Liberty in America's Founding Moment

Doubts About Natural Rights in Jefferson's Declaration of Independence

Howard I. Schwartz, Ph.D.

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rights philosophy as much a political myth as the royalist theory that the king is God's steward on earth. We shall see in fact that many colonial writers, including Jefferson, seemed to be aware of Hume's critique of Locke and took it seriously.

In this sense, my argument moves on two parallel levels. I'm trying to draw out some of the colonial writers' doubts about Locke's natural rights and their sensitivity to the critique of natural rights philosophy, even as they embraced much that they liked about natural rights philosophy and its emphasis on consent. At the same time, I am endorsing a view that is much more suspicious of history as a source of truth that can pin down a notion of American rights, or any notion of rights at all. My larger goal, which moves beyond the discrete study here and which I have written about elsewhere, is to contest the notion that liberty has a fixed, determinate meaning independent of the particular public values that a society has and adopts.[15] One cannot anchor Americans' conception of liberty and rights, nor that of any society, ultimately on an abstract notion of liberty and rights that does not still need interpretation and engagement with the values of a given society at a given place in time. History is just one fact, among others, that enters into a discussion of how we want to live our lives collectively under this social contract that we call America.

PART I

The Declaration and Jefferson's Alternative Theory of American Rights

1. The Declaration, Locke, and Conflicts about Natural Rights

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 a 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.

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 occasions 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's 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. It will also become the point of departure for a much broader discussion of how history and historical analysis relates to political philosophy.

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. As we shall see later, 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 Congress 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 exhibiting a wholehearted embrace of natural rights theory, the Declaration's position on 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

smoothes 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 understanding, the Declaration's genius is not only in its beautiful language and 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 can justify the American right to declare independence.

On this view, 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 Revolution 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 have 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 1800s, 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 at least two key passages in the Declaration reflecting these assumptions. The first is the Declaration's 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 in conception and language to passages in John Locke's *Second Treatise on Government* 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 a central contention in Locke's *Second Treatise*.[4] Second, the Declaration clearly articulates the notion that government is instituted to secure these basic rights and that governments in general therefore derive their "just powers from the consent of the governed." Third, we also find present the idea that people have the right—indeed the duty—to throw off a government that attempts to "reduce them under absolute Despotism." So far all of these ideas are key natural rights concepts articulated by John 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 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 in the Congress's *Declaration of Rights* of 1774 and by a pamphlet of James Otis.[5]

In response to Pickering and Adams'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. Adams' in addition, that it [the Declaration] 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.[6]

Then on May 8, 1825, in a letter to Henry Lee, Jefferson 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.[7]

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

One stream of subsequent thought follows Jefferson's own perspective and argues that Jefferson's genius was in his ability to eloquently capture the American mind or sentiments of the day. For example, Carl Becker, commenting on John Adams'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."[8] 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."[9] 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."[10] And Boyd in his opening thus essentially follows Jefferson by stating that "[i]n 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."[11] 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 Jefferson biography writes that the ideas "belonged to everyone and to no one."[12] Picking up a similar theme, Pauline Maier, in her book on the Declaration, *American Scripture*, comes to the conclusion that the Declaration was "unexceptional in its ideas."[13]

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 stream of thought has argued the Declaration is most properly described as a Lockean document and owes its largest debt to enlightenment philosopher John Locke.[14]

These two views are not necessarily mutually exclusive. Jefferson's ideas could have been "Lockean" and still have been "in the air." The view that the Declaration is Lockean was put forward most articulately by Carl Becker in his book *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 inconsistently that:

(1) Jefferson copied directly from Locke, (2) Jefferson had read Locke so many times he had memorized Lockean language which he used in the Declaration, (3) Lockean ideas were so much in the air that "where Jefferson got his ideas is hardly so much a question as where he could have got away from them,"[15] and (4) natural rights were compelling to Jefferson and his cohorts because they solved a problem, namely, how to justify independence.

