

# 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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## Preface and Acknowledgments

Earlier in my life I had no interest in either Thomas Jefferson or the Declaration of Independence. Who cared about early American history anyway? But a change in American political discourse combined with a series of events in my life, and I found myself drawn irresistibly back to the Declaration and its author, Thomas Jefferson, to understand more about the vision with which America was founded.

This was perhaps a natural transition in some sense for a historian of religion and religious studies scholar who spent a good part of his academic life studying religion. After all, the Declaration was the “American Scripture,” as Pauline Maier had so aptly called it. And I had already spent a good part of my adult life as an academic studying Judeo-Christian scriptures and their histories of interpretation. It was thus in some sense natural for me to turn to those texts that held mythic significance for Americans and to adopt some of the same skeptical and analytic techniques I had learned in the study of religion.

Yet what drew my attention to these early American texts was a growing awareness of and uneasiness with a new kind of political language that increasingly stressed the importance of individual rights to the exclusion of other values in America. Moreover, the increasingly emphatic language about government infringing individual rights often looked back to and justified itself in terms of the founding documents of early American history. The Declaration of Independence often figured prominently in the stories that Americans were telling about their sacred rights and why those rights must never be infringed. In that story, individuals had rights that transcended government. And the Declaration was often the key

## Conclusion: Does It Matter What the Declaration Means?

The answer to the question of whether it matters what the Declaration of Independence means is in some ways simple: “It depends.” And the fact that we cannot give an unequivocal answer to the question points to one claim which is ultimately at stake in this book: the very question of whether the Declaration, or for that matter whether any historical document, matters is itself part of the interpretive historical enterprise and political philosophical journey of American public life. The point of this concluding chapter is theoretical: to argue that whether the Declaration matters depends on how we answer other questions about its place in history and its significance as a statement of American political philosophy. And how we answer those questions depends not only on history, but a theory of history and the relationship of history to political theory.

In making this argument, I am shifting from what has been principally a historical exercise in this book to a theoretical and philosophical one, though the two are ultimately tied together. In the historical argument, I explored whether the pre-Revolutionary founders had a consensus on rights and in particular whether that consensus was visible in the Declaration of Independence. I argued that in fact the Declaration skirted over divergent and contested theories of rights that were present among the pre-Revolutionary founders. Many, and possibly even Jefferson, were ambivalent about certain aspects of natural rights theory and ideas about social contract in particular. Furthermore, the pre-Revolutionary colonial thinkers were not all of one mind on the question of American rights.

This conclusion I suggest is significant for the question whether history can and should serve as a foundation for political rights. For if key documents such as the Declaration have ambiguous meanings or we cannot pin down the meanings of those documents through historical analysis, then the use of historical documents for resolving political rights is thrown in doubt or at least subject to reinterpretation.

I wish now in this final chapter to turn back to this normative question that has been hovering in the background since the beginning: Does it matter what the Declaration of Independence means anyway? Or to put it another way, should the Declaration of Independence have moral and normative significance for American life? Forget for a moment that the Declaration may have had that kind of significance in the past. The matter at hand is whether that significance was and should continue to be warranted. To what extent should history or great historical documents such as the Declaration play a role in ongoing debates about political rights?

The question under discussion is interestingly enough at the heart of "social contract" theory itself. For one version of social contract political theory suggests that some original vision or agreement, "a social contract," should remain binding in some fashion upon subsequent generations in that society. In this view, the "original contract" with America should be definitive for the way later Americans live their lives. The founders' views of rights should count heavily in how we define and protect rights. This conviction that Americans should harken back to the founders' views is often based on the Declaration of Independence itself, which supposedly proves that the founders' embraced a natural rights theory. Since natural rights theory assumes that a society enters into a binding social contract upon inception, Americans must therefore pay attention to the original contract or founding view when debating ongoing political rights. This kind of argument is a kind of vicious circle. The Declaration proves the founders embraced Lockean natural rights and the foundation in natural rights in turn proves the founders' vision of society is binding upon us. But should that be?

