

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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in religious studies. My conclusions are drawn from such careful textual readings of primary sources that have been often overlooked by a more traditional historical method. Furthermore, traditional American historians do not always delve very deeply into the philosophical sources that the American founders were reading and quoting. They miss some of the nuances of the founders' thinking because they do not always look at the context of those sources that the founders were quoting. I dive deeper than most traditional historians in looking at the ways in which the founding documents quote and use their philosophical sources.

Numerous people supported me and contributed to my thinking during the journey that produced this book. My grown daughter Penina has over the last few years become one of my best interlocutors. I am continually amazed and gratified that she thinks so deeply about many of the same issues that also preoccupy me. Maggie deserves much more than the credit she receives here for putting up with me and supporting me during the years of moodiness that always accompanies creative activity. She gave much more than she received in return. Good friends encouraged me to keep at my intellectual pursuits despite my full-time work in the software industry, which keeps paying the bills. Scott, Ray, and Rick, in particular—thanks for accepting me for who I am.

Introduction

On Natural Rights, History, and the American Founding

It is commonly assumed that Americans as individuals have a set of “God-given” or “natural rights” which are declared in the Declaration of Independence and ultimately embodied in and protected by the Constitution of the United States. It makes sense to call this the founding myth of the United States. It is the story of how the American colonies came to throw off the rule of Great Britain and begin the process of becoming independent and free “united states.” It is the story too that Americans tell when defending and arguing over their rights and when protecting themselves against what is viewed as the inappropriate encroachment by government. This founding story, in other words, articulates a political philosophy that justifies the rights and protections that Americans cherish so highly.

But what if part of this story is incorrect or misleading? What if the Declaration of Independence is much more ambivalent about natural rights than has been commonly thought? And what if the Declaration's author, Thomas Jefferson, held an alternative theory of rights that was rejected by the majority of his colleagues? Would these facts matter?

Posed here are two different types of intersecting questions, and both are at the heart of my inquiry. The first group of questions is historical in character and concerns the political ideas held by the leadership in the American colonies in the decade leading up to the Revolution and embodied in the Declaration. This group of questions can be approached

through the traditional methods of the historian. The second set of questions is philosophical and political in nature. These questions ask about the relevance of history for deciding questions about how we live, or what some people refer to as “normative” questions. Generally speaking, what impact should history have on questions of political philosophy and rights? More specifically, if the Declaration does not mean what we think it means or does not have a stable set of meanings, does that matter?

I bring both set of questions together in this book and find the intersection of those questions fascinating and interesting. This book is thus in some sense a dialogue between the historian and the political philosopher. It asks whether a historian's revelations about the past should have any relevance to political philosophy and in particular to the American understanding of rights. Ultimately, the larger question at stake is how history should figure into political philosophy. The answer, I suggest, depends on how we understand both history specifically and rights in general. I pursue these questions in two different ways: first, from the side of the historian, doubting the still common and popular conclusion that the Declaration unequivocally endorses a philosophy of natural rights, and second, from the side of the philosopher, who wonders whether it matters what the Declaration means and what value history as a discipline should have in determining how we live and specifically what rights we protect. Let me flesh out both sides of my argument.

The Declaration of Independence is one obvious location to pursue questions at the intersection of history and political philosophy. Historically speaking, the Declaration is an interesting and important historical document that tells us something significant about the views of the colonial leaders at the moment they were declaring political independence from Great Britain. The Declaration thus marked a formal transition from a period in which the colonies fought for their rights within and as part of the British Empire to a period in which they declared Great Britain irrelevant to their rights and declared their own political independence. The Declaration is thus one important statement, although not the only statement, about how what were then “British colonies”

understood their rights and the relationship of those rights to their vision of the kind of society in which they wanted to live.

It is important to ask whether this place in history should give the Declaration a “normative” or “prescriptive” claim on the present. Should it weigh in heavily in setting our norms or in establishing what rights we want to protect or even the fact that rights are the “right” language for describing the boundaries of government power and individual freedom? This is not only a question about how Americans understand rights but also a question about the relevance of history to political philosophy. When is history as a discipline relevant to defining rights within political societies?

On the historical side of this investigation, there are a number of interesting questions about the Declaration's meaning and the understanding of rights leading up to its publication. Here I challenge what has become one of the dominant understandings of the Declaration and the idea of rights in that period. In the commonly told version of the story, the leaders of the American colonies came to embrace a natural rights philosophy, and in particular that of philosopher John Locke.¹ According to that theory, individuals are created equal with a set of natural rights to life, liberty and property that cannot be infringed. Although a number of historians recognize other influences on the colonial leaders' thinking, the Declaration's focus on natural rights, and its apparent prominence in the move towards independence, is cited as evidence that a natural rights philosophy is the prominent theory of rights that defines American political philosophy.