While many have accepted or further developed Becker's assumption of John Locke's direct influence on Jefferson, there has been extensive debate about one or more of Becker's contentions: whether Jefferson knew or read Locke, whether Locke's 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,*[16] or George Masons' Virginia Bill of Rights, both of which have strong linguistic similarities to Jefferson's language in the Declaration.[17]

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 John Locke's writings has been overstated in the pre-revolutionary writings in general.[18] Emphasizing the importance of republican ideas and traditions, such as radical Whig thinking, republican views from antiquity or Scottish Enlightenment thinkers, these writers stress how other intellectual traditions beyond that of Locke shaped American thinking. 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 as 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.[19]

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 Locke's ideas were very important and influential in

the period leading to the Revolution and to the Declaration itself. These responses argue that ideas of Locke were both distinctive in European thought and had themselves already 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 Treatise* 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.[20]

In what follows, I offer a different approach to the question of the Declaration's position on rights, arguing 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, I will suggest 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 ambiguous than typically 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 in fact 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 interpretation of the situation, Jefferson's brilliance was not only in his powerful rhetorical performance, but in finding an articulation of rights that would seemingly be amenable 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 a more profound and ironic interpretation than anyone has fully appreciated.[21] 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.[22] 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 position of the First Congress, but also those who did not, including its author. This interpretation of the Declaration thus 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 Locke's ideas were in the air but also argues that these ideas were contested and doubted. The American foundation of rights was not a settled matter.

In addition to rethinking the meaning and place of rights in the Declaration, the argument here 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 central purpose of the Declaration was not primarily to state a theory of rights or of government but to explain to the world why the British colonies were declaring independence from Great Britain and why they deserved to be recognized as independent states among the nations of the world.[23] In fact, we shall see that the colonies had already declared their rights in several earlier documents, in particular in 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 right of the colonies to be recognized as independent political entities among the nations of the world. The right to be recognized as a nation or "state" equal with other powers of the world was itself a separate but related question from the matter of the Americans' natural rights. Indeed, it could be the case that 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 political entity on a territory and be recognized as a nation of the world. It was one of the central purposes, if not *the* central purpose, of the Declaration to make that latter claim: that the colonies did have the right to *each* become separate nations. 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 *Law of Nations* reaching back to thinkers such as Vattel.[24] In that tradition, key questions include: "When does a political entity get recognized as a state like other nations?" and "What rights do states have vis-à-vis each other?" These are questions that cannot be entirely separated from but also not reduced to individual natural rights. 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."[25]

While most interpreters agree that justifying the independent statehood of the colonies was the overarching purpose of the Declaration, and indeed the understanding of the Declaration in the period immediately after 1776, it is generally conceded that the natural rights language and philosophy of government is critical to that argument.[26] It is the language of rights and philosophy of government that provides the justification for the claim that the colonies should be recognized as independent states. Indeed, the *Law of Nations* tradition was built on and extended the natural rights tradition and was often conflated with it.[27] There is no easy way to extract and separate the stream of thought dealing with the *Law of Nations* completely from the natural rights tradition. The rights language and philosophy of government reflected 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. It thus 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 Adams was one of the "Committee of Five" who approved the Declaration and gave Jefferson feedback before it was sent on to the full Congress for final revision and approval. But at the same time the Declaration's language leaves equivocal exactly how the theory of individual rights married up with the theory of the states' rights. 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 "British American" colonies, as they were often called, had already achieved a quasi-official position defining how natural rights would figure into the basis of American rights. That understanding had been embodied in the First Continental Congress's Declaration of Rights in 1774. However, the political philosophy articulated in that document was inconsistent with Jefferson's own personal view.[28]

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 later called the "right of expatriation."[29] We shall look at Jefferson's argument in some detail later. Before writing the Declaration, 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. Richard Bland, Jefferson's cousin and senior colleague in the Virginia House of Burgesses, 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.[30]

On Jefferson's theory, the settlers had no rights nor obligations derived from the British Constitution when they immigrated to the lands in America. They left those behind. The new settlers, therefore, were not originally "British Americans" in the way that many other colonial writers thought of themselves. 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 political 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 usually avoids the word "colonies" because for him the newly founded political 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.[31] In his view, the various settlers of North America had

adopted those laws and traditions of common law by choice. The fact that the settlers had by right quit their country of origin, conquered the new lands in some cases, and set up new political states meant that they were not subject to Parliament's authority. Parliament was simply one other legislature in the empire representing its own people (the English only) and did not have authority over the new political states in America. In this image of a "commonwealth of nations" or "federation of states," multiple political states had autonomy from one another, but were united by a common executive, the Crown, to whom each subject had allegiance.[32] In Jefferson's view, there was no supreme legislature over all the states in the British Empire. It was the Crown alone that held them together and set rules for their interactions.

The Crown in turn was obligated to offer protection to the empire's subjects. In Jefferson's view, the settlers had not only chosen to adopt the British constitution but had also adopted the king as their "chief officer." For this reason, the relationship of the various American states to the British Empire was less of "mother" to "child" (a metaphor many colonial writers used) but 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. Jefferson, as we shall see, had read about earlier European treaties between nations and conceptualized the relationship of the American states to the British Empire in similar ways. In this way, the American political entities called "colonies" had separate legislatures not subordinate to Parliament, yet the individuals 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 under the legislative authority of Parliament.

