary View* that those preferring the theological and religious sub- tradition such as James Otis would have approved of: "The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them." Jefferson emphasizes that liberty was created by God but no where talks about social compact or the rights to "life, liberty and property." [114] Instead he seems to think of inherent rights as part of human nature, known intuitively by moral beings, and being dependent on the natural rights tradition, at least in its classic formulation. [115]

Jefferson's avoidance of more traditional natural rights is evident as well in the body of charges against the King that follow the opening preamble. Had Jefferson wanted to in this context, he could easily have shifted into natural rights language. One of the grievances against the King is that "he has refused to pass other laws for the accommodation of large districts of people unless those people would relinquish the right of representation [in the legislature], a right inestimable to them & formidable to tyrants only." [116] Here again Jefferson calls the right of representation, which is a natural right par excellence, "a right inestimable to them". There seems to be a conscious and continual avoidance of more traditional natural rights language the way used by Wilson or Samuel Adams for example.

Pursuit of Happiness

We can now turn to one of the most interesting puzzles about Jefferson's right language: Why did Jefferson replace the traditional "life, liberty, and property" with "life, liberty and the pursuit of happiness"? There has been much debate on this question. In general, the recent consensus seems to be that the language of pursuit of happiness is used frequently in the philosophical tradition of liberty and therefore its appearance in Jefferson's language here should come as no surprise.[117] Indeed, Jefferson may simply have been improving language from George Mason's Bill of Rights, who used a similar expression.

But this consensus overlooks a couple of important points. Jefferson never uses the triple play of "life, liberty and property", not in *Summary View*, the *Declaration of the Causes* or here in the Declaration. We have to assume, then, that this was intentional. Jefferson certainly knew the refrain. The first resolution of the First Continental Congress read: "*Resolved, N. C. D.* 1. That they are entitled to life, liberty and property: and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent."

It is true that "references to happiness as a political goal are everywhere in American political writings..as anyone can see who bothers to look", to quote Pauline Maier. But those who emphasize that fact miss the subtle point that happiness was often thought of as the end or purpose of government and not as a natural right. The difference between "end" and "right" was preserved by many thinkers such as Locke. On Locke's view, people gave up some of their natural rights and liberties to reap the benefits from society. Happiness on Locke's view was not a natural right, but an end for which people joined society. The protection of their rights of life, liberty and property resulted in happiness, which was the goal of society and the reason people sacrificed their rights. This is the more conventional way that happiness was related to natural rights theory. Reflecting this view, for example, James Otis wrote that "The end of government being the good of mankind, points out its great duties: It is above all things to provide for the security, the quiet, and happy enjoyment of life, liberty, and property."[118]

As James Wilson puts it in language that some claim may have influenced Jefferson,

> All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the first law of every government. This rule is founded on the law of nature: it must control every political maxim:

Wilson, following Burlmanqui, conceives happiness as the end of government, the purpose for which consent was given, "with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature." Wilson does not call it a natural right but conceives of happiness as the driving motivation that leads individuals to give up natural liberties to enter a state of society under law. This is what he means by happiness is the first law of government.

Similarly, in a passage from section 3 of the Virginia Bill of Rights, George Mason preserves a similar distinction:

> SEC. 3. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

But in George Mason's first section, a section that some Jefferson may have copied from, we find more ambiguous language:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of

> society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

The status of "happiness" is ambiguous in Mason's wording. It is not clear whether pursuing and obtaining happiness and safety are thought to be part of the "certain inherent rights." "All men…have certain inherent rights…namely, the enjoyment of life and liberty, with…." The question is whether the "with" clause is construed as part of the inherent rights or as supplementary, namely, whether pursuing happiness and acquiring property are thought by Mason to be part of inherent rights or derivative from the more primary rights of life and liberty. Indeed, Locke has certainly portrayed acquisition of property (means of subsistence) as a right derived from the right to life. One might think, however, that if Mason meant for the acquisition of property and pursuit of happiness to be thought of as inherent rights, he would *not* have used the word "with" but would simply have written, "namely, the enjoyment of life and liberty, the means of acquiring and possessing property, and the pursuit of happiness and safety." The "with" thus seems to make these other rights secondary to and derivative from the right of life and liberty. [119]

Let us assume for a moment that Jefferson did copy Mason's language, as some have suggested.[120] It still seems inadequate to conclude as does Maier that Jefferson "sacrificed clarity of meaning for grace of language." If Jefferson copied from Mason, then in his first draft of the Declaration, Jefferson removed the reference to property and also eliminated the ambiguity about whether happiness was a natural right or an end of government. "We hold these truths to be sacred and undeniable that all men are created equal & independent; that from that equal creation they derive in *rights* inherent & inalienable, among which are the preservation of life, & liberty, & the pursuit of happiness;" In this wording of Jefferson, there is no ambiguity that pursuit of happiness is an inherent right. But in the very next sentence the ambiguity creeps back in: Jefferson continues "that to secure these ends, governments are instituted among men, deriving their just powers from the consent of the governed;" Now happiness as well as the preservation of life and liberty is described as an "end" of government, arguably a different concept than a right, a distinction many like Wilson faithfully preserved. In the Rough Draft produced by the Committee of Five (see above), the word "end" is replaced by the word "rights" removing the ambiguity altogether and leaving no doubt that the Declaration treats pursuit of happiness as a natural right.

Would there have been any reason apart from literary and stylistic reasons, that Jefferson would wanted to have emphasize that happiness was a natural right? Indeed there may have been. In two interesting contexts before the Declaration we find happiness serving another interesting purpose. In Richard Bland's*, An Inquiry Into the Rights of the British Colonies*, Bland argues that happiness is not just an end of government but a natural right.[121] Bland makes this argument in the context of arguing that the American rights were based on a natural right to quit society. Bland writes:

> But though they must submit to the Laws, so long as they remain Members of the Society, yet they retain so much of their natural Freedom as to have a Right to retire from the Society, to renounce the Benefits of it, to enter into another Society, and to settle in another Country; for their Engagements to the Society, and their Submission

> to the publick Authority of the State, do not oblige them to continue in it longer than they find it **will conduce to their Happiness, which they have a natural Right to promote. This natural Right remains with** every Man, and he cannot justly be deprived of it by any civil Authority. Every Person therefore who is denied his Share in the Legislature of the State to which he had an original Right, and every Person who from his particular Circumstances is excluded from this great Privilege, and **refuses to exercise his natural Right of quitting the Country**, but remains in it, and continues to exercise the Rights of a Citizen in all other Respects, must be subject to the Laws which by these Acts he *implicitly*, or to use your own Phrase, *virtually* consents to: For Men may subject themselves to Laws, by consenting to them *implicitly*; that is, by conforming to them, by adhering to the Society, and accepting the Benefits of its Constitution, as well, as *explicitly* and directly, in their own Persons, or by their Representatives substituted in their Room.[122] [my emphasis added in bold]

As I have discussed elsewhere, Bland anticipates most of the core assumptions of Jefferson in *Summary View.* He evokes a natural right to quit society and he also associates this with a natural right to pursue happiness. Thus Bland makes the connection that the right to quit society is tied into the natural right to pursue happiness. In *Summary View* too, Jefferson links the two conceptions as well although there he does not call happiness a natural right but sees happiness as the end of government.

> that our ancestors, before their emigration to America, were the free inhabitants of the British dominions in Europe, and possessed a right, which nature has given to all men, of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote public happiness.

Here in *Summary View*, Jefferson is more in line with Locke and Wilson, seeing the end of political society to promote "public happiness" which is different from an individual's right to pursue happiness, as discussed earlier.

But turning to the Declaration, where Jefferson had to include a statement of natural rights, Jefferson's turn of phrase "in pursuit of happiness" serves an interesting purpose. Now the Declaration's introduction can be read as a good summary of Jefferson's theory set out in *Summary View*. The pursuit of happiness is what drives men to quit society and look for new habitations. It is not dependent on "intolerable persecution", as Adams would have it, or the failure to meet the happiness rule, as Wilson did. The shift from the "life, liberty and property" to "life, liberty and pursuit of happiness" enables Jefferson to slide a reference to and an argument for his view about the origin of American rights. It was not based on general natural rights, on "life, liberty, and property," as many of his colleagues would and did say, but the right to quit one's society and go in search of happiness. The "pursuit of happiness" for Jefferson is arguably the equivalent of the right to quit society. This position differs from Wilson who considered happiness as the key criterion by which to measure government's execution of its responsibility to the people. By making this a natural right, or at least eliminating the ambiguity in Mason's language, Jefferson

smuggles in a reference to his own theory and to the foundation for the right to quit society. While there is no way to prove that this is the case, it does fit with Jefferson's repeated desire to defend his own theory of rights. And while he may have copied from Mason, he shortened up the language and removed an ambiguity that Mason had in his language.

Jefferson's statement on rights went through a revision some of which reflect his own changes, some of which are likely from Franklin or Adams (see above). Interpreters debate whether the change of "sacred and undeniable" to "self-evident" was Franklin's, Adam's or Jefferson's own.[123] Self-evidence is very close in meaning to "undeniable" but may carry more allusion to the self-evidence to Reason, although Jefferson himself never seems to appeal to Reason as a basis of rights and instead, as he puts it in *Summary View*, refers to "Not only the principles of common sense, but the common feelings of human nature", and then again to "the feelings of human nature." But "self-evident" can also fit in with and support other types of evidence and thus fit within the parallel tradition that was doubting natural rights based on reason, and making sure to emphasize other means of knowing such as "common sense" as visible in Thomas Paine and in the young Alexander Hamilton, or even innate knowing that may have been presupposed by Jefferson.