In some versions of this story, the Declaration is in fact unique in being the first blueprint for society that is actually founded on a natural rights philosophy.² I find both versions of this story too simplistic and misleading in a number of ways that I shall spell out in more detail later. Building on the work of others before me, I shall argue that the story of American thinking about rights and the Declaration's view of rights in particular is much richer, more complex, and more contested than the story that is often presented. I find that fact interesting and probative. I shall argue that the colonial leadership both held diverging

and incompatible theories of American rights in the period leading up to independence and had substantive doubts about natural rights philosophy in general and the specific ways in which it should be applied to their own situation in particular. They doubted in fact one of the central claims of natural rights philosophy: that government in general was founded in social contract. This is a stunning fact that warrants attention, both historically as well as for thinking about how rights should be defined in an ongoing way in American society.

The notion that government was founded in a social contract, rather than in other ways, such as by force or by God, was construed by the revolutionary colonial political leaders as both a historical argument about the actual origins of government as a human institution and a normative argument about the way government should rightfully operate. Indeed, the two parts of the theory were intertwined in interesting ways that the colonial political thinkers, like other notable thinkers before them, found troubling and problematic. They were not alone in this worry. It was the link between the historical argument about the origin of government in social contract and what we can refer to as “the normative argument”—that government should be founded on consent—that critics of social contract theory seized upon.³ At issue was the question of whether the claim that “society should be founded on social contract” was justified by the historical argument that government in fact was a human institution that came about through an actual social contract. And if government was not founded historically in that way, how could one still make the argument that government should be founded that way?

The normative argument that derives from social contract theory is well known and immortalized in the common understanding of the Declaration of Independence.

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

are instituted among Men, deriving their just powers from the consent of the governed...⁴

These words encapsulate social contract theory even as they sidestep and skirt over one of its known major problems, the relationship between the historical origin and character of government (the way government developed) and the normative expectations of it (the way government should operate). We shall see that among writers in the colonies leading up to the Revolution, there were significant and recurring doubts that government was historically in fact founded in social contract. They knew that historically governments often came about through the use of force and an act of conquest. Indeed, the idea that rights derive from conquest was embraced by a number of the colonial thinkers in the period leading up to the Revolution, including the Declaration's author, Thomas Jefferson. Others thought God had much more responsibility in the creation of government as a human institution and doubted the claim that a voluntary social contract was the origin of government. These doubts about the origin of government made colonial thinkers worry that a theory founding government on the “consent of the governed” had to be grounded in some other understanding of government. These doubts caused some to conclude that a natural rights philosophy, or at least parts of it, were unworkable as a foundation for their own political philosophy. In short, while they embraced the notion that government by consent should be the way political societies operated, they were not all of one mind on what reasons could justify that view. The fact that they could not agree on the philosophical and moral justification of the social contract made some of them realize that there was no theory of government's origin on which everyone agreed.

In the historical argument developed in this book, I build on the work of other historians in contending that there was no settled understanding of colonial rights in the decade before the Declaration and that the disagreements and doubts about various aspects of natural rights are evident up to and into the Declaration itself. To unpack this argument, I suggest that it is a mistake to understand the Declaration as a simple

and straightforward endorsement of either natural rights philosophy generally or Lockean philosophy specifically. There is no longer any doubt that Jefferson and most of the other colonial leaders read or were familiar with Locke.⁵ Yet this view oversimplifies the purpose of the Declaration, which was to state a unified colonial position on independence, despite the fact that there were still some significant disagreements about key elements in natural rights theory. Instead, the Declaration emerges as a document that papers over and hides the substantive disagreements about the nature of American rights that had not been resolved in the period leading up to the Revolution.

It is not widely recognized, for example, that the Declaration's primary author, Thomas Jefferson, held an alternative theory of rights that none of his colleagues actually accepted. While most of his colleagues thought that the settlers brought their "British" rights with them from the "Mother Country," Jefferson argued they had left behind both their country and their British rights to which they had previously been entitled. There was a vast conceptual difference between these views. Jefferson tried and failed to get his colleagues to accept his theory of rights on several different occasions. In this third and final attempt while writing the Declaration, Jefferson tried one more time to smuggle in his alternative theory, only to have his colleagues in the Continental Congress obliterate his theory and leave completely unresolved the actual foundation of American rights. In the end, the Declaration hides as much as it reveals about the understanding of rights held by colonial leadership on its way to declaring independence. In seeing the Declaration this way, I place it into a larger story about the development of American thinking about rights in the period leading up to independence.