Significantly, in Jefferson's view, there was never, ever a need to assert independence as a new state. Independence had already occurred with the emigration of the settlers from England.[33] These new states were independent from the start and never were "colonies." Jefferson outlined these ideas in *A 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 first Congress, but he sent the pamphlet to Patrick Henry and Edmund Pendleton, and the latter "laid it on the table" for perusal by the delegates to Congress. It was this pamphlet which initially gained Jefferson a reputation across the colonies as a strong writer and advocate for legislative independence.[34]

Jefferson's perspective in *A Summary View* could be and often is construed to be based on Locke's view of natural rights. But that picture of Jefferson 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 and qualifications to the statement.[35]

To begin with, Jefferson's views were rejected by the First Continental Congress, the first official crosscolonial body to approve the use of natural rights arguments as a basis of colonial rights.[36] The published view of the First Continental Congress was much closer to a different and what can be called a more classical natural rights argument as adopted by James Wilson and Samuel Adams, among others. At the very minimum, then, there were several fundamentally different views of how natural rights arguments should justify American rights and independence. And at the heart of the disagreement between Jefferson and Congress were a number of key questions: Do people have a natural right to quit society, and under what conditions? Do they have a right to create new political entities? What conditions must obtain so that conquest of a land should rightfully result in the right to form new states? Did the settlers of North America conquer the land or find it uninhabited? We shall contrast the various 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 discuss below.[37] Locke recognized that each individual had a right to consent to (or reject) 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. For Locke, the right to leave society depended on whether individuals had explicitly consented to live under the compact of a society. Once in, you could not leave without sufficient cause. While Jefferson's right to quit society could be linked back to Locke's philosophy of natural rights, Jefferson nowhere made any argument that would ground his 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. Jefferson gives no indication that he cared or understood that this key philosophical assumption may have had no philosophical grounding in Locke.

Third, Jefferson sometimes avoids the use of some classic natural rights language, a point I have developed in much more detail below in an analysis of his *A Summary View*.[38] 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 in his essay where it would make the most sense. We find nothing in Jefferson's essays 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 Richard Bland, James Wilson, or Samuel Adams, to cite other contemporaries of Jefferson. Although Jefferson makes 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 found in the writings leading up to independence.

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 James Otis, discussed in more detail below as well. 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 Locke's ideas of 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." 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.[39]

In *A Summary View*, Jefferson's 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 can be described as a classic Lockean argument. This is often forgotten or not noticed in the general characterization of Jefferson as a disciple of Locke. There were multiple interpretations of natural rights philosophy, and they had fundamental and critical differences between them, differences that ultimately matter in trying to found a theory of American rights.

Even if one still wants to categorize Jefferson's views as a natural rights 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 when adopting the Declaration of Rights and Grievances published in October 1774, even though Congress 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.[40] 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 rights should be considered a solid or feeble foundation for American rights. In a matter of days, Congress voted to include natural rights as one of the foundations for the colonies' complaints. Like Jefferson, Congress also came to the conclusion that the colonies were independent states. Congress, however, arrived at that conclusion by a very different route and based on very different assumptions than did Jefferson.

Instead, 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, the emigrants had brought their British rights and obligations with them from the mother country and were as entitled and obligated to them as natural-born British 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 thus "British Americans" when they arrived in North America.

This view 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, for example, who endorsed a different kind of 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" [emphasis mine]. For Samuel Adams, the right to quit or leave society was not an absolute right. That right became operable only upon intolerable oppression, and for Adams and many colonial writers, that condition had not obtained in the initial migration of the settlers. The settlers came to the lands in America as bona fide British subjects.

In the view of Congress, James Wilson, and others, a problem emerged for these British American subjects in America because of the colonies' geographical distance from Great Britain, which made it impossible for the colonies to have adequate representation in Parliament. The Continental Congress, of course, took for granted that representation was a key

right of British Americans. However, Congress rejected the possibility that the right could be fulfilled simply by adding American representatives to the British Parliament. It also rejected attempts, like that of Joseph Galloway, to construct a new structure of government that would attempt to meet this requirement of representation.