In the original the language, Jefferson writes that "from that equal creation they derive in rights inherent & inalienable." The notion that "they derive" their rights, is certainly more tentative than the claim that they are self-evident to Reason, which the natural rights tradition argued, and more tentative than the wording of the subsequent draft:"they are endowed by their creator inherent & inalienable rights". This latter phraseology, which came from the Committee, puts much more emphasis on the active role of God rather than of men deriving their rights from their equal creation.[124] This may reflect some sensitivity to the theological reinterpretation of natural rights theory discussed above and elsewhere. This revision also interestingly enough breaks the dependence of rights on equality at creation. Now the statement posits two facts at creation: people were created equal *and* God conferred inherent rights. Inherent rights are not derived from equality of creation, the way that Locke originally had put it. It also eliminates the word "independent". Perhaps this was just a literary improvement, as Becker suggests, but it could also reflect some sensitivity to the idea that Otis and other religious minded writers had put forward: that people were created to be in society, and that sociality was mandated by God, a view that religious thinkers had emphasized in their critique of the natural rights tradition. They are created equal but not independent.

Conclusion

The Declaration of Independence is treated as one of the most important statements of natural rights for the American tradition that followed it. That reading of the Declaration is based on the assumption that Jefferson himself endorsed natural rights philosophy without reservation. Debate has therefore focused on secondary questions such as the source of Jefferson's ideas, whether Jefferson read or knew Locke, borrowed languages from George Mason or James Wilson, or whether a republican tradition was more prominent. Many thus endorse the view that Jefferson captured the American Mind in the Declaration and thus summarized in an eloquent way key views that had been held for some time. There was nothing new in the Declaration but it was beautifully said. But that reading of Jefferson is anachronistic, projecting a reading of the Declaration's meaning back into Jefferson's earlier writings, such as Summary View. In fact, a careful reading of Jefferson shows a

young man who had an alternative theory of rights that was not in favor among most of his colleagues in the Congress. That theory held that there was a natural right to quit society and from that right the settlers derived their status as independent states. But Congress and many of Jefferson's colleagues did not accept such a view, even though they agreed that the colonies were independent states. They held that the settlers came with British rights to the lands in America and settled them under British auspices. This was a fundamentally different view of American rights than that held by Jefferson. At issue in the debate was the source of the settlers' rights, the question of how they acquired rights to the land, whether the settlers owed allegiance to the Crown, and whether allegiance to the Crown and representation in Parliament worked according to similar principles. These were not small unimportant issues, especially as a large group of colonial writers were lawyers who cared deeply about constitutional issues. Nor was Jefferson the only one to have ambivalence about the more classical natural rights arguments. There was a strong tradition in the colonies raising doubts about the social compact theory and the theoretical arguments over government's origins. These doubts led writers like Otis, Dulany and even Adams to doubt whether natural rights by itself constituted a solid foundation. Religious writers too had doubts about the traditional notion of natural rights, thinking that not enough emphasis had been placed on God's role in creating government and too much emphasis had been placed on the human role in consenting to join government.

The interpretation of the Declaration offered here argues that all of these fault lines are visible in the Declaration especially when the history of its revisions is taken into account. When the disagreements about natural rights in the pre-revolution period are understood, a very different understanding of the Declaration emerges. If the Declaration is to be regarded, as many claim, as a summary of the American mind, then we at least have to understand that that mind was fractured. Much more apt a description is to see Jefferson and the Congress as producing a document in which, to quote Jefferson himself, "All its authority rests then on the harmonizing sentiments of the day." But it was harmonizing only because it suppressed open and critical questions that had not been completely resolved. This is all the more evident after Congress had gotten through with its revisions. Jefferson's first draft is much more explicit in articulating his theoretical views in contrast to Congress'. But by the time Congress had finished "mutilating" the document, the open and deep questions were suppressed, with little hint left as to which of the various theories of rights, land possession, and allegiance, was the ground for American Independence. In sum, the Declaration leaves completely unresolved the foundation of American rights.

Endnotes

[1] The closest the Constitution comes to articulating a political philosophy is the opening of "We the people." Of course that statement evokes a political philosophy of republicanism and/or natural rights behind it, but it does not explicitly articulate those assumptions of political philosophy and one has to look to documents prior to the Constitution, such as the Federalist papers or the debates leading up to the Constitution to excavate its political philosophy. Indeed, the fact that the Constitution did not explicitly articulate a theory of rights was one of the reasons for resistance to it and the Bill of Rights which followed a year later was intended to address that gap. Ironically, the Bill of Rights which was ostensibly a document to fill the gap left by the absence of a statement of rights in the Constitution also does not anywhere explicitly articulate a political philosophy either, though it does mention the right to life, liberty and property in Amendment V and thereby points back to a natural rights philosophy as well. But it is interesting that the Bill of Rights never articulates that political philosophy explicitly, especially as some of its predecessors, such as the First Continental Congress *Declaration of Rights* and the Virginia *Bill of Rights* provide an explicit statement endorsement of natural rights philosophy. Indeed, the iteration of American rights in resolutions preceding the Revolution make the absence of such statements surprising in the Constitution and Bill of Rights. The philosophy of rights and government lying underneath the Constitution and Bill of Rights therefore has to be inferred from the diverse and sometimes contradictory writings and debates leading up to the adoption of those documents. On the discussion related to the Constitution, see Amar, *American's Constitution*. See also Gerber, To *Secure These Rights*, for an explicit argument that the Declaration of Independence serves as the principle source for the view that the founders intent was to create a Constitution that protected natural rights.

[2] I discuss this point below and in depth elsewhere. See Schwartz*, Natural Rights,* Parts II and III.

[3] Carl Becker's, *The Declaration of Independence*, is the classic exposition of this view, although as early as the 1820's, Jefferson was noting that Richard Henry Lee had suggested he was copying it from Locke. Many other writers follow or endorse this view as discussed below in footnote 12.

[4] Adams, *Works*, II 512, see Becker, *Declaration*, 24, a point to which we return.

[5] See Boyd, *Declaration*, 16. Becker, *Declaration*, 25.

[6] See Malone, *Jefferson*, 220; Ford, *Works*, X, 343; Boyd, *Declaration*, 16; Becker, *Jefferson*, 25.

[7] Becker, *Declaration*, 24-25.

[8] Boyd, *Declaration*, 15 -16.

[9] Boyd, *Declaration*, 17.

[10] Boyd, *Declaration*, 24.

[11] Malone, *Jefferson* I, 221; Petterson, *Jefferson*, 90. For similar views, see also Carey, "Natural Rights" 49. See also Maier, *American Scripture*, 135 for a similar view. Maier follows the same position in writing "The sentiments Jefferson eloquently expressed were, in short, absolutely conventional among Americans of his time."

[12] The classic argument is by Becker, *Declaration*. See also Friedenwald, *Declaration*, 197-201, Chinard, *Jefferson*, 72, Carey, "Natural Rights", 47. Maier, *American Scripture*, 138, Jayne, *Jefferson's Declaration*. Gerber, *To Secure These Rights*, 22 writes that "Virtually no

student of American political thought denies that the Declaration of Independence is an expression of natural-rights political philosophy." Jayne, *Jefferson's Declaration*, gives a more complex and in my view more accurate picture of Jefferson by arguing that he was influenced by multiple philosophical sources including Bolingbroke, Lord Kames, Locke and others. But in my view Jayne still overemphasizes the importance Lockean influence on the Declaration of Independence. For my particular reservations about Jayne's argument, see note 27.

[13] Becker, *Declaration*, 27.

[14] I cite the relevant passages from Becker in Appendix I.

[15] The language of Wilson and Mason are quoted for convenience in the Appendix 2. An excellent summary of these various arguments is found in Ganter, "Pursuit of Happiness." See Becker, *Declaration*, 108; Chinard, *Commonplace Book*, 39-44 and Chinard, *Jefferson*, 72-73.

Carl Becker initially noted the similarity of Jefferson's language in the Declaration to Wilson's language in his pamphlet *Considerations* but assumed both were still Lockean. Chinard initially noted that passages from Wilson's pamphlet were copied by Jefferson into his own Commonplace Book. Chinard then raises the question of whether "Mr. Becker's statement that the lineage is direct (Jefferson copied from Locke and Locke quoted Hooker) now calls for some reservations. It becomes quite possible that Jefferson remembered not only Locke, but also Wilson, who quoted Burlamaqui, who drew his inspiration from Locke." Based on a chronological analysis, Chinard argues that Jefferson copied from Wilson sometime in 1776, but Chinard cannot determine if it was before or after drafting the Declaration, which would affect whether Jefferson can be assumed to have relied on Wilson's language. Chinard notes a puzzle with this theory. Jefferson did not copy the passage of Wilson that is so similar to his own but copied the passage before and after and skipped the passage that is so close to his own language.

A possible answer to Chinard's puzzle is provided by the interpretation given of Jefferson in this essay. Jefferson never heartily adopted a natural rights perspective, a point that ironically, Chinard himself seemed to understand at times, at least when commenting on Jefferson's Summary View. In my view, Jefferson didn't copy precisely the passages from Wilson that didn't interest him, namely those that deal with natural rights. He copied the passage before and after because those were of more interest to his line of thinking. It should be noted that Jefferson and Wilson had fundamentally different views of American rights as I have discussed in Schwartz, *Natural Rights*, Part II. I completely disagree with Becker conclusion that " Mr. Wilson's theory of the relations of the colonies to Great Britain was essentially the same as that which we find in the Declaration of Independence." (Becker, *Declaration*, 113, 115).

[16] On the claim that Jefferson was dependent on George Mason's Virginia Bill of Rights, see John C. Fitzpatrick's, *The Spirit of the Declaration*, 2-3; Chinard, *Jefferson*, 74, and Maier, *American Scripture*, 104, 126, 134; Boyd, *Declaration*, 22, suggests that "it was scarcely possible that Jefferson could have escaped a conscious or unconscious reliance on two notable Virginia Documents of the preceding weeks." And Chinard wrote that "Jefferson had expressed the American mind, but he had above all expressed the mind of his fellow Virginians." See also Malone, *Jefferson*, 221 who notes the similarity to Mason's language and suggests that Jefferson could have been influenced by it. Pittman, "*George Mason"* provides one of more incisive arguments in favor of Jefferson's reliance on Mason's Bill of Rights.