In doubting these matters, I am pressing several separate but related issues: (1) Should American public life be bound by philosophical notions of the social contract, and in particular notions that say the founders' views matter more than others?; (2) Can history provide a vehicle for getting at the original contract and the founders' intentions anyway? These two broader philosophical questions dovetail with the more specific historical questions examined already in this book; (3) does the Declaration in particular prove the founders' embraced natural rights theory and a specifically Lockean social contract theory; and (4) does the Declaration therefore prove that those conceptions are therefore incumbent and binding on us. My answer to all these questions is "No" for a number of intersecting reasons. To tease out these reasons, it is useful to lay out a possible alternative political philosophy for contrastive purposes.

An alternative political philosophy that did not start from a foundation in natural rights could work from the assumption that we are not bound in any particular way by the views of the founders. That is, the founders' views are not inherently or by definition better than any other person or group of persons that has existed or will exist in this society. The founders in such a view were at best smart thoughtful men (and to some extent women) whose views are worth throwing into the mix of our discussion. But their views are one voice among many in the public debate about rights. They were not all-seeing or all knowledgeable. And we are no more obligated to their views than we are to yours and mine. This is a very different view of the founders' voice than typically underlies the interest in the Declaration of Independence. The return to the Declaration is often fueled by an attempt to get back to some original vision of the founding as a way to say what America really stands for and therefore how we should govern our lives today. It is a way to say that our own views and values matter less than those who originated our society. History therefore is evoked to put an end to the philosophical and moral debates that we have about how we should structure our contemporary social practices. In this manner, the founders get invoked on one side or other of the debate in trying to defend a particular position, as if knowing

their views should put an end to any other moral convictions that we may have.

The Declaration in particular has often figured prominently in discussions of the founders' political philosophy. Abraham Lincoln's Gettysburg Address is, of course, the most famous example of this desire to treat the Declaration as the definitive political vision for the United States.<sup>1</sup> On November 19, 1863, Lincoln defined the meaning of the Civil War this way: "Four score and seven years ago our fathers brought forth, upon this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal." Lincoln was referring to 1776 and alluding to the Declaration of Independence and the Declaration's words "all men are created equal." This famous address is illustrative of many of the underlying assumptions of those who treat the Declaration as the presumptive political philosophy of the United States. Lincoln implies here that a vision of a new nation was in place in 1776, that the Declaration of Independence encapsulates the vision for the new nation and that the phrase "all men are created equal" is the centerpiece of the Declaration.<sup>2</sup>

Lincoln was neither the first or last to make this argument. As Philip Detweiler has shown, the Declaration was largely ignored before the 1790s in the period before the ratification of the Constitution and the emergence of the rival political parties of Federalists and Republicans.<sup>3</sup> If the Declaration was invoked in that period at all it was typically associated with the idea of the colonies' political independence, not its statement on individual rights. Most state constitutions drafted during the revolutionary period after 1776 did not model their language of rights after the Declaration. And the debates during the Constitutional Convention and ratification process for the most part ignored the Declaration. It was not that the earlier constitutions or the ratification process ignored rights language and concepts. But the Declaration did not figure significantly as an authoritative source of what rights should be or the language by which they should be understood.

Matters changed during the 1790s, shortly after the ratification of the American Constitution, during the political debates between the

emerging Federalist and Republican political parties.<sup>4</sup> The two parties had rival political philosophies and approaches to government and thus fundamentally disagreed on what vision of liberty had been conceived during the Revolution. Republicans, who were the party of Jefferson, naturally turned back to the Declaration as an interpretive tool to say what American political institutions should be like and what the founders really intended by the Revolution and the move towards independence. They appealed to the Declaration's preamble and focus on rights, as well as the anti-British character of the document, as a means of chastising Federalists for abandoning the spirit of '76.

In the Republicans' view, the vision of a strong federal government articulated by then Secretary of Treasury Alexander Hamilton undermined the core values of the Revolution which had been focused on liberty and rights. Hamilton's Federalist vision of government, which he modeled after Great Britain's, was anathema to Republicans, who thought it represented a return to the corrupting institutions that were responsible for the loss of liberty under British rule in the first place. Republicans appealed to the Declaration's account of liberty to suggest that the Federalists under Hamilton's leadership were abandoning the original vision of the Revolution as it was articulated.