At issue was a broader debate on the nature of representation.[41] Congress, like many colonial and British writers, had come to the conclusion that there was no means possible to satisfy the requirement of British American representation in Parliament. The geographical distance meant that the representatives "there" in England did not live among their constituents "here" in America. By definition, then, representatives in Parliament could not represent the colonies, for a representative, according to one understanding of "representation," had to live with one's constituents and be impacted by the very same laws that were legislated for them. Representatives of the colonies could not both be in Parliament and live at home among the people they represented.

Americans rejected the British claim that representation in England had always been "virtual."[42] British critics had argued that even parts of the English populace did not get to vote or lacked representatives who lived among them. Why should the colonies be any different? The Continental Congress, by contrast, took the position that it was by definition impossible to provide representation to the colonies because of their geographical distance from Parliament. The conclusion followed that the colonists' natural rights were by definition infringed should Parliament legislate for them. On the view of Congress, then, it was this inherent, inevitable, and irreversible infringement of natural rights that justified the colonies having their own separate and independent legislatures. Like Wilson and others, Congress held the view that British Americans' natural rights could be protected in no other way but through their own legislatures. Their British rights came with them as emigrants, but their fulfillment ironically required independent legislatures. Congress thus asserted that the colonies should be supervised by their own legislatures that were wholly independent of and not subordinate to that of Parliament. Had airplanes existed at the time, the argument may have had less

weight because American representatives to Parliament could have lived more easily among their constituents.

The position adopted by Congress was thus fundamentally different than that put forward by Jefferson in *A Summary View*.[43] Jefferson did not have to appeal to a theory of representation at all. He understood the initial political independence occurring as soon as the settlers migrated from England. The migration was itself an act of independence. The whole question of representation was thus irrelevant to his theory of independence.

The First Continental Congress was not the only one to reject Jefferson's views. Jefferson tried once again to have his position 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.[44] In fact, Dickinson's version was quite forceful in its own terms. Yet Dickinson's revision was explicitly a rejection of Jefferson's theory of rights. The Declaration of the Causes, published by the Second Continental Congress, was Dickinson's reworked version, which substantially demoted if not obliterated the theory of the ancestors' rights that Jefferson had put forward. Instead, Dickinson's version was much more consistent with the position on rights adopted by the First Continental Congress, a point to which we return.[45]

Rights and the Allegiance to the Crown

In addition to the fundamental disagreement about the origin of the settlers' rights, Jefferson and Congress also diverged on their views of allegiance to the Crown. It is important to separate the question of allegiance from the issue of subordination to Parliament, although today many discussions of the founding period conflate these two issues. On Jefferson's view, the right to quit society implied the right to freely repudiate not just the sovereignty of Parliament but also allegiance to the Crown. This "right of expatriation," as Jefferson later called it, implied that one could leave one's country at will and also leave behind one's status as a subject to the Crown. One's allegiance to and expectation of protection by the Crown did not follow a person who left his or her country of origin.[46] In Jefferson's view, the settlers came to this country with neither a "chief officer" nor an inherited monarchy. They could have elected a different ruler. But they freely chose to adopt the British king as their executive leader once they set up their own political states here.

What is emerging in embryonic form in Jefferson is the notion that the executive officer should be the representative of the people and chosen by them, a view that would become more important as the colonies moved towards independence. A year and a half after Jefferson wrote *A 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 more traditional 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, Montesquieu, who had tremendous prestige in the colonies, thought the "blended" form of British government, which combined democracy, aristocracy, and monarchy, was the most perfect form of government for achieving and protecting liberty.[47] 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 played the key roles of protecting the state and the people and balancing the diverse interests of society.[48]

Jefferson initially accepted this view himself. But Jefferson assumed that because the emigrants from Great Britain had a right to quit that society, they no longer were subjects of the British Crown. Once in America, they freely chose to adopt the king as their executive officer. And once adopted, the king had all 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 had underutilized in controlling the bad behavior of Parliament.[49] In Jefferson's early view, the king's executive role was to mediate between the various states of the British empire for the good of the whole. And the king had been failing to do that, by letting Parliament take powers over the colonies that it did not rightfully have.

It is important to remember that many revolutionary writers thought a pure democracy was potentially dangerous since it lacked the kinds of checks and balances of the English constitution.[50] Jefferson reflected this view 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."[51] Jefferson also understood the king's role "as yet the only mediatory power between the several states of the British empire."[52] This is what it meant 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, natural rights theory did not initially require an elected *executive* branch.

When Jefferson argued that the settlers had created new political states with the king as their chief executive officer, he made allusion to the possibility that power could revert to the people. What Jefferson's early position in *A Summary View* never makes explicit is, how does one end the relationship with an "adopted" monarch? Can one "unadopt" him, and if so, how? 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. However, those instances were examples in which an inherited monarch had been deposed. Was the standard the same for removing a "chief officer" one had voluntarily adopted?