[17] I am endebted to Zuckert, *Natural Rights*, for the characterization of this stream of thought as a republican synthesis. The key writers who fall into this category are Bernard Bailyn, *Ideas*, Gordon Woods, *Creation*, and J. G. A. Pocock, *Machiavellian Moment*. See also the assessment of Locke's influence in American in Dworetz, *Unvarnished Doctrine*; Huyler, *Locke in America*; Jayne, *Jefferson's Declaration*. Others who side with the Lockean hypothesis, see Gerber, *To Secure These Rights*.

[18] See Maier, *American Scripture*, for an account that emphasizes the Declaration's relationship to the English Declaration of Rights. For a contrasting view, see Zuckert, *Natural Rights*.

The debate provoked by Gary Will's, *Inventing America*, does and does not belong in this category. Wills argued that the Lockean interpretation of the Declaration was overstated (a point with which I agree) but he then argued that Jefferson was dependent on the writers of the Scottish enlightenment, such as Lord Kames, Adam Ferguson but particularly Francis Hutchenson. Harmowy, "Jefferson and the Scottish Enlightenment" argues that Wills is incorrect and that Jefferson is "Lockean". But for important criticisms of Harmowy's argument, see Varga, et al "Communications." My own view follows Wills in arguing that the Declaration should not be taken as a straightforward "Lockean" document but I diverge from Wills by not trying locate the specific source of Jefferson's thinking but rather to see Jefferson trying to stay true to his own theoretical perspective (wherever that may have come from) while also meeting the requirements of Congress.

[19] See Zuckert, *Natural Rights*, who presents a comprehensive view of how Locke's theory differed from other theories of the seventeenth century such as those of Grotius and Pufendorf and how Locke's reception came to dominance after the Glorious Revolution. See also Dworetz, *Unvarnished Doctrine*, also argues that the republican synthesis has unestimated the importance of Locke. See Gerber, *To Secure These Rights*, 28 who argues that the Declaration of Independence was ignored by those favoring the republican synthesis and constitutes significant evidence of the influence of Locke.

[20] Carey, "Natural Rights," 49, for example, writes that "there cannot be much doubt of Jefferson's claim that the document's 'authority rest[ed] …on the harmonizing sentiments of the day."' When Carey explains what this means, he adopts the commonly accepted view that social contract theory and Locke's depiction of the conditions of the state of nature were widely accepted." Carey does recognize that there were conflicting view of rights in the period before the revolution but he tends to see these as all details in the tradition of social contract theory, My own view emphasizes the disagreements and thus argues that there was not such a monolithic tradition as previously assumed and that the Declaration's harmonizing of sentiments is actually smoothing over and hiding these disagreements. See also Gerber, *To Secure These Rights*, 31 who says "'the harmonizing sentiments of the day' were those of Locke."

[21] See for example Conrad, "Putting Rights Talk," who has applied a similar perspective to the reading of Jefferson's *Summary View*. See also Schwartz, "Natural Rights" Parts I, II, and II on the diverging view of rights from the Stamp Act through the First Continental Congress. For others who anticipate this position but do not develop it as fully see Carey, "Natural Rights," 48. Carey notes that "not all contract theories were exactly alike: differences existed over the context and source of the natural law, as well as over the character of rights." But Carey conflates Jefferson's view with a standard social contract view and concludes that "In sum,…the language of the Declaration itself, illustrates the veracity of Jefferson's claim that the Declaration itself was but "an expression of the American mind."

[22] For those who make this point see, Becker, *Declaration*, 18, who says that the Declaration is "solely" or "chiefly" concerned with a theory of government but elsewhere (203) says that the "primary purpose" was to convince a candid world that the colonies had a moral and legal right to separate from Great Britain." Amitage, *Declaration*, makes one of the strongest arguments linking the Declaration to the Law of Nations tradition and Vattel. See also Carey, "Natural Rights," and Detweiler, "The Changing Reputation".

[23] See Amitage, *Declaration*, for a strong statement of this position. Carey, "Natural Rights" 63, also provides the interesting interpretation that the equal rights mentioned refer not to individual rights but corporate rights of "one people."

[24] Vattel, *Law of Nations*, VI .

[25] Vattel has an excellent introduction to this issue in his *Laws of Nations*.

[26] See Schwartz, *Natural Rights*, Part III.

[27] I develop this reading of Jefferson's *Summary View* in much more detail in Schwartz, "Natural Rights", Part II. As noted there, I disagree with those writers who think Jefferson's *Summary View* articulates a classic natural rights philosophy that is "Lockean". Malone, *Jefferson*, v. I, 184, Ward, *Politics of Liberty*, 352. Becker, *Declaration*, never even asks the question of whether Jefferson's *Summary View* represents a Lockean or natural rights perspective and simply assumes that it does. Becker, 116-119, thus summarizes Jefferson's *Summary View* but never asks whether Jefferson's view there is consistent with his argument that Jefferson endorsed a Lockean natural rights view (because he simply assumes that is the case).

A number of other interpreters have commented on the centrality of the "right to quit society" to Jefferson's own view. However, none of these writers have drawn the same conclusions that I have for understanding of the Declaration of Independence, as is developed here. See Lewis, *Liberty*, 352, Peterson, *Thomas Jefferson*, 73-74, Chinard, *Jefferson*, 47-51, and Ellis American Sphinx, 36-38 and Maier, *American Scripture*, 112.

Chinard perhaps says it most explicitly: Speaking about Jefferson's own reflection on *Summary View* and the centrality of expatriation, Chinard, 47, writes, "Jefferson had reached that conclusion, not from following a certain line of abstract reasoning, but after studying the history of the Greek colonies in Stanyan, and the history of the Saxon settlement of Great Britain in many authors, as may be seen in his 'Commonplace Book', and as he was soon to reaffirm the doctrine of expatriation as the fundamental principle on which rested all the claims of the American colonies." Lewis, "Summary View," also sees quitting society as central to Jefferson and provides a good summary. But I disagree with Lewis in seeing the *Summary View* essay making an affirmation of individual rights and in articulating a theory of a balance of powers, thus anticipating the later American Constitution. Finally, Ellis, *American Sphinx*, 36-37 also notes the centrality of expatriation argument to Jefferson's theory and the dependence on the Whig view of history. Ellis tends to put a psychological interpretation on Jefferson's interest in this position and links this with Jefferson's romantic interest in an idyllic time, a "once upon a time" view of history that posted a" romantic endorsement of a pristine past, a long-lost time and place when men had lived together in perfect harmony without coercive laws or predatory rulers."

Jayne, *Jefferson's Declaration*, 51-55, by contrast, is one of the few interpreters to explicitly argue that Jefferson's "right to emigration", as he calls it, is influenced by Locke. To prove this, Jayne quotes Locke:

> For there are no Examples so frequent in History, both Sacred and Prophane, as those of Men withdrawing themselves, and their Obediance, from the Jurisdiction they were born under, and the Family or Community they were bred up in, and setting up new governments in other places: from when sprang all that number of petty Common-wealths in the Beginning of Ages, and which always multiplied as long as there was room enough. (Locke II 8,15)

This statement of Locke certainly sounds like an endorsement of the right to quit society. However, there are several problems with Jayne's assumption of a *direct* Lockean influence over Jefferson on this particular issue and they point to some of the larger problems in Jayne's analysis overall in my view.

First, Jefferson never quotes the passage from Locke that Jayne cites, and never attributes the right to quit society to Locke, though Jefferson does call it a natural right. The identification of parallel ideas does not provide enough evidence of dependence especially when there are other possible sources of the idea.

Second, because Jayne looks only at Jefferson, and not earlier colonial writers, he does not seem aware that Jefferson's own Virginian colleague, Richard Bland, had made a similar argument about the right to quit society, at the time of the Stamp Act Crisis. I've discussed this in Schwartz, *Natural Rights*, Part II. Jefferson's argument and language is very similar to Bland's, and Jefferson could just as easily have gotten the idea from Bland or other sources. Indeed, this raises what I consider to be one of the most significant problems with Jayne's analysis: he assumes parallels between Jefferson and Locke mean the influence was direct from Jefferson's knowledge of Locke. But in this case, as in others, there were other sources from which Jefferson could have picked up the ideas and even language. This is one of the problems in saying whether something is "Lockean" in nature or direct from Locke. A parallel in other words does not mean dependence.

Third, even if Jefferson were reading Locke and basing his theory on Locke, it is important to realize that Jefferson disagreed with other colleagues such as James Wilson about the basis of American rights. The discussion about whether Jefferson read Locke or adopted Lockean ideas thus misses the important fact that other applications of Locke were invoked by colonial writers that differed from Jeffersons'. And these thinkers disagreed on precisely this point of whether the settlers were free men when they came to the colonies or British citizens. It is this disagreement over rights that is often missed in discussion of Jefferson's views in relationship to Locke and which is developed in this essay.

Fourth, Locke's view is actually quite a bit more complex than the single passage quoted by Jayne to prove that Locke endorsed the right to emigration. Locke in fact did not think that a person always had an unqualified right to leave a society. There were conditions, as we shall see, in which a person gave up that right. If Jefferson had a complex understanding of Locke, as Jayne suggests, then he might have realized that Locke's view was more complicated than the "right to quit society." The fact that Jefferson didn't acknowledge that complexity either shows that he did not have a complex view of Locke, contrary to Jayne, that he had not read Locke very thoroughly, or that he chose to ignore Locke's more complex view, all of which are more interesting clains than Jayne's assumption of an "unambivalent" adoption of Locke.