There were several reasons that Federalists were naturally less likely to find the vision of the Revolution in the Declaration. Not only was the document authored by Jefferson, the leader of the opposition, but Federalists like Hamilton had to contend with the anti-British rhetoric of the Declaration. Led by Hamilton's vision, Federalists had a much more positive view of the relationship with Great Britain than did Republicans, seeing economic and political ties as key to the economic growth of the newly formed United States. Hamilton's Federal banking vision which was anathema to Republicans was modeled after Great Britain's own system. The Declaration's anti-British character thus lent itself more easily to Republican ideology that favored closer ties with France rather than Britain. Similarly, the Declaration's focus on revolution also posed a difficulty for Federalists who had a more negative assessment of the French Revolution with its reputation for violence.



It is significant that the early political debate over the interpretation of the United States and the Constitution provoked an appeal to the Declaration as one of way to grasp the meaning of the founders' vision. Up until that point, the Declaration apparently did not hold such a prominent place in American imagination. It was only after debate emerged over how to interpret the new nation and its Constitution that Republican political leaders reached back to the Declaration to try to pin down the meaning of the Revolution.

In many ways, it actually would have made more sense to look for a statement of American political philosophy in the American Constitution, the document that constituted the United States officially as more than a confederation of states. But the Constitution itself is noticeably light on an explicit political philosophy. Apart from the preamble to the Constitution, there is no explicit statement of rights and no mention of natural rights in the Constitution until the Amendments.

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

The Constitution's preamble is thus quite abbreviated compared to other statements of rights that we have seen, such as the resolutions of the Stamp Act Congress, the Declaration of Rights of the First Continental Congress, the Declaration of Independence, and various state constitutions in the period leading up to the Constitution. Indeed, it is partly because the Constitution lacked a more explicit statement of rights that some prominent anti-Federalists such as Patrick Henry, George Mason, and Richard Henry Lee, among others, were against its ratification creating the mounting pressure to add the Bill of Rights, the first ten amendments to the Constitution, within a year of the Constitution's ratification. Indeed, some historians argue that the promise by Federalists to add a Bill of Rights was critical to the ratification process.<sup>5</sup>

Of course, it is possible to argue, as Akhil Amar does, that the political philosophy of the United States is everywhere taken for granted in the American Constitution but not explicitly articulated here because it was well understood.<sup>6</sup> On one reading, for example, the preamble embraces a republican ideology that sees the Constitution grounded in the people and consent. Yet we know that the Constitution was debated and crafted in closed-door sessions in Philadelphia during the summer of 1787, a partial record of which is recorded in the notes of Madison which were not published until fifty years later in 1840.<sup>7</sup> Most points of the Constitution were debated multiple times and subject to intensive debate involving questions of political philosophy. But whether there is a single, unified political philosophy exemplified in the Constitution is arguable. In fact, many interpreters see the Constitution itself as a political compromise between competing visions of America's political philosophy and different visions of how government power and individual rights should related. That is a separate debate beyond the scope of the present study, but does intersect with the questions at hand in this study.<sup>8</sup>

To summarize, there were several reasons that early Republicans probably reverted to the Declaration to try to settle the issue of America's political philosophy. It was not just because the Declaration was conveniently drafted by their party leader. The Constitution itself was terse on its vision of rights and a statement on the particular balance of government and individual freedom. Since the Constitution could not self-evidently anchor the Republican view of government and in fact was explicitly created to give the federal government more power than the earlier Articles of Confederation had provided, Republicans had to find some other vehicle to anchor their view of the founding vision. The Declaration was one natural place to alight since the document was associated with the moment when the colonies declared independence. Even though there were dozens of other statements of rights before the Declaration, and some like that of the First Continental Congress, were arguably as important, the Declaration represented a consensus of the colonies on why the war with Great Britain had become a war for political independence.