We shall see, in fact, that there was not "one American mind" on the question of rights. Instead of seeing the Declaration as a document that unequivocally endorses a natural rights philosophy and possibly even a specifically "Lockean" view, we see the Declaration as ambivalent about the foundation of natural rights and trying to sidestep what are unresolved questions that troubled colonial thinkers before and during the Revolution. Rather than depicting these political leaders as all of one

mind on the question of the social contract, I see them hedging their bets and leaving great moral questions unresolved because they could not agree about the foundation of their rights. The details of this historical perspective are developed in the pages that follow.

This reinterpretation of the Declaration brings us to the normative question that hovers always in the background: does it matter what the Declaration of Independence means? Here I am concerned about how history and historical facts should enter into or be used in debates over how people should live their lives and what kinds of rights should be protected. This is a question of how history should intersect with political philosophy. Should it matter, to put it bluntly, if Jefferson or Adams liked or disliked Locke or Hume? How much should that historical issue weigh in our decisions about what limits to put on government or what freedoms to grant individuals? In this stream of my argument, I have constructive goals. History, after all, is only of importance if it illuminates something about the human condition. In this side of my argument, I take up the question of whether the historian has something to say to the political philosopher and social theorist, and if so, what? Here, I argue that because history is an interpretive humanistic discipline, it is problematic as a basis for how a society resolves its view of rights. By this I mean that historians themselves are engaged in an enterprise of continually coming to terms with the past. That enterprise is interpretive. It is always only partial and incomplete and there is no final objective standard for establishing historical truth, once and for all.⁶ In this sense, history cannot provide a final answer for resolving questions of how we should live, for history is one way only, and not a privileged way, in which we engage moral philosophical questions. For this reason, the voice of the historian should have no preeminent weight, although it should perhaps have a contributing place, in determining how we understand our rights.

In saying that history should not have a privileged voice, I am taking up a question that is at the heart of American political debate on rights and, in fact, at the heart of social contract theory itself. For American political tradition, building on social contract theory itself suggests that

an original contract should be the framework by which Americans interpret the rights by which we are governed. Social contract theory implies that the intentions of the founders as defined in some original contract are binding on the subsequent generations, although subsequent generations become the majority who can change the rules and at least part of the social contract itself. Those who are “contractarians” of this type believe they can resolve the great question of American rights by appealing to the founders’ ideas and the meanings in the original texts, whether in the Declaration of Independence, in the American Constitution, or in the political writings leading up to those publications.⁷ This understanding of the American founding presupposes a political philosophy in which the intent of the founders or framers should determine how we resolve questions of rights that confront us today. That philosophy of “original intent” or “original meaning,” as it is called in discussions of the Constitution, often takes for granted that historical interpretation can be a stable and meaningful foundation for deciding original intentions rights and for settling great questions of political debate.⁸ History thus becomes one of the pivotal ways of determining rights, since history helps resolve the question of original intent or original meanings.⁹ History, in other words, becomes one of the methodologies of actualizing social contract theory. History is the method that helps reveal the intent of the founders. It is this kind of view that leads some thinkers to turn to the Declaration of Independence as the document by which to clarify the meaning of the original social contract with America. In this view, the Declaration enunciated the political philosophy that led the colonies to declare independence and ultimately provided a vision by which the newly emerging “united states” should be governed.

I argue that these views are problematic for several interrelated reasons. First, as already suggested, the attempt to use the Declaration to settle questions of rights rests on too simple a historical understanding of American thinking about rights leading up to the Declaration. The Declaration does not unambiguously prove that American rights are based on natural rights philosophy in general or the Lockean formulation in particular. I find this point to be interesting and potentially helpful,

since many political philosophers would no longer find natural rights arguments compelling, at least in their traditional form.¹⁰ Thus the possibility that the colonial political leaders were themselves in doubt about natural rights opens up a larger discussion about whether there is a defined political philosophy that is embedded in and ultimately endorsed in “an original social contract with America.” By contrast, there are enormous implications for us if there are multiple conflicting views in the key founding documents.