The complexity of Locke's position becomes apparent when we take a deeper look at Locke's thoughts on the conditions in which a person may quit their society. One of Locke's central contentions was that a child was not obligated to adopt the country or political allegiance of his parents. At maturity, young adults had the choice to leave a country in which they were raised. Their parents' political allegiance was not an inherited obligation of the children. A man "*cannot*, by any *compact* whatsoever, *bind his children or posterity*: for his son, when a man, being altogether as free as the father, *any act of the father can no more give away the liberty of the son*, then it can of any body else:" (II, 8 § 116). "It is plain, then, by the practice of governments themselves, as well as by the law of right reason, that *a child is born a subject of no country or government."* (II, 8 § 118).

At maturity, a young adult can choose which political entity to join. But Locke distinguishes between two types of consent. (II, 8, §119) As long as the young adult only *tacitly* consents to live in a country, for example, by accepting the inheritance or possession of the father's property, the young adult may still choose to leave the country later, as long as the young adult leaves the property behind. Locke notes that the father often used rights in land, which was owned by the political entity, as a way to bind his children to the political allegiance of the country in which they lived. But Locke emphasized that the young adult ultimately had the freedom to chose whether to accept the land on the conditions of living in that state or to leave the political entity in which he had been raised. If the young adult took possession of the land that belonged to the father, then that child had given *tacit consent* to live under the laws of that country. However, and this is the point that Jayne never mentions, if after maturity, a young adult explicitly consents to join a community, there is no longer a right to quit society. Once explicit consent is given to join a political society, an individual renounces his or her right to leave that society.

As Locke put its it, not too far from the quote that Jayne cites:

> "so that whenever the owner, who has given nothing but such a tacit consent to the government, will by donation, sale, or otherwise, quit the said possession, he is at liberty to go and incorporate himself into any other common-wealth; or to agree with others to begin a new one, in vacuis locis, in any part of the world, they can find free and unpossesesd: whereas he, that has once, by actual agreement, and any *express* declaration, given his *consent* to be of any common-wealth, is perpetually, and indispensibly obliged to be, and remain unalterably a subject to it, and can never be again in the liberty of the state of nature; unless, by any calamity, the government he was under comes to be dissolved; or else by some public act cuts him off from being any longer a member of it. (II, 8 § 121).

Locke's concern in the passage is to make clear that the child's political allegiance is not determined by the father's because a child is not the property of the father. This was a critical part of Locke's argument for several reasons. First, it gave him an explanation for why Filmer's argument about the divine right of Kings was wrong. Filmer had argued that children are their father's property and therefore were subject to their father's authority. In this way, the divine right of Kings was "natural" since Filmer argued it could be traced back to the original father's (Adam's) authority over his children. Locke disputes Filmer's view and makes the authority of the father over the child one key place of disagreement. The authority of the father over the child is not a political type of authority (II, 1 § 2) but only a temporary responsibility that a man (and woman according to Locke) have for a child. A child is not a free person in the same sense as an adult, however, because he or she have not yet matured and reached the age of reason, which is the requirement of liberty. Thus a child is born with the rights of liberty that only become fully activated at maturity, the age of reason. At maturity a child can decide which commonwealth to join. "Common-wealths themselves take notice of, and allow, that there is a *time when men* are to *begin* to act *like free men,* and therefore till that time require not oaths of fealty, or allegiance, or other public owning of, or submission to the government of their countries." (II, 6 § 62). Similarly "foreigners" cannot become full members of a society simply by living in a society. "Nothing can make any man so, but his actually entering into it by positive engagement, and express promise and compact." (II, 6 § 122)

Having now understood Locke's distinction between tacit and explicit consent and the implications for the right to quit society, we can return to the quote that Jayne cites from Locke concerning the multiplication of commonwealths in early times. Jayne cites this quote as evidence that Locke endorsed the right to quit society. This quote appears in a context in which Locke is replying to what he takes to be a criticism of his social contract theory. His critics, says Locke, argue that if all people are born under government, how can there be multiple different commonwealths? Wouldn't there simply be one government? The same problem, answers Locke, arises on the view of Filmer who believed Adam was the original father and monarch. If you assume the child is under the political authority of the father, then there should be one monarchy and not many commonwealths. By contrast, Locke argues that on his own view we can explain this diversity of governments. At maturity people have the right to leave their society. This explains the fact that there are multiple commonwealths in the early history of humanity.

But if we probe deeper into Locke's view of the earliest societies, we find that Locke assumes that the early political allegiances often involved tacit consent. The reason for this is that the earliest societies were extensions of the patriarchal family. In early history, children found it easier to live under their father's rule as they had been accustomed to his authority. Therefore, the first societies were patriarchal with the father as the political leader. In these early societies, the children tacitly consented to let the father rule because it was a natural extension of the family. "Thus it was easy, and almost natural for children, by a tacit, and scarce avoidable consent, to make way for the *father's authority and government."* (II 6, § 75). Thus the natural *fathers of families*, by an insensible change, became the *politic*

monarchs of them too: and as they chanced to live long, and leave able and worthy heirs, for several successions, or otherwise; so they laid the foundations of hereditary, or elective kingdoms, under several constitutions and mannors..(II 6, § 75). "Yet it is obvious to conceive how easy it was, in the first ages of the world, and in places still, where the thinness of people gives families leave to separate into unpossessed quarters, and they have room to remove or plant themselves in yet vacant habitations, for the *father of the family* to become the prince of -it; he had been a ruler from the beginning of the infancy of his children: and since without some government it would be hard for them to live together, it was likeliest it should, by the express or tacit consent of the children when they were grown up, be in the father, where it seemed without any change barefly to continue" (II 6, § 74) (see Schochet, Family and Origins of State, 81-98 for a good account of relationship of organic natural family and the transition to the first states).

Now the significance of this understanding is that Locke assumes the multiplicity of commonwealths occurred because families spread across the earth into the vacated land. These early political societies had developed organically, with the children tacitly consenting to the political leadership of the patriarchal father. The early multiplication of governments is thus consistent with the view Locke held that people can quit society only when they have given tacit consent to be bound to it. Thus, "whether a family by degrees grew up into a common-wealth, and the fatherly authority being continued on to the elder son, every one in his turn growing up under it, tacitly submitted to it, … II 6, § 110. Thus Locke's picture is that there were many families without explicit political structures that spread across the world or combined with other families to form the original governments. Many if not most of these early societies were natural and did not involve the explicit consent that would characterize more advanced societies that were not familial in nature. When societies were more complex and land was not as abundant, explicit consent would be required to become "perfect" members of such socities. II 6, § 110112.

Jefferson shows no awareness of any of this complexity in Locke's thinking, Despite Jayne's insistence Jefferson had an "extensive understanding" of Locke. Thus either Jefferson did not read Locke carefully, did not read Locke at all, or simply was simplifying a part of Locke to serve his own pragmatic interests are all possibilities that arise Thus while one might argue that the right to quit society is Lockean, we have no evidence in fact that Jefferson got the idea from Locke directly. He may just as well have gotten the idea from Richard Bland.

Jayne assumes that Jefferson had a comprehensive view of Locke's Second Treatise from one citation of Locke in Jefferson's political commonplace book. I deal with that citation and its meaning in Appendix xxxx

[28] For a discussion of the relationship of Bland's and Jefferson's pamphlets see Schwartz, "Natural Rights", Part II as well as references there to other discussions.

[29] See Colbourn, *Lamp of Experience*, Chinard, *Jefferson*, 49, Ellis, *American Sphinx*, Schwartz, "Natural Rights", Part II.

[30] See R. G. Adams, *Political Ideas, 15-18* on various conceptions of the British empire among the American colonists and particularly on the notion of a commonwealth of nations. Adams identifies three major views of the empire (dependence, federated state, and commonwealth of nations or league of states). Adams argues that the colonists moved from a view of the colonies as dependent to one of a view of the empire as league of nations. The notion of a league or commonwealth of nations meant that various dominions of the empire were independent states with their own legislatures rather than subordinate political entities to Parliament and England. On the view of the commonwealth, the Crown served to link the various parts of the empire together serving as a common executive branch and therefore attending to the issues that were "intra-state." The notion of a commonwealth was endorsed eventually by John Adams, Benjamin Franklin, James Wilson and Thomas Jefferson. Because

they all shared such a view, R. G. Adams tends to conflate their views at time, as do other interpreters. But R. G. Adams recognizes that there were different paths of reasoning that led to each to the view of a league of nations, a point I will explore below. Jefferson, Wilson, and Adams all arrive at view of a commonwealth of nations in different ways. The fact that they arrived there through different theoretical assumptions is important to the understanding of what the Declaration declares and what it does not say.

[31] See Jefferson's account in Ford, *Complete Works*, I: 15.

[32] See my discussion of the debate on natural rights in Schwartz, "Natural Rights" Part III.

[33] See Schwartz, "Natural Rights", Part II. Jayne, *Jefferson's Declaration*, 51-55, by contrast, is one of the few interpreters to explicitly argue that Jefferson's notion of the "right to emigration" is directly influenced by Locke.

To prove this, Jayne quotes Locke: "For there are no Examples so frequent in History, both Sacred and Prophane, as those of Men withdrawing themselves, and their Obediance, from the Jurisdiction they were born under, and the Family or Community they were bred up in, and setting up new governments in other places: from when sprang all that number of petty Common-wealths in the Beginning of Ages, and which always multiplied as long as there was room enough." (Locke II 8,15) This statement of Locke certainly sounds like an endorsement of the right to quit society. However, there are several problems with Jayne's assumption of a direct influence of Locke over Jefferson on this particular issue and they point to some of the larger problems in Jayne's analysis overall in my view. While the notion that there is a right to quit society might have a "Lockean lineage" it oversimplifies the issue to say that Jefferson got the idea directly from Locke.

First, Jefferson never quotes the passage from Locke that Jayne cites, and never attributes the right to quit society to Locke, though he does call it a natural right. I shall argue below that the use of parallel ideas does not provide enough evidence of dependence especially when there are other possible sources of the idea.