The desire to invoke the Declaration and to pin down American political philosophy continues into contemporary political philosophers on both sides of the political spectrum. In the book *To Secure These Rights*, for example, Scott Gerber, argues that “it was in the Declaration of Independence that the Founders articulated the political philosophy upon which this nation is based.” Gerber argues that the “principles embodied in the Declaration are not ‘above’ or ‘beyond’ the Constitution; they are at the heart of the Constitution.”<sup>9</sup> Gerber places himself in a tradition of other scholars such as Walter Berns, Martin Diamond, Harry Jaffa, and Walter Murphy, among others, who make a similar argument. Building on the assumption that the Declaration is “the” political philosophy of America, Gerber and others go on to argue that Declaration endorsed Lockean natural rights and therefore that we can resolve questions of the American Constitution by reading John Locke. Gerber argues we can even come to clarity on complicated questions such as abortion, gay marriage, rights to terminate life, and the meaning of equality, among other heated topics. Gerber ultimately believes his methodology ends the debate between liberals and conservatives by letting Locke’s natural rights resolve our questions about rights.

Gerber is not alone in giving the Declaration this kind of prominence. H. N. Hirsch, in *A Theory of Liberty*, argues that the Declaration and Locke are critical for understanding the political philosophy of this country and that the centerpiece of the founders’ vision was the idea that all men were created equal. Similarly, Michael Zuckert, in *Natural Rights and the New Republicanism*, argues that the United States is unique in creating a state based on natural rights. His argument depends on seeing the Declaration as endorsing natural rights and making that philosophy the foundation of the United States. In this way, he can contrast the uniqueness of the American founding with the “Glorious Revolution” and the English constitution of 1688, which he argues were not founded on Lockean vision of natural rights. Conservative thinkers such as Randy Barrett make similar arguments, seeing natural rights as the core of the American founding. In popular accounts of the Constitution’s history, such as the Wikipedia, there is a straight line from the Declaration of Independence, which is

portrayed as the political philosophy of the United States, to the Constitution. The Wikipedia article begins with this statement:

On June 7, 1776, a resolution was introduced in the Second Continental Congress declaring the union with Great Britain to be dissolved, proposing the formation of foreign alliances, and suggesting the drafting of a plan of confederation to be submitted to the respective states. Independence was declared on July 4, 1776; the preparation of a plan of confederation was postponed. Although the Declaration was a statement of principles, it did not create a government or even a framework for how politics would be carried out. It was the Articles of Confederation that provided the necessary structure to the new nation during and after the American Revolution. The Declaration, however, did set forth the ideas of natural rights and the social contract that would be at the foundation of constitutional government.<sup>10</sup>

As is evident now, I find the attempt to anchor an American political philosophy in the Declaration, or any historical document for that matter, to be problematic for many reasons. While that attempt was originally motivated by a Republican anti-Federalist agenda that was focused on limiting government power, it is equally problematic when adopted by more moderate or liberal thinkers. My point is that the Declaration and the founders’ views are essentially as relevant or irrelevant to the nature of rights in America as are mine and yours. That is, they may be illuminating but they are not prescriptive.

The alternative view, which downplays or at least equalizes the founders’ views with our own, places less emphasis on history as the source of moral and philosophical insight about what our society should be. It sees appeals to the founders’ views as distractions from the core issues about what values do we want to embrace as a society and what are the rules by which we end disagreements when they arise. In this alternative political philosophy, history ceases to be a source of truth and becomes just one more perspective in the debate, but much less important than otherwise thought, especially since history is interpretive and ambiguous anyway.

On the view proposed here, the Declaration's meaning does not matter for several reasons, some of which are specific to the history of American in particular and some relevant to the nature of history in general.