Leaving Jefferson's position for now and turning back to the view of the First 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 the view of Congress the immigrants came to this country with their British rights intact and as subjects to the Crown. Here are two of the first three resolutions adopted by the First Continental Congress in the 1774 Declaration of Rights.

> 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.

In the official view of Congress, the settlers were British Americans initially and came to the American continent subject both to Parliament's authority and as subjects of the Crown. As discussed previously, Congress argued that Parliament could not retain its authority over the settlers, because of the geographical distance that made true representation impossible. Yet the relationship of the settlers to the Crown was of a different nature. That relationship remained intact across geographical distance unless the Crown overstepped its powers or abandoned its protection. James Wilson states this explicitly in his essay, arguing that in the case of Ireland and in the case of the Americas, "[a]llegiance to the king and obedience to the parliament are founded on very different

principles. The former is founded on protection; the latter, on representation."[53] Wilson is here reflecting a view at the time that the right of representation was limited to the domain of legislation, and not that of the elected head of state or monarchy.

In the view of Congress, James Duane, James Wilson, John Adams, and a number of others, the settlers of America brought their allegiance to and status as subjects of the Crown with them to America. They were British subjects in British America. That relationship would remain intact across geographical distance, even if legislative representation could not. While for Jefferson that relationship to the "chief officer" was initially a matter of choice, in the view of Congress, the relationship to the Crown already existed at the founding of the American settlements and was obligatory, unless conditions arose for deposing the Crown. One of the conditions for ending that relationship of allegiance was the king reneging on his obligations of protection. The Congress initially did not think the king had reneged on those obligations, and thus natural rights arguments tended to be used more to justify the independence of the colonial legislatures rather than to justify the end of allegiance to the Crown, which was understood as the executive branch.

Rights, Territories, and Land Possession

There was another thorny theoretical problem of rights lurking underneath the surface that differentiated Jefferson's views from some of his colleagues: what right did settlers have to lands in America? The whole issue of how lands were legitimately 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 within political entities originated and came about in the first place. The very question was ultimately tied into a much larger question about property rights in general. Indeed, as we shall see, some individuals had argued that natural rights theory was wrong precisely because governments so often were created through conquest, rather than social compact.[54] 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 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?[55]

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. Here is Jefferson:

> 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.[56]

In part, Jefferson is trying to justify his argument that the settlers were not British Americans when they came to America. "For themselves they fought, for themselves they conquered." But at the same time the argument 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?[57]

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, however, were duped into believing the principle that all lands belong originally to the king.

In *A 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" as if to imply 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, indicating that he thought there was a right to conquest and a conquest had taken place. The justice of this conquest, and the relationship to rights argument, was a question that Jefferson passed over in deafening silence in *A 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 more directly.

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 but only published in 1774. Wilson considered the view of William Blackstone, the revered British legal scholar, jurist, and philosopher who had pondered the status of the colonies in his majestic *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 treatises…
>
> 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.

Blackstone's *Commentaries*, published between 1765 and 1769, had become a definitive statement on the rationale of the British Common Law tradition. Blackstone's view of property and of the colonies represents important statements with which colonial lawyers such as James Wilson had to contend. 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:

> 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.[58]

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 Blackstone—it was up to the king to decide what laws apply. In Blackstone's understanding, then, the American lands were not under Parliament's control but instead under the control of the Crown. The king could set the laws that he liked. It is interesting to note that Blackstone, in passing, 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.[59] 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 [i.e., 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, as Blackstone framed it, to the question of whether Britain had conquered the colonists. Far from being conquered, he argues, the colonists had come under the auspices of the Crown and settled the lands peacefully. Next 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. If it is a conquest, he argues, it "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 here 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 perspective seems to presuppose 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 from 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.[60]

Here Vattel is building on a Lockean style justification of property's origin to justify the European entitlement to 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 his or her own purposes. One people is not allowed to take more than it needs. Since the natives were not making any true use of the land, they cannot be said to possess it, and therefore the peoples of Europe, who needed more land, 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 with British rights, took possession of unoccupied land, and thereby were subject to all the English laws. He thus disagrees with Blackstone on the facts. American lands were not conquered but were uninhabited. But Wilson 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."[61] 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 "inhabited" 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 a law of nations is precisely the same equivocation that arises in the Declaration, as we shall see.