Second, because Jayne looks only at Jefferson and not earlier colonial writers he does not seem aware that Jefferson's own Virginian colleague, Richard Bland, had made a similar argument about the right to quit society, at the time of the Stamp Act Crisis, nearly ten years before Jefferson wrote his Summary View. I've discussed this in Schwartz, *Natural Rights*, Part II. Jefferson's argument and language is very similar to Bland's, and Jefferson could just as easily have gotten the idea from Bland or other sources. Indeed, this raises what I consider to be one of the most significant problems with Jayne's analysis: he assumes parallels between Jefferson and Locke mean the influence was direct from Jefferson's knowledge of Locke. But in this case, as in others, there were other sources from which Jefferson could have picked up the ideas and even language. A parallel in other words does not mean dependence.

Third, even if Jefferson were reading Locke and basing his theory on Locke, it is important to realize that Jefferson disagreed with other colleagues such as James Wilson who also used Lockean ideas as the basis of American rights. The discussion about whether Jefferson read Locke or adopted Lockean ideas thus misses the important fact that other applications of Locke were invoked by colonial writers that differed from Jeffersons' and they disagree on precisely this point of whether the settlers were free men when they came to the colonies. I develop this point in more detail in this essay and in Schwartz, *Natural Rights*, Part II. In some sense, then, the argument of whether Jefferson's views were Lockean misses the more interesting problem that diverging and conflicting views could all be seen as Lockean.

Fourth, Locke has a more complex view about the right to quit society that Jayne gives him credit for and thus Jefferson's right to quit society does not map directly to Locke's views. It is true that Locke held that a child was not obligated to adopt the country or political allegiance of his parents. At maturity, young adults have the choice to leave a country in which they were raised. The parents' political allegiance was not an inherited obligation of the

children. As Locke put it, a father "cannot, by any *compact* whatsoever, *bind his children or posterity*: for his son, when a man, being altogether as free as the father, *any act of the father can no more give away the liberty of the son*, then it can of any body else" (II, 116). As long as a young adult only tacitly consents to live in a country, for example, by accepting possession of the father's property, he must observe the laws of the country but still has the choice to leave.

However, if after reaching maturity, the adult *explicitly consents* to join the community, that person can not longer quit society. As Locke put its it, not too far from the quote that Jayne cites: "so that whenever the owner, who has given nothing but such a tacit consent to the government, will by donation, sale, or otherwise, quit the said possession, he is at liberty to go and incorporate himself into any other common-wealth; or to agree with others to begin a new one, in vacuis locis, in any part of the world, they can find free and unpossesesd: whereas he, that has once, by actual agreement, and any *express* declaration, given his *consent* to be of any common-wealth, is perpetually, and indispensibly obliged to be, and remain unalterably a subject to it, and can never be again in the liberty of the state of nature; unless, by any calamity, the government he was under comes to be dissolved; or else by some public act cuts him off from being any longer a member of it. (II, 121).

Thus on Locke's view one can lose the right to quit a society upon explicitly consenting to join a political community. If Jefferson had an "extensive knowledge" of Locke as Jayne claims, he certainly gave no indication he understood the complexity of Locke's thinking on the right to quit society.

Fifth, Locke had a different focus when he wrote about the spread and multiplication of early governments in the passage cited above by Jayne. Locke's interest in this passage was not justify the right to quit society to respond to his critics who criticized his views about the contract theory of government. If, says his critics, all people are born under government, how can there be multiple different commonwealths? ( ) It was in answer to this question that Locke wrote about the spread and multiplication of early governments. The same problem, answers Locke, arises on the view of Filmer who argued for the divine right of kings reaching back to Adam. If you assume the child is under the political authority of the father, then there should be one monarchy and not many monarchies. But on the assumption of a social contract, says Locke, we can explain this diversity of governments. At maturity people have the right to leave their society. It is in this context that Locke makes the statement that Jayne quotes above. "For there are no Examples so frequent in History, both Sacred and Prophane, as those of Men withdrawing themselves, and their Obediance, from the Jurisdiction they were born under, and the Family or Community they were bred up in, and setting up new governments in other places: from when sprang all that number of petty Common-wealths in the Beginning of Ages, and which always multiplied as long as there was room enough."

When we probe deeper into Locke's view of these early commonwealths and the origin of diverse governments, we find that Locke assumed that the early political societies were based only on tacit consent and not explicit consent. It is for this reason that he assumes that new political societies could break off from one another, not because he assumed a general right to quit society. That this is Locke's assumption becomes evident when we pay attention to his comments on the nature of these early societies. It was only natural, in Locke's view, that the early societies were based on patriarchal family with the father at the head.

74 "..yet it is obvious to conceive how easy it was, in the first ages of the wrodl, and in places still, where the thinness of people gives families leave to separate into unpossessed quarters, and they have room to remove themselves or plant themselves in yet vacant habitations, for the *father of the family* to become the prince of –it; he had been a ruler from the beginning of the infancy of his children: and since without some government it would be hard for them to live together, it was likeliest it should, by the express or tacit consent of the children when they were grown up, be in the father, where it seemed without any change barely to continue; when indeed nothing more was required to it, than the permitting the *father* to exercise alone, in his family, that executive power of the law of nature, which every free man naturally

hath, and by that permission resigning up to him a monarchical power, whilst they remained in it. But that this was not by any *parternal right*, but only by the consent of the children, … 75 Thus it was easy, and almost natural for children, by a tacit, and scarce avoidable consent, to make way for the *father's authority and government*. They had been accustomed in their childhood to follow his direction, and to refer their little differences to him; ..It is no wonder that they made no distinction betwixt minority and full age; nor looked after one and twenty, or any other age that might make them the free disposers of themselves and fortunes, when they could have no desire to be out of their pupilage:

In contexts where Locke is describing the relationship of child to father, he notes that in the earliest societies the children simply found it easy to live under their father's authority which they had grown accustomed to in youth. See 75. When the child reached maturity, they found it convenient to live under the father's leadership and thus tacitly consented to stay in these social organizations. Thus in Locke's account the earliest societies were essentially the family writ large (clans) and there was a tacit consent to be governed by the patriarchal father. On Locke's account, then, these earliest societies would allow people to quit and found their own socities because they had never given explicit consent to a social contract but had only given tacit consent at maturity. In Locke's account, therefore, the spread of civilization was possible because the children could split off to form a new society. Locke leaves open the possibility that in more advanced states, this dynamic changes for now people are under governments that no longer have familial foundation.

To summarize, then, the claim that Jefferson'Locke's core notion is that a children are not the property of their parents and therefore their parents cannot oblige them to social contracts in which they have entered. At maturity a child has a right to quit society and chose a different political affiliation. But once the child has explicitly consented to live in a society, the right to quit that society has ended.

Since Jayne assumes that Jefferson had an "extensive understanding" of Locke, one might have thought that Jefferson would attribute ascribe his view about the right to quit society to Locke (which he did not) or allude to some of the limitations on the right (which he did not). Thus while one might argue that the right to quit society is Lockean, we have no evidence in fact that Jefferson got the idea from Locke directly and not from Richard Bland his Virginian colleague.

And they can force the child to submit if they want to inherit the land. 75 because they can use the land to force the child to submit 73

See also 110 on tacit submission. At issue then is when did these tacit submissions end.

This particular example raises a larger methodological problem with Jayne's analysis. Jayne tends to assume that a parallel between Jefferson and Locke means a direct dependence, an assumption made Carl Becker at times as well. But there is very little evidence that Jefferson actually read Locke, as Gary Wills has pointed out. Indeed, there is only one citation of Locke in Jefferson's Commonplace book on government before 1776 and it has to do with the question of whether succession of Kings can be determined by Parliament. Wills had argued that Jefferson misunderstood Locke in that context showing that Jefferson didn't really have a good grasp of Locke. Jayne, by contrast, argues that Wills was wrong to trivialize Jefferson's citation as "misunderstanding" Locke. On Jayne's account Jefferson understood Locke correctly in this context. I agree with Jayne that Jefferson cited Locke appropriately in this context. But I do not draw the same conclusions as Jayne.

Based on this one correct citation of Locke by Jefferson, Jayne argues that Jefferson has "extensive knowledge" of Locke. He therefore assumes that parallels that he finds between Jefferson's writing, particularly the Declaration of Independence, And Locke's Second Treatise, reflect direct influences. This conclusion seems to me to be questionable for several

reasons. As already indicated, the fact that Jefferson used Lockean ideas does not mean he was directly influenced by Locke. Lockean ideas were in the air and many other American colonial writers had quoted Lockean ideas, including James Wilson and George Mason, other writers that we know Jefferson read. As already noted, the idea of the right to quit society could have been picked up by Jefferson having read Richard Bland's essay or having spoken to him.

Furthermore, if Jefferson was so familiar and so influenced by Locke it seems surprising he didn't cite Locke more, if not in his Summary View, then in his Commonplace book on government. The fact that he only cites Locke once does not prove that the influence was direct.

Finally, Jayne oversimplified Locke's statement and thus does not ask about the relationship of Jefferson to Locke.

from this single citation and from Jefferson's correct understanding of Locke in that context, that Jefferson had an "extensive knowledge" of Locke's work (Jayne, 44). On the basis of that assumption, and the parallels he draws between Locke's Second Treatise and Jefferson's Declaration of Independence, Jayne assumes a direct influence of Locke to Jefferson.

Jayne, however, assumes that Jefferson had an extensive knowledge of Locke's Second Treatise. Jayne derives that assumption from one citation of Locke in Jefferson's Commonplace Book on Government before 1776 that involves the question of whether Parliament can establish succession rules for Kings. Jayne argues that since Jefferson's citation of Jefferson there is correct, that Jefferson can be assumed to have extensive knowledge of Locke. On this basis, Jayne assumes that parallels he finds between Locke and Jefferson must reflect direct influence.