To start with the specifics of American history, there are several reasons the Declaration should not be considered the summary of American political philosophy. First, as noted above, there were many different statements of rights leading up to the war with Britain and to the Declaration of Independence. As other interpreters such as Pauline Maier have already argued, it is debatable whether the Declaration itself should be "the document" that represents the founders' views. The Declaration is only one among many documents on the path towards independence. As Maier puts it, the Revolution

is not of a solo performance or even, to extend the metaphor, a performance of chamber music with a handful of players. What I had mind was more the Boston Symphony orchestra, or, better yet, the Mormon Tabernacle Choir, a production with a cast of hundreds...I set out in short to tell the stories of Independence and of the Declaration of Independence when the Declaration was a workaday document of the Second Continental Congress, one of many similar documents of the time in which American advocated, explained and justified Independence, the most painful decision of their collective lives.<sup>11</sup>

The problem Maier is describing I would argue is broader than just the question of the Declaration. It is a problem that is in some sense inherent in the historical enterprise itself. It is always a problem of interpretation to say which of many documents represent the essential views of a period. In this case, which of all the statements on rights that the pre-Revolutionary and post-Revolutionary American writers produced should represent the founders' views?<sup>12</sup> The decision of which documents represent the founders' definitive political philosophy is itself an interpretive decision that is already caught up in some other interpretation of what matters.

The notion that the Declaration is the definitive statement or vision of the United States is problematic for several reasons. While the Declaration was the consensus statement about why the colonies were declaring independence, it was not a statement about founding of the United States. On the contrary, the Declaration was a statement justifying the political independence of the colonies as independent political states. The vision of a United States, which was achieved in the Constitution, was not yet in view at the signing of the Declaration. Indeed, the one person who came closest to envisioning a United States, Joseph Galloway, had been ignored by Congress. It is true that the Declaration did use the language of "united states" but only in the sense that it represented the common view of independent states that had been united in a common cause. There was no "United States" envisioned in the Declaration in the sense of a state that had federal powers above the state level. On the contrary, the signers of the Declaration envisioned only a union of loosely confederated states each with its own political independence. That is why the Declaration of Independence was staged to happen at the same time that Virginia announced its political independence as a political state. The Declaration is a joint statement by the colonies explaining why they each would become independent political states.

This is one reason, among others, that it is problematic to turn back to the Declaration to define what the Constitution meant or what the United States was supposed to be. Such a position ignores the fact that the Constitution was in fact a response to the problems perceived in the Articles of Confederation in the years intervening since the drafting of the Declaration. Between 1776 and 1787, the Articles of Confederation proved inadequate during the revolutionary war because they could force the independent states to take action. The Constitutional Convention took up that problem in 1787. The Declaration itself, by contrast, never envisioned a Federal government at all. Ironically, then, if one wants to see the political philosophy of the United States in the Declaration of Independence, *one should theoretically be against any form of federal government* and not just for a particular interpretation of its limited powers.

But suppose for a moment that we could agree that the Declaration is *the* political philosophy of the United States and ignore the fact that there were many different competing visions of American rights in the period leading up to the Revolution. We still have another problem. The problem, as I have argued throughout this book, is that even the meaning of the Declaration is ambiguous. The Declaration is much more equivocal about natural rights than is often thought. My argument in this book has been that the founders were not all of one mind on the question of rights. Even in the Declaration, at the moment they were declaring independence, the undercurrents of debate were still visible. Jefferson, the Declaration's author, still had a different theory of rights than the majority of colleagues in Congress. While Jefferson's own alternative view of rights was for the most part edited out of the Declaration, the Declaration is still a palimpsest through which we can see the unresolved questions of rights on which the founders' had not agreed. The Declaration simply sidesteps and skirts over the key debates over the nature of American rights. While Jefferson himself can be interpreted as standing in the natural rights tradition, there is an indication he may never have bought into key natural rights concepts such as "social contract" and may have been persuaded by Hume among others to doubt the very notion of the social contract. The evidence for these views is already provided in other chapters of this book and need not be rehearsed here again.

There are historical and interpretive reasons, therefore, not to treat the Declaration as the only statement of American political philosophy nor to think that the Declaration offers a single definitive view of what our political philosophy should be. Going further, it is therefore arguable that the notion of natural rights and social contract were not the only political philosophy at work in the American founding. Indeed, as we have seen, many of the founders had doubts about Lockean notion of social contract. Those doubts continue to be visible up into the Declaration and may lie behind Jefferson's own reluctance to explicitly endorse a social contract theory. We know Jefferson was reading Hume as well as Locke, for example. And he was therefore aware of Hume's damaging

critique of Locke's social contract theory. Similar doubts about Locke's social contract theory had been voiced by others before him.