About the same time that Wilson was writing his essay, 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.[62] 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."[63] 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), Adams assumes that the lands had been rightfully possessed by the natives.

Did the Europeans have the right to conquer and take away those lands? With obvious sarcasm, Adams questions the doctrine that religious grounds give Christian princes the right to take away lands from pagan peoples. But even if you grant that dubious principle, Adams argues the land would nonetheless be annexed to the Crown and not to the Realm of England, reflecting the view that conquered lands belong to the king. On that view, the king has the right to dispose of land that he had conquered. By implication, Adams is arguing that the king could (and did) 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 like that of Jefferson and Wilson but along a different path than either of them. 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 but were not British people when they had done so and thus 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 have here are 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 settlements were by right free and independent states. Some of these disagreements were partially settled in the First Congress's Declaration of Rights when it sided with the position like that of James Wilson. The Congress held that the settlers settled the lands under the auspices of the

British Empire. The Congress rejected the view held by Jefferson. 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 ended up in very similar conclusions. From the perspective of the end game, all had argued that the colonies were independent states in the sense that they were not subject to Parliament's authority at all and should be governed only by their own legislatures. In each of these views, moreover, 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 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.[64]

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 felt that natural rights simply complemented the argument from British rights (the position of the Congress and James Wilson), but that natural rights arguments could not stand as well on their own. In addition, the embrace or rejection of natural rights did not neatly align with a moderate or radical position. For example, some moderates, such as John Jay, endorsed natural rights arguments quite forcefully, though ultimately siding with those like Joseph 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" for American rights. 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, several leading colonial writers expressed various doubts about the social contract theory and theory of government's origin upon which classical natural rights theory seemed to rest.[65] Writers like Massachusetts lawyer James Otis, Rhode Island governor Stephen Hopkins, Maryland lawyer Daniel Dulany, and Massachusetts radical Samuel Adams had all expressed serious reservations about some of the central assumptions of the natural rights tradition. In particular, they had doubts 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 colonial writers doubted the idea that government *should* be governed by the consent of the people or that representation was a critical requirement of a just government. No one doubted those propositions. But they knew that most historical governments were not actually founded in that way, nor were they convinced that the original human institution of government in general originated through a compact. They may even have found evidence of such a doubt in the story of how the British American settlers acquired their own lands, as discussed above. The historical fact that societies may not have been founded in social contract raised doubts for some that natural rights philosophy could justify the fact that political

society *should* be founded on consent. We shall see, for example, that David Hume, among others, blasted Locke on just this point, poking fun at what he perceived to be Locke's attempt to ground consent in a social contract. This was a critique, moreover, with which Jefferson and other colonial writers were familiar.

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, although even Locke equivocated considerably on the issue.[66] But the American writers attributed to the natural rights tradition both convictions and assumed that one grounded the other. In their minds, the claim that government should be founded on consent was based on the claim that governments did actually arise that way. If, therefore, that latter 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 or needed some other foundation. 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 governments—indeed, possibly a preponderance of existing and historical ones—that had risen by means other than social compact and were ruled by tyrants. 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 appeared 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 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.[67]

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's decision to submit to government to involve a renunciation of some natural liberties. There was a trade-off, relinquishing 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 royalist writers such as Robert Filmer in his *Patriarcha* 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 state could one act in accordance with God's will.

2. Jefferson's Declarations of Independence

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 Adams had published his *Thoughts on Government* (spring 1776), and several colonies had become ready to declare independence.

We know that in the intervening period since he had left the Continental Congress in December 1775, Jefferson had not yet given up his pet theory about the early settlers' 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.[1] 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.