But parallels do not always mean direct influence. The fact that Jefferson once cites Locke correctly and in a context in which he is talking about the rules of succession for a King does not mean that all parallels indicate direct dependence. To begin with, Lockean ideas were in the air and Jefferson could have picked up the ideas from reading any number of sources including James Wilson's Considerations, which he also quoted in his Commonplace book, or George Mason's,

But the assumption that Jefferson had mastered Locke from one citation of Locke that Jefferson had mastered Locke part of the problem of Jayne's argument is that he assumes that a parallel found in Locke and Jefferson must derive from Locke. Thus Jayne lists a series of similarities between Locke's Second Treatise and Jefferson's Declaration and assumes that parallels prove dependence, an assumption that Becker also made at times. But as we shall see, Jefferson also shows some ambivalence about natural rights arguments.

Third, the passage that Jayne quotes from Locke to prove that Locke held the view that people had a right to quit society is actually part of a much larger context in which Locke was arguing against Filmer's view that children are property of their fathers.

But parallel conceptions do not necessarily mean influence. Lockean ideas were in fact in the air and Jefferson could have may have picked them up from any number of places Furthermore, it is questionable whether a single citation of Locke in a very specific context means that Jefferson's other views were shaped directly by Locke or by ideas in the air in general. Indeed, the very same ideas were available to Locke in his reading of other writers.

[34] See Schwartz, "Natural Rights", Part II.

[35] See notes 27 and 28. See also Reid, *Authority of Rights*, 133, and Zuckert, *Natural Rights*, xxx who notes that terms like contract and even original contract also belonged to the common law tradition.

[36] See my analysis of the First Continental Congress' debate in Schwartz, "Natural Rights", Part III.

[37] See J. G. Adams, *Political Ideas*, 29-36 for a survey of various individuals in the colonies and England who proposed adding American representatives to Parliament as a solution to the problem of representation. See also Woods, *Creation*, 162-196, on the debate about the nature of representation.

[38] On the debate about virtual representation, see Woods, *Creation*, 162-196, and my own Schwartz, "Natural Rights" Parts I-III.

[39] Some have also noted Jefferson's alternative view in *Summary View* but have not always drawn the implications relevant to the Declaration. See my earlier discussion in note 27.

[40] Boyd, *Papers*, I:191. See my account and analysis in Schwartz, "Natural Rights", Part III, 34.

[41] The contrary view that allegiance followed a subject was the view of the Stamp Act Congress, Bland Wilson, and during the First Continental Congress the view of Rutledge, Duane, John Duane . As John Duane put it in his notes for debate "The priviledges of Englishmen were inherent They were their Birth right and of which they coud only be deprived by their free Consent." The First Continental Congress endorsed this view in its Declaration of Rights in 1774.

[42] See Woods, *Creation*, 197-226.

[43]Jefferson in *Summary View*, 129 wrote that "It is now therefore the great office of his majesty, to resume the exercise of his negative power, and to prevent the passage of laws by any one legislature of the empire, which might bear injuriously on the rights and interests of another."

[44] See Woods, *Creation*, 197-226 on ideas of blended government among the colonists

[45] Jefferson, *Summary View*, 129.

[46] Wilson, *Considerations*.

[47] James Harrington is one seventeenth century thinkers who emphasized rights arising out of property ownership. Americans were familiar with the theory. James Otis, in "The Rights", for example, mentions this theory in his review of the theories of government. Similarly, Galloway bases his view on rights arising from property during the First Continental Congress debates. Galloway states that "Power results from the Real Property, of the Society" and argues that is the founding assumption of many states See John Adam's "Notes on Debates" in *Letters of Delegates*, Letter 23. Also discussed in Schwartz, *Natural Rights*, III. David Hume also held the view that often possession was the source of government, but it is does not appear that the colonial writers were very familiar with Hume's philosophic essays.

[48] See for example the discussion in Reid, *Authority of Rights*, 118 on the intersection of the "migration" issue and the question of whether America was conquered or settled. I disagree with Dworetz, Unvarnished Doctrine, 47 who minimizes the question of conquest with respect to looking at the use of natural rights in the colonial writing.

[49] Jefferson, "Summary View," in Boyd, Papers, I, 129.

[50] 1. Bl Com. 106. 107. Available online.

[51] See Jezierski, "Parliament or People," on the relationship of Blackstone and Wilson's legal theories, from a theoretical perspective, although there is no discussion there of this particular disagreement.

[52] Vattel, *Law of Nations*, 100. Originally written in French in 1758 it was translated into English in 1759. James Otis, for example, mentions Vattel in his essay , "*The Rights of the British Colonies Asserted and Proved"* (July 1764).

[54] Thompson, *Revolutionary Writings*, 121. See also Taylor, *Papers*, I:315ff for Adam's essay and background on Adam's role in drafting this writing and in the debate with governor Thomas Hutchinson.

[55] Thompson*, Revolutionary Writings*, 120.

[56] The claim is made by among others Becker, *Declaration*, 96-97 and Morgan, *Stamp Act*, 87. For a discussion, see Schwartz, *Natural Rights*, Parts II and III.

[57] Schwartz, *Natural Rights*, Parts I, II, and III.

[58] See, for example, Locke II: VIII, 100 and in particular XVI, 175 where he offers several different responses to the objection that not all societies developed through a social contract. First, he argues that the evidence of the social contract is often lost in early history because by the time people kept records they had passed the stage of entering the contract. Second, he argues that there were historical societies in which consent is evident, such as Rome, Venice and Sparta. But Locke also ponders the possible criticism that there were no convincing historical examples of the social contract. On this possibility he parenthetically writes that "(though at best an argument from what has been, to what should of right be, has no great force) one might, without any great danger, yield them the cause." Here Locke is saying that what has been true historically has no great value for what should of right be, separating the historical from the moral claim, which is based on reason. Many modern interpreters emphasize this last dimension of Locke (Laslett, Locke, 93, Dunn, Locke, 49, Becker 65), which was not the dimension of Locke that was most prominent to the American colonists.

Indeed this is just a parenthetical statement here and does not seem like Locke's primary conviction. When he wraps up he summarizes by again appealing to both reason and history: "But to conclude, reason being plain on our side, that men are naturally free, and the examples of history shewing, that the of the world, that were begun in peace, had their beginning laid on that foundation, and were there can be little room for doubt, either where the right is, or what has been the opinion, or practice of mankind, about the governments made by the consent of the people; first erecting of governments."

[59] See Schwartz, "Natural Rights" Parts I and II.

[60] For Hopkins, "Rights,*"* see Bailyn, *Pamphlets*, 499-521. A shortened version is also available in Jensen, *Tracts*, 41-62.

[61] Hopkins, "Rights,*"* quoted in Bailyn, *Pamphlets*, 507.

[62] Otis, "Rights", in Bailyn, *Pamphlets*, 423. I thus disagree with those who see Otis' as endorsing the tenents of "Lockean liberalism", Gerber, *To Secure These Rights*, 35. See also Dworetz who also assumes Otis adopted an unqualified Lockean perspective. For a contrasting view of Otis, see Schwartz, Natural Rights, Part I.

[63] Locke makes several statements suggesting that God intended society to be the end state of human beings, but in Locke this is clearly a human choice to enter the social compact. For a discussion, see Schwartz, "Liberty Is Not Freedom." For example, Locke writes that "GOD having made man such a creature, that in his own judgment, it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination to drive him into as well as fitted him with understanding and language to continue and enjoy it. (Locke II: VII,77). The passage just emphasizes God's desire for humans to live as social beings. Now contrast it with the following passages in which Locke emphasizes the role of human beings in choosing to join society "To avoid this state of war (wherein there is no appeal but to heaven, and wherein every the least difference is apt to end, where there is no authority to decide between the contenders) is one great reason of men's putting themselves into society, and quitting the state of nature (II: III, 21). And again "MEN being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society,is by agreeing with other men to join and unite into a community, for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it (Locke II: VIII, 95)."

[64] For a fuller discussion of some of the ways more religiously and theologically minded writers reshaped natural rights theory in covenantal and theological concepts, see Schwartz, Natural Rights, Part II. See also Dworetz.

[65] Otis, "Rights", in Bailyn, *Pamphlets*, 419-420. Vattel develops an extensive understanding of the rights and duties of nations based on natural rights philosophy.

[66] Otis, "Rights", in Bailyn, *Pamphlets*, 422. I disagree with Dworetz, Unvarnished Doctrine, 84 who sees Otis' as un-ambivalently endorsing Locke.

[67] Koch, Philosohpy of, 17, has argued that such ideas may have been derived from his readings in Lord Kames.

[68] Boyd, *Papers*, I, 277-284

[69] Boyd, *Papers*, I, 283.

[70] Boyd, *Papers*, 1, 284

[71] See Boyd, *Papers*, I, 284, for the dating of the essay. Boyd citing Keller also notes the similarity between the views expressed here and Jefferson's earlier "Summary View" and "Declaration of the Causes."

[72] JCC IV, 342

[73] Maier, *American Scripture*, 37. Rakove suggests the language equivocated to some degree. Colonies that had government "sufficient to the exigencies of their affairs" did not have to engage in constitution making, enabling the more radical states to progress faster than the more moderate ones.

[74] Adams wrote to his wife that "Great Britain has at last driven America to the last step." Quoted in Boyd, *Declaration*, 18.

[75] For a discussion of the context in which Jefferson wrote these drafts, see Boyd, *Papers*, I: 329-337, 345; Boyd, *Declaration*, 22, Maier, *American Scripture*, 48, Hazelton, *Declaration*, 147. Boyd, *Papers*, 345 suggests the possibility that Jefferson had made notes even before returning to Congress in anticipation of the need for a constitution.

[76] See Boyd, *Papers*, I 384, who disagrees with the previously held view that Jefferson's draft arrived too late to have any measurable impact on the Virginia constitution.

[77] See Boyd, *Papers*, I: 332, and Boyd, Declaration, 22-23 for the insight that the draft of the Virginia Constitution should be viewed as the documentary history of the Declaration of Independence. I am however going further than Boyd and arguing that the first draft of the Virginia Constitution should be viewed as Jefferson's actual first "Declaration of Independence" and one that most closely adheres to his own views.