What my historical reading confirms is that the American founding was constituted by conflicting and contested views of rights.<sup>13</sup> There were multiple political philosophies at work and in play. If we take away any conclusion from history about how we should resolve great questions of rights, it could easily be that we work through a process of debate and disagreement from multiple points of view and agree on a process by which we achieve compromise. That position, which does not evoke a political philosophy as "the true view of the founders", is arguably more true to the founding.

It is, as I have been arguing, also more true to the nature of history as an interpretive enterprise. The desire to turn to history to put an end to moral debate is ultimately problematic because history can't bear that weight. There is an inclination in doing so to treat history as science and to forget that history, like moral debate itself, is ultimately interpretive. History is inherently ambiguous. Our views of historical periods change over time. And interpretations of particular documents like the Declaration are nearly always open to multiple interpretations. That is the nature of historical interpretation as a humanistic activity.

History, therefore, does not stand outside of or above moral debate as a kind of standard that can put to rest squabbles we have over rights. It too is embedded in an interpretive process that is subject to debate. So should America (or any country) be bound by the political philosophy of its founders? My answer is no. They had contested understandings of rights just as do we. There was not a single political philosophy of the founders. Whether Locke's natural rights or Hume's political philosophy or even Kant's should guide us today is up for grabs now just as it was then. They debated key issues of rights within the frameworks of their moral understandings. We have to do the same.

The rejection of the founders' wisdom, then, stems from an understanding of history as a limited tool by which to resolve issues of rights. This alternative view which downplays the founders' views and treats them as nothing more (or nothing less) than just some voice in the debate

obviously takes leave of one notion of the social contract. For if the social contract is interpreted to mean that there is an original founding contract with society, then we cannot dismiss the founders' views or the documents which embodied their views. We are on the contrary duty bound to understand their views and vision and try to apply it to our current circumstances. Their views are more important than ours. Our role is interpretive rather than constructive. History and interpretation become the key way through which we come to understand the rules by which we should live by. On the alternative view described here, the nature of the debate is shifted away from history to the values and processes by which we come to resolution. The founders carry no particular weight in the debate. History cannot and does not put to an end to the debate on the thorny moral and political issues that face us. All we have is the political process that tries to create a set of fair rules by which we have that debate and resolve it. For some, this alternative view is perhaps worrisome since there is no foundation in the past for resolving contentious issues of today. But while that may be worrisome, it is arguably the way things really are. And what that insight does is shift the debate, not to what the founders' meant, but to the values that ultimately we want to embrace and protect.

## Notes

### Introduction: On Natural Rights, History, and the American Founding

1. Following Locke, they believed that people entered into society through a social contract in which they traded their freedom in the state of nature for life under society. People made this compact because life in society was preferable to life in the state of nature in which people, living without political societies, lacked protection of their lives, health, liberty and possessions. In this state of nature, there was a law of nature that was discernible to reason and to which they were subject before entering into society. But because life in the state of nature was vulnerable, people preferred to come together and relinquish some freedoms in exchange for the benefits provided by society.
2. See Zuckert, *Natural Rights*.
3. This was one of the criticisms of Locke's natural rights arguments made by his critics. For example, Hume and others criticized Locke for implying that societies historically developed through social contract. Locke himself had taken up this question in a footnote but left the ambiguity in his work, as we shall see later.
4. I discuss the history of the wording in this paragraph later. See also Becker, *Declaration*, and Boyd, *The Declaration*.
5. I review this literature in more detail as we proceed.
6. I am not alone in this contention, although I have weighed in on this issue in my own writing, such as Eilberg-Schwartz, *Savage in Judaism, God's Phallus*, and Schwartz, "Does God Have A Body." However, as we shall see many philosophical and legal interpreters seem to assume history can provide a solid foundation for interpretation that resolves ambiguity in the matters of rights. This is evident in debates on the meaning of the Declaration and Constitution, for example.