7. For examples related to the Declaration, see Hirsch, *A Theory of Liberty* and Gerber, *To Secure These Rights*. For a general discussion of intent and the Constitution, see Rakove, *Original Meanings*, and Levy, *Original Intent*.
8. On original intent, see discussions in Levy, *Original Intent* and Rakove, *Original Meanings*.
9. In general the notion of original intent is tied up with the notion of history, since history is the vehicle through which the original intent is uncovered. In this view, history becomes a key contributor to the interpretation of the founders' intent. But some Supreme Court justices, feeling the possible dilemma of history's own limitation, try to argue that original meanings of text can be derived from their language without reference to history. See the position of Justice Antonin Scalia in *A Matter of Interpretation*, which problematically tries to ignore history but still hold onto the notion of original meaning.
10. Most modern political philosophers agree the modern critique of traditional social contract theory has been devastating and they therefore seek other philosophical foundations for rights. Critiques of Lockean social contract by Hume, Bentham, Kant and numerous others made a traditionally Lockean account of rights problematic to political philosophers. But these critiques are considered irrelevant in America if the founders' intent is binding upon us. If the founders accepted Lockean natural rights as a foundation of their social-political framework and if we as a society are bound to their conceptions, then it does not matter that Lockean natural rights are a problematic construction or that there are better philosophical foundations for understanding rights.
11. In questioning whether natural rights are or should be the source of American rights, I actually have my aim on the implied link between the idea of "original intent" and social contract theory itself, for social contract theory claims that governments should be founded in the consent of the governed as defined by an original contract that structures the meaning and intent of the original parties. In this sense, social contract theory, at least one interpretation of it, seems to rest on the notion that it possible to locate and fully excavate the original intent of the original contract. The founders' views in the original contract are the views that define the rules by which we live. In the American situation, the American Constitution is thought to be the original "social contract" whose philosophical underpinnings are expressed in the Declaration of Independence. The notion that we should be governed by the "original intent" of the Constitution, therefore, rests on and is tied tightly into the philosophy of natural rights and social contract theory.

There is, if one thinks about it, a kind of interesting circular self-fulfilling logic at work here. If the Declaration or Constitution is our original social contract and if natural rights philosophy informed the understanding of rights that was embodied in the Constitution, then America is to be governed by natural rights, even if later generations have different views. In such a view, it does not really matter whether natural rights philosophy is right or wrong. It is our philosophy of rights, whether we like it or not. I shall return to this issue in the conclusion and argue that it is indefensible based on the historical analysis in this book.

12. For a discussion of this point, see my conclusion.
13. In some sense, I see Hume as more thoughtful than Locke on this point since Hume begins to develop a social-scientific view of political philosophy which he sees as justifications and worldviews for political organizations. As we shall see, Jefferson was reading Hume and arguably was influenced by him. I discuss Hume's possible influence on Jefferson below.
14. See Eilberg-Schwartz, "Who's Kidding Whom?", *The Savage in Judai*sm, and *God's Phallus.*
15. These essays have been published online. See my www.freedomandcapitalism.com.

Chapter 1 The Declaration, Locke, and Conflicts about Natural Rights

1. The closest the Constitution comes to articulating a political philosophy is the preamble 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 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. The Bill of Rights, which followed a year later, was intended to address that gap. Ironically, the Bill of Rights also does not anywhere explicitly articulate a political philosophy, though it does mention the right to life, liberty, and property in Amendment V and thereby points back to a natural rights philosophy. 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 in the Constitution and Bill of

Rights surprising. 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, *America'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. I return to this subject in the conclusion to the book.

2. I discuss this point below in the chapters that follow.

3. Carl Becker's *The Declaration of Independence* is the classic exposition of this view, although as early as the 1820s, Jefferson was noting that Richard Henry Lee had suggested he had copied it from Locke. Many other writers follow or endorse this view as discussed below in note 14.

4. This issue is actually more complex than is suggested here. In the *Second Treatise*, Locke initially argued that humans derived their inherent rights because they were the "workmanship" and hence property of God. See Locke, *Second Treatise* 2:6.

5. C. F. Adams, *Works of John Adams*, II 512. See also Becker, *Declaration*, 24, a point to which we return.

6. See Boyd, *Declaration*, 16. Becker, *Declaration*, 25.

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

8. Becker, *Declaration*, 24-25.

9. Boyd, *Declaration*, 15-16.

10. Ibid., 17.

11. Ibid., 24.

12. Malone, *Jefferson* I, 221; Petterson, *Jefferson*, 90. For similar views, see also Carey, "Natural Rights" 49.

13. Maier, *American Scripture* (135) for a similar view. Maier articulates the same position in writing that "The sentiments Jefferson eloquently expressed were, in short, absolutely conventional among Americans of his time."

14. 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 Jefferson. For my particular reservations about Jayne's argument, see note 29.

15. Becker, *Declaration*, 27.

16. 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 James Wilson's pamphlet *Considerations* but assumed both were still Lockean. Chinard recognized that passages from Wilson's pamphlet were actually copied by Jefferson into his own commonplace book, proving that at some point Jefferson had read Wilson's essay. 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 in writing the Declaration itself. As Chinard notes, the whole relationship of Jefferson's dependence on Wilson's language in his pamphlet is made more puzzling by the fact that Jefferson did not copy into his Commonplace book the passage of Wilson that is so close to his own in the Declaration but copied the passage before and after it. Why would Jefferson not copy the very language of Wilson that is so similar to his own in the Declaration?