[78] Confirmation of this view is found in a letter in 1825, Jefferson wrote "the fact is that that preamble was prior in composition to the Declaration, and both [the Declaration and the Virginia Constitution] having the same object, of justifying our separation from Great Britain, they used necessarily the same materials of justification: and hence their similitude." Quoted in Boyd, *Declaration*, 23.

[79] Maier, *American Scripture*, 47.

[80] An exception is Maier*, American Scripture*, 128, who also notes that Jefferson did not add a preamble originally to his own theory of independence. Maier even comments that the Committee of Five may have asked Jefferson to add the section. But Maier does not draw the conclusions which I do, namely, that this preamble was not in keeping with Jefferson's own views.

[81] Maier, *American Scripture*, 51-55.

[82] Boyd, *Papers*, I: 347.

[83] Lee's resolution is available online.

[84] Jefferson and Adam's own account of why Jefferson was selected differ and have been discussed on numerous occasions. See Boyd, *Declaration*, 20-21, Hazelton, *Declaration*, 141, Maier, *American Scripture*, 99-100.

[85] There is a conflict between Jefferson's and Adam's memories of how much consultation occurred between Jefferson and the Committee or between Jefferson and Adams and Franklin in particular. Boyd, *Declaration*, 22 concludes that there likely was a discussion and Jefferson, though he challenged the fact that there was a "subcommittee" never challenged the fact that there was a discussion on the subject. Boyd speculates that it likely discussed the codification, arrangement, amplification and emphasis to be given. Maier, *American Scripture*, 100-103, also emphasizes that Jefferson likely consulted with the Committee or at least some of its members on several occasions.

[86] Boyd, *Declaration*, 24.

[87] Peterson, *Jefferson*, 89 also uses the word "smuggle" to describe Jefferson's attempt to get his views in the Declaration.

[88] Compare the fair version prepared for the Committee of Five (Boyd, *Papers*, 426) with the "Rough Draft" version after Congress made its changes (Boyd, *Papers*, 318). Boyd, *Declaration*, 34 attributes these changes to Congress but passes over this deletion without attributing to it much significance.

For a discussion of the history of the evolution of the text, see Boyd, *Papers*, I 413-17 and Boyd, *Declaration*, 26-33, as well as Becker, *Declaration*, 135-193. Eighty-six changes were made to the original draft that Jefferson wrote and Congress cut out about twenty-five percent. Adams and Franklin made a much smaller set of changes during their review before the Committee submitted its copy to Congress. Although the rough draft contains the whole history of the changes made in the Declaration as it went through its revisions, it is possible to

see the state of the text at various points in its evolution. John Adams copied an early version, before the fair copy was created by the Committee of Five. This Adams version already contains some changes that may have come from Adam's and Franklin's suggestions

[89] Jefferson recounts the now famous story of how he was sitting next to Benjamin Franklin "who perceived that I was not sensible to these mutilations." Franklin told Jefferson that he avoided drafting papers for public bodies precisely to avoid such heavy editing. To illustrate, Franklin then told him a humorous story of an apprentice Hatter who created a public sign that read "John Thompson, Hatters, makes and sells hats for ready money." But when he submitted it to his friends for comments, they eliminated nearly all the words as unnecessary. By the end of the review session, the sign was reduced to "John Hatter" with a figure of a hat only. See Becker, *Declaration*, 208; Ford, *Works*, X, 120; Hazelton, 179.

[90] Quoted in Boyd, *Declaration*, 20.

[91] Becker, Declaration, 209; Boyd, *Declaration*, 33, Maier, *American Scripture*, 148

[92] Becker 211. Becker thus assumes that the Declaration of Independence still reflects Jefferson's theoretical perspective, namely, the view that the ancestors created independent states and voluntarily joined the empire.

[93] Boyd, *Declaration*, 36. Maier, *American Scripture*, 148, portrays Congress' editing job here as reducing Jefferson's overlong attack on the British people. But she seems to sense that something more is going on but without drawing out the full significance :"Out went his claim that the Americans had settled the country without any British help; the remaining assertion that 'we reminded them of the circumstances of our emigration and settlement here' then became more justifiable. From the beginning of the conflict, the colonists had insisted that in coming to American their ancestors had yielded none of the right of Englishmen. That could be construed as reminding British people of the "circumstances of our emigration." Maier thus does not fully draw the conclusion that a significant dispute over the matter of rights is being played out here and that the rewrite raises precisely doubts about what theory of rights the Declaration is endorsing.

[94] See Becker, *Declaration*, 115, writes: "If, therefore, the first Continental Congress did not adopt the theory of British American relations which we find in the Declaration, it was not because the theory was a novel one. In 1774 it was familiar doctrine to all men." As proof he cites Jefferson's *Summary View*. Becker, however, makes the mistake of assuming the Declaration reflects Jefferson's view and thus does not hold the same view as that published by Congress in 1774. In my reading, the changes made by Committee and Congress moved Jefferson's original draft to a place where it fit with the view of the First Congress. Furthermore, Becker also misses the fact that Wilson and others had a different view than Jefferson in Summary view, not giving sufficient detail to the disagreements which I have pointed out above. He writes " Mr Wilson's theory of the relationship of the colonies to Great Britain was essentially the same as that which we find in the Declaration of Independence" The reason Becker says that is he sees no differences between the view of Jefferson and Wilson. On my reading, however, Jefferson and Wilson fundamentally disagreed. The First Continental Congress espoused a view like Wilson's. Jefferson wrote the first draft of the Declaration trying to slip his theory in. But after it was edited out, the Declaration is ambiguous because it does not explain the foundation of the settlers rights at all.

[95] See Boyd, *Papers*, I, 427, for the fair copy prepared for Committee of Five and 319 for the rough draft with changes by Congress.

[96] Becker, *Declaration*, 171. Boyd argues that Jefferson's Notes of Proceedings is not a later recollection but is much closer in time than other interpreters had thought. See Boyd, *Papers*, I, 299-309

[97] That is not the only reading possible since the resolution is itself ambiguous whether it is declaring the colonies to be states at the moment of the declaration or treating them as states that were already in existence.

[98] Becker, *Declaration*, 210.

[99] Quoted in Hazelton, *Declaration*, 178.

[100] I am here following Becker's reconstruction of the early draft based on the Adam's copy of the Declaration. Becker, *Declaration*, 141, 160. See also Boyd, Papers, I, 315 and 423.

[101] Boyd, *Declaration*, 31 identifies these changes as resulting from the Committee work.

[102] Becker, *Declaration*, 198.

[103] Maier, 132, also notes that "a people" was consistent with Jefferson's theory in *Summary View*.

[104] Becker, *Declaration*, 144

[105] In *America Declares Independence*, Dershowitz, 75,makes a great deal of Jefferson's use of the language "the laws of nature & of nature's god." Dershowitz sees this as evidence that Jefferson embraced a deist view of God and religion. In the deist tradition, Jefferson saw God as an abstract creator God of Reason but not as a personal being with whom one could have a personal relationship. He suggests this is why Jefferson did not choose more traditional theological language. On this basis, Dershowitz then explains "another challenging question" of how "Jefferson persuaded his colleagues—first, those on the committee appointed to draft the Declaration, and second, those in the Congress who eventually approved it—to accept his un-Christian and anticlerical references to "Nature's God" and "Creator" in place of the more orthodox reference to "Almighty God," "Jesus," or simply "God." Dershowitz' answer is that the majority on the committed (Franklin, Adams, Livingston) were deists or Unitarians.

I am sympathetic with Dershowitz' general argument against those who read very traditional Christian conceptions into the Declaration. I think that is wrong too. But Dershowitz provides an overly simplified view of Jefferson's position and the complicated ways in which colonial writers brought religious and natural rights language together. Some writers like James Wilson did not invoke God at all in his pamphlet *Considerations*. But Jefferson was among those who felt comfortable invoking God as he did in *Summary View* and *Declaration of Causes*. In both of these cases moreover Jefferson used more traditional God language without any reference to "nature's god" as found here in the Declaration. It is only here that he invokes the God of Nature. I suggest that Jefferson adopted more natural rights oriented language in the Declaration precisely because he was writing for the committee who expected him to lay out a statement of natural rights. When left to his own inclinations, as in *Summary View* or the *Declaration of Causes*, Jefferson favored more straightforward references to just "God". At what point Jefferson came to held deist views of religion is itself an interesting question. All of Dershowitz' quotes illustrating Jefferson's deist type views come from later in his life. But as a young man Jefferson was clearly reading deist oriented literature, as evident in his Commonplace book, though he did not adopt the language of "nature's god" in his earlier writings.

In fact, there is a complex relationship between more traditional Christian theological and covenantal language and the natural rights tradition that I have discussed elsewhere (Schwartz, Natural Rights, Part II). There were various ways in which American colonial writers tried to bring together more traditional covenantal and theological conceptions with the natural rights language. If anything, the Declaration was trying to straddle those conceptions, speaking simultaneously to more traditionally theologically minded Christians and those oriented to more deist type language. Congress added two additional references to God in revising Jefferson's earlier draft.

[106] I thus disagree with those who project back from the Declaration the emphasis on natural rights into Jefferson's earlier writings.

[107] See, for example, Boyd, *Declaration*, 36.

[108] Becker, *Declaration*, 21, 203-204.

[109] Becker, *Declaration*, 204. Boyd, *Declaration*, 36 also recognizes that the Declaration assumes no connection between the American colonies and Parliament but misses the fact that there was substantial disagreement on how that relationship had ended. In eliminating Jefferson's theory, Congress left equivocal which theory was the foundation of that rejection of Parliament's power.

[110] Becker, *Declaration* 142, 161.

[111] See the reference in Summary View, see Boyd, Papers, I, 123. For the reference in the draft of the Declaration, see Boyd, Papers, I, 317.