54. See notes about the circumstances of the case in Ford, *Works*, I: 470-481.

55. I am relying on Randall here, who indicates that Jefferson made a note in his account book that he would not take a fee for the case.

56. Ford I: 475.

57. Malone I: 175

58. Randall, *TJ: A Life*, 145, 147.

59. Kimball, *Road to Glory*, 93.

60. Dumbauld, *TJ and the Law*, 214 note 86.

61. Randall, 147, copies a lengthy quote from Jefferson but completely excises the reference to Pufendorf. Malone makes no mention of the Pufendorf quote. Kimball is an exception. She does note that Jefferson cited Pufendorf.

62. See Hobbes, *Leviathan*, Chapter 11.

63. Ibid., Chapter 13.

64. Randall, *TJ: A Life*, 144 cites Jefferson's autobiography indicating that Jefferson tried to emancipate slaves in the Virginia House of Burgesses when he was first elected in 1769 but failed.

65. Jefferson makes a number of other arguments to prove that inheritance of the mother's status as a slave is against the law of nature, for example by arguing that a child should get the status of both the father and mother and this creates contains a contradiction where the father is free and mother a slave. See also Ford, *Writings*, I:476

66. See Schwartz, "Liberty Is Not Freedom" for a discussion. Contrast Locke, *Second Treatise*, 2:6 with 5:27. See Zuckert, *Natural Rights*, 216-223 who argues that Locke favors the latter view that people have self-ownership, a right over their own body and person. As I have argued, however, there is no contradiction here. In 2:6 Locke says that people are the property of God. But in 5:27 he says every person has a property in his own person. "The *labour* of his body, and the *work* of his hands, we may say, are property his." On my reading Locke thinks only the labor belongs to the person but not their own body, which explains why according to Locke people cannot take their own lives.

67. In one chapter, Locke says that liberty flows from the fact that people are the workmanship of God and therefore the property of God. To harm another person would therefore be damaging God's property. In another chapter, Locke argues that individuals have property in their own body and therefore no one else has a right to that person's labor but him or herself (Locke, *Second Treatise*, 5:27). For a discussion of whether these two views conflict, see Schwartz, "Liberty and the Public Good" note 2 and a contrary view in Zuckert, *Natural Rights*, 239-246.

68. Pufendorf, *Law of Nature and Nations*, Book II, Chapter 2, 82.

69. Dewey, *TJ: Lawyer*, 57-72.

70. Hume, "Of Polygamy and Divorce", in Hume, *Essays*, 85-88.

71. Ibid., 87

72. Locke, *Second Treatise*, 7:81

73. Dewey, *TJ Lawyer*, 67.

### Conclusion: Does It Matter What the Declaration Means?

1. See Garry Wills, *Inventing America*, xiii-xxvi.

2. See Garry Wills, *Inventing America*, xiii-xxvi.

3. Detweiler, "Changing Reputation."

4. See Elkins and McKittrick, *Age of Federalism*.

5. On the history of the Bill of Rights, see Akil, *America's Constitution*.

6. For such a view see Amar Akil, *America's Constitution*, 5-53.

7. See Levy, *Original Intent*, 1-7 and Madison, *Notes*.

8. See Levy, *Original Intent*.

9. Gerber, *To Secure These Rights*, 2-3.

10. See [http://en.wikipedia.org/wiki/History\\_of\\_the\\_United\\_States\\_Constitution](http://en.wikipedia.org/wiki/History_of_the_United_States_Constitution) (September 2009).

11. Maier, *American Scripture*, xviii.

12. I take this theoretical problem to be at the heart of Foucault's work in arguing that it is impossible to define a specific origin of a historical moment.

13. My own line of thinking dovetails with others who have made similar arguments such as Reid, *Authority*, and Bailyn, *Ideological Origins*. I have tried to trace this more specifically in relationship to Jefferson and the Declaration than either Reid or Bailyn, in hopes of showing that even the Declaration can't anchor the view of a univocal view of rights.

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