A possible answer to Chinard's puzzle is provided by the interpretation given of Jefferson in chapters to follow. In my view, 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 *A Summary View*. On this view, Jefferson copied precisely the passages from Wilson that interested him, and skipped those that did not interest him, namely those dealing with natural rights. He copied the passage before and after because those were of more interest to his line of thinking. As I discuss below, Jefferson and Wilson had fundamentally different views of American rights. As will become evident below, I disagree with Becker's 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).

17. 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.

18. 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 America in Dworetz, *Unvarnished Doctrine*; Huyler, *Locke in America*; Jayne, *Jefferson's Declaration*. For others who side with the Lockean hypothesis, see Zuckert, *Natural Rights*, Gerber, *To Secure These Rights*, and Jayne, *Jefferson's Declaration,* Harmowy, "Jefferson and the Scottish Enlightenment."

19. 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 Garry Wills, *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 Hutcheson. 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 instead seeing Jefferson as trying to stay true to his own theoretical perspective (wherever that may have come from) while also meeting the expectations of the Second Continental Congress.

20. 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*, who argues that the republican synthesis has underestimated the importance of Locke. Gerber, *To Secure These Rights* (28), argues that the Declaration of Independence was ignored by those favoring the republican synthesis and constitutes significant evidence of the influence of Locke.

21. 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), which says "the harmonizing sentiments of the day were those of Locke."

22. See Conrad, "Putting Rights Talk," who has applied a similar perspective to the reading of Jefferson's *A Summary View*. In part II of this study, I look at 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."

23. 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 (ibid., 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."

24. 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."

25. Vattel, *Law of Nations*, VI.

26. See Detweiler, "The Changing Reputation," for an account of the early reception of the Declaration.
27. Vattel has an excellent introduction to this issue in his *Law of Nations*.
28. I discuss this in detail below in the following chapters.
29. This view of Jefferson is articulated in his *A Summary View*, which I analyze in much more detail below in Chapter 5. As noted there, I disagree with those writers who think Jefferson's *A Summary View* articulates a classic natural rights philosophy that is "Lockean." See Malone, *Jefferson*, v. I, 184; and Ward, *Politics of Liberty*, 352. Becker, *Declaration*, never even asks the question of whether Jefferson's *A Summary View* represents a Lockean or natural rights perspective and simply assumes that it does. Becker, (ibid., 116-119), thus summarizes Jefferson's *A 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).
30. For a discussion of the relationship of Bland's and Jefferson's pamphlets see my discussion below in Chapter 4 and 5.
31. See Colbourn, *Lamp of Experience*; Chinard, *Jefferson*, 49; and Ellis, *American Sphinx*, and my discussion in Part II.
32. 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 a view of the empire as a 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 this 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 times, 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 does and does not declare.

33. Jefferson does not appear to ponder the question of whether the settlers came from many European countries, possibly because he wanted to emphasize that the American settlers inherited the Anglo-Saxon political tradition.
34. See Jefferson's own account in Ford, *Complete Works*, I: 15.
35. I take up this question in much more detail in my analysis of Jefferson's *A Summary View* below, 178.
36. See my discussion below of the debate on natural rights in the First Continental Congress, see p. 207ff.
37. See below, Chapter 5.
38. See below, Chapter 6.
39. I discuss in more detail in my analysis of Jefferson's *A Summary View*. See also Reid, *Authority of Rights* (133), who notes that terms like "contract" and even "original contract" also belonged to the common law tradition.
40. See my discussion below, Chapter 6.
41. 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. See also Woods, *Creation* (162-196), on the debate about the nature of representation.
42. On the debate about virtual representation, see Woods, *Creation* (162-196), and my discussion below in chapter 3. Early Doubts about Natural Rights Before the Revolution."
43. Some have also noted Jefferson's alternative view in *A Summary View* but have not always drawn the implications relevant to the Declaration. This is discussed below in Chapter 5. *A Summary View*: Jefferson's First Major Foray into Political Writing.
44. Boyd, *Papers*, I: 191. See my account and analysis below, in Chapter 6.
45. See my discussion of Jefferson's version of the *Declaration of the Causes and Necessity of Taking Up Arms*, in Chapter 6.
46. The contrary view that held that allegiance followed or "stuck to" a subject was put forward by the Stamp Act Congress, James Wilson and, during the First Continental Congress, Rutledge and Duane, among others. 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.
47. See Woods, *Creation*, 197-226.
48. See Woods, *Creation*, 197-226 on ideas of blended government among the colonists.

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