[112] See Schwartz, *Natural Rights*, Part II and particularly the use of the terms by Samuel Adams.

[113] See Zuckert, *Natural Rights*, for a particularly helpful discussion explaining how the Whigs relied on the common law tradition of "inherent rights" before the rise to prominence of Locke.

[114] Becker tends to treat these changes as simply literary improvements of Jefferson and not necessarily

[115] This philosophical perspective of Jefferson has been emphasized by Koch and by Wills.

[116] Becker, *Declaration*, 144.

[117] See, for example, Schlessinger, "Lost Meaning;" Ganter, "Pursuit of Happiness," Part II; Maier, *American Scripture*, 134, Maier follows the view that Jefferson was trying to just be more economical in his writing style than Mason and "sacrificed clarity of meaning for grace of language." Ganter cites dozens of passages from Locke's Essay and other philosophical sources that use the expression pursuit of happiness. Becker doesn't even comment on Jefferson's use of the term happiness.

[118] Otis, *Rights*, in Bailyn, *Pamphlets*, 425.

[119] Mason's original draft is not available and Mason attempted to reconstruct it from memory. In that remembered draft, Mason wrote that

> That all men are created equally free & independent, & have certain inherent natural Rights, of which they cannot, by any Compact, deprive or divest their posterity; among which are the Enjoyment of Life & Liberty, with the Means of acquiring & possessing property, & pursuing & obtaining Happiness & Safety

[120] See note 16.

[121] Ganter, "Pursuit of Happiness" Part II, also mentions the Bland parallel, but he simply lists this one among many rather than as a unique source of insight for understanding Jefferson's position.

[122] Jensen, *Tracts*, 112 – 113. Bland cites Wollaston in a footnote as a source of this view, though Locke says something quite similar about a child taking on the laws of a country when the child inherits the property from his father. See Locke II 73 and 120.

[123] See Boyd, *Declaration*, 27-28 for a summary. Boyd prefers Jefferson as the source of change, while others attribute the change to Adams or Franklin. Boyd's tentative conclusion is that Jefferson presented the draft to Adams first, who made only one correction, and then presented it to Franklin for his corrections. However, Boyd (30) also notes that Jefferson submitted his rough draft to Adam's twice and therefore it is difficult to know which of these changes reflect Jefferson's own changes or were based on Adam's suggestions.

[124] Boyd, *Declaration*, 31 attributes these changes to the committee.

Appendix 1 Carl Becker's Interpretation of the Declaration

Carl Becker wrote the classic statement arguing that Jefferson's Declaration was a Lockean document. But Becker was not consistent on his assumptions, as is evident from the following statements. At times Becker assumes that Lockean ideas or social compact ideas (he views the two as synonymous) were in the air and unavoidable. Thus: "Where Jefferson got his ideas is hardly so much a question as where he could have got away from them." (Becker, 27)

But at other times Becker assumed direct literary dependence by Jefferson on Locke.

> The Americans did not borrow it, they inherited it. The lineage is direct: Jefferson copied Locke and Locke quoted Hooker. In political theory and in political practice the American Revolution drew its inspiration from the parliamentary struggle of the seventeenth century. The philosophy of the Declaration was not taken from the French. It was not even new; but good old English doctrine, newly formulated to meet a present emergency. In 1776, it was commonplace doctrine, everywhere to be met with, as Jefferson said, 'whether expressed in conversation, in letters, printed essays, or the elementary books of public right.' And in sermons also, he might have added. But it may be that Jefferson was not very familiar with sermons." (Becker, 79)

Still at other times Becker questions his own "diffusion of ideas" assumptions and asks the interesting question of why Lockean or social compact ideas seemed so compelling to the Jefferson and his cohort. That is, Becker asks the question of why social compact theory spoke so powerfully to the American colonists. Or as Becker put it:

> "Most Americans had absorbed Locke's works as a kind of political gospel; and the Declaration, in its form, in its phraseology, follows closely certain sentences in Locke's second treatise on government. This is interesting, but it does not tell us why Jefferson, having read Locke's treatise, was so taken with it that he read it again, and still again, so that afterwards its very phrases reappear in his own writing." (Becker, 27)

And again:'What we have to seek is the origin of those common underlying preconceptions that made the minds of many men, in different countries, run along the same track in their political thinking." (Becker, 28).

Becker seems to provide two answers to the question and neither are very satisfying. The first is that compact theory was a good theory to justify revolution: "Jefferson used compact theory to justify revolution just as Locke did. The theory came with the revolution in both cases." (Becker, 30). Second Becker seems to link the popularity of natural rights ideology to the "common influence—the widespread desire to limit the power of kings and priest—was one source of those underlying presuppositions which determined the character of political speculation in the eighteenth century; a strong antipathy to kings and priests predisposed Jefferson and Rousseau, as it predisposed Locke, to 'intend their minds' towards some new sanction for political authority (Becker, 30).

At other times he gives a historically specific answer, namely that Jefferson and the colonists needed a general theory of rights that did not depend on specific British rights or positive law moorings. Thus:

> The framers of the Declaration refrained from mentioning Parliament and the 'rights of British subjects' for the same reason they charged all their

> grievances against the king alone. Being now committed to independence, the position of the colonies could not be simply or convincingly presented from the point of view of the rights of British subjects. To have said 'We hold this truth to be self-evident, that it is a right of British subjects not to be taxed by their own consent,' would have made no great appeal to mankind, since mankind in general could not be supposed to be vitally interested in the rights of British subjects, or much disposed to regard them as axioms in political speculation. Separation from Great Britain was therefore justified on more general grounds, on the ground of the natural rights of man; and in order to simplify the issues, in order to make it appear that the rights of man had been undeniably and flagrantly violated, it was expedient that these rights should seem to be as little as possible limited or obscured by the positive and legal obligations that were admittedly binding upon British subjects. To place the Resolution of Independence in the best possible light, it was convenient to assume that the connection between the colonies and Great Britain had never been a very close connection, never, strictly speaking, a connection binding in positive law, but only a connection voluntarily entered into by a free people. On this ground the doctrine of the rights of man would have a free field and no competitors. (Becker, 21-22)

Appendix 2 Jefferson's Declaration and James Wilson's Considerations

There has been some discussion of the possible relationship between Jefferson's language in the Declaration of Independence and James Wilson's *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*. Paragraph C below is the key passage that sounds like the Declaration of Independence. Jefferson copied paragraphs A and B but skipped paragraphs C and D and then resumed with paragraph E (article 832). It is paragraph C in particular that is close in language to the wording of the Declaration. For a discussion see endnote 15.

> A. Those who allege that the parliament of Great Britain have power to make laws binding the American colonies, reason in the following manner. "That there is and must be in every state a supreme, irresistible, absolute, uncontrolled authority, in which the jura summi imperii, or the rights of sovereignty, reside;"1 "That this supreme power is, by the constitution of Great Britain, vested in the king, lords, and commons:"2 "That, therefore, the acts of the king, lords, and commons, or, in other words, acts of parliament, have, by the British constitution, a binding force on the American colonies, they composing a part of the British empire."
>
> 1 4 Bl. Com. 48, 49.
> 2 Id. 50, 51.
>
> B. I admit that the principle, on which this argument is founded, is of great importance: its importance, however, is derived from its tendency to promote the ultimate end of all government. But if the application of it would, in any instance, destroy, instead of promoting, that end, it ought, in that instance, to be rejected: for to admit it, would be to sacrifice the end to the means, which are valuable only so far as they advance it.
>
> C. All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the first law of every government.[3]

[3] The right of sovereignty is that of commanding finally—but in order to procure real felicity; for if this end is not obtained, sovereignty ceases to be a legitimate authority. 2. Burl. 32, 33.

D. This rule is founded on the law of nature: it must control every political maxim: it must regulate the legislature itself.[4] The people have a right to insist that this rule be observed; and are entitled to demand a moral security that the legislature will observe it. If they have not the first, they are slaves; if they have not the second, they are, every moment, exposed to slavery. For "civil liberty is nothing else but natural liberty, devested of that part which constituted the independence of individuals, by the authority which it confers on sovereigns, attended with a right of insisting upon their making a good use of their authority, and with a moral security that this right will have its effect."[5]

[4] The law of nature is superior in obligation to any other. 1. Bl. Com. 41.

[5] 2 Burl. 19.

E. Let me now be permitted to ask—Will it ensure and increase the happiness of the American colonies, that the parliament of Great Britain should possess a supreme, irresistible, uncontrolled authority over them? Is such an authority consistent with their liberty? Have they any security that it will be employed only for their good? Such a security is absolutely necessary. Parliaments are not infallible: they are not always just. The members, of whom they are composed, are human; and, therefore, they may err; they are influenced by interest; and, therefore, they may deviate from their duty. The acts of the body must depend upon the opinions and dispositions of the members: the acts of the body may, then, be the result of errour and of vice. It is no breach of decency to suppose all this: the British constitution supposes it: "it supposes that parliaments may betray their trust, and provides, as far as human wisdom can provide, that they may not be able to do so long, without a sufficient control." 6 Without provisions for this purpose, the temple of British liberty, like a structure of ice, would instantly dissolve before the fire of oppression and despotic sway.

Appendix III. George Mason's Virginia Bill of Rights.

Here is the language from George Mason's Virginia Bill of Rights of June 12, 1776 that is often cited as a source of Jefferson's own language. For a discussion see the discussion in endnote 16.

A DECLARATION OF RIGHTS *made by the representatives of the good people of Virginia, assembled in full and free Convention; which rights do pertain to them, and their posterity, as the basis and foundation of government.*

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

3. That government is, or ought to be, instituted for the common benefit, protection, and security, of the people, nation, or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that whenever any government shall be found inadequate or contrary to these purposes, a majority

of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the publick weal.

4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge, to be hereditary.

5. That the legislative and executive powers of the state should be separate and distinct from the judicative; and that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for publick uses without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the publick good.

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