Second, even if the Declaration were unequivocal about natural rights—a point I dispute—the question would arise whether history by itself can resolve the great moral questions of rights that face us. I argue that it cannot. And this argument derives from my understanding of how history itself is a constructive enterprise of interpretation. I believe that those who appeal to history and historians to resolve political and moral questions are trying to build a foundation for their house in quicksand. There is no absolute truth in history, and historians’ arguments, therefore, should have no more a privileged place in deciding our values and rights than other kinds of arguments. In fact, perhaps historical arguments should have less weight than other forms of arguments that rest on articulated reasons and values.

Political philosophers and politicians, however, often turn to history to save them from what otherwise looks like an ongoing and evolving attempt to define what rights are and which ones should be protected. History, it is hoped, will save us from the messiness of differing views on the various contested values and rights. But history can’t save us. Historians are engaged in a constructive humanistic enterprise of trying to understand our past. Their interpretations are always partial, infused themselves with assumptions about human nature and what facts from the past really matters. History itself can never fully explicate the complexity of the past. Information is always missing, and no account can capture the rich complexity anyway.

We shall bring this issue to the fore when we try to pinpoint even something as seemingly simple as what books and philosophies influenced Jefferson’s Declaration of Independence. The problem of history,

like the problem of original intent, is that the past is always more complex and varied than any historical account can possibly capture. Trying to figure out what ideas influenced Jefferson is enormously problematic and potentially irresolvable. For example, the conclusion that Jefferson was a natural rights thinker or a “Lockean” is an overly simplistic view of both Jefferson and Locke. And the fact that so many historians and interpreters of Jefferson have seen Jefferson that way points to the constructive nature of history as a discipline, too. In showing other influences on Jefferson, and suggesting that he, like other revolutionary political thinkers, had doubts about natural rights philosophy, I want to throw into relief the way that historians sometimes oversimplify the past and assume that there is necessarily a single discernible original intention about rights in the founding documents prior to the Revolution.¹¹

This brings me to my third point. Even if the Declaration were clearly endorsing natural rights, and history were clearly an objective discipline, we would still have the problem of knowing whether the Declaration is the core centerpiece of the social contract. While there are good arguments to claim that the Declaration should hold a central place in our understanding of the founders' vision, there are counterarguments about whether the Declaration can bear that weight. The problem of how to locate the essence of the colonial revolutionaries' view is itself inseparable from the historical enterprise and the definition of what the original contract means. All of this is to say that while one argument could put natural rights at the center of the Declaration and the Declaration at the center of the social contract, there are other compelling ways of looking at both of those problems. Thus any attempt to pin down the Declaration's meanings still has to grapple with the many other dimensions of a problem that is always possibly slipping out of our grasp.

On the basis of these different trajectories in my argument, I ultimately tackle the question of whether this reinterpretation of the Declaration matters politically for how we live our lives and shape our political frameworks. From one perspective, one could argue that the Declaration's philosophy should matter simply because it has mattered in the past.¹² If, however, the Declaration does not provide the unequivocal endorsement

of natural rights that many suppose it does, then arguments about the nature of the American rights have to rest on some other foundation or source.

That is not to say that the nature of the debate on rights will necessarily change. By its very nature, a philosophy of rights has the power to justify itself in many different ways on historical facts.¹³ If the facts or meaning of those facts are perceived to change, the philosophy of rights can shift and find another set of facts upon which to alight. This goes to the larger thesis put forward in this book. History does not and cannot permanently anchor a theory of rights. Or, to put it another way, history can provide only a temporary anchor for a theory of how we should live. But the historical account on which a theory rests is always, by the very nature of historical interpretation, ultimately unstable as a foundation.

There are two ways in which political philosophies can deal with this problem of history. Either they can divorce themselves from history altogether and rest on a philosophical understanding of the human condition in general, a strategy that may have its own problems, too; or they can move on to other historical facts when the ones they rest on become slippery and soft.

This, it seems to me, is the larger, interesting upshot of my study and ultimately led me down the path to tackle the questions that I ask here. It is a myth that the American political framework rests on an original social contract that has a discrete determinate meaning in time that can be discerned. It is this kind of myth, incidentally, that religious traditions presuppose all the time, as I've discussed in my earlier work.¹⁴ A political philosophy of natural rights has the same tendency as religion: to posit some original revelation or contract in which subsequent generations are bound. The debates in American society over the last quarter century are ultimately about whether the original contract that the colonial leaders made should hold sway over our own current understanding of rights. It is that inclination that sees history as the means by which we resolve these debates that I ultimately want to contest. In this sense, I side with David Hume against John Locke, for Hume viewed natural

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.

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