

**SYMPOSIUM: RETHINKING RIGHTS: HISTORICAL, POLITICAL, AND  
THEOLOGICAL PERSPECTIVES: ARTICLE: HISTORICAL PERSPECTIVE:  
NATURAL RIGHTS, EQUALITY, AND THE DECLARATION OF  
INDEPENDENCE**

Spring, 2005

**Reporter**

3 Ave Maria L. Rev. 45 \*

**Length:** 18851 words

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## **Text**

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**[\*45]**

Introduction

In 1945, the noted constitutional historian Charles Warren wrote: "It is a singular fact that the greatest event in American history - the Declaration of Independence - has been the subject of more incorrect popular belief, more bad memory on the part of participants, and more false history than any other occurrence in our national life."<sup>1</sup> While Warren was preoccupied with the early partisan efforts to claim exclusive credit for the Declaration, key elements of his indictment apply to the current popular understanding of its theoretical dimensions. This is particularly evident with regard to the document's "all men are created equal" clause and its assertions regarding "unalienable rights."<sup>2</sup> So much would seem apparent from the uses to which the Declaration is put in contemporary America - ranging from the sublime, as being a statement of the nation's goals and aspirations, to the ridiculous, as "mandating" the "right" of same-sex marriages.

While significant differences abound today concerning the theoretical underpinnings of the Declaration and its purpose - differences too numerous and complex to pursue here - this was not the case during the revolutionary period. Indeed, there was a substantial consensus in this earlier period concerning the document's status and meaning. The major purpose of this article is to set forth the assumptions and ways of thinking that produced this consensus and to explore briefly certain problems of interpretation that still remain unresolved. **[\*46]**

The Declaration and the Social Contract

From the time of its drafting, the Declaration of Independence was almost universally viewed by the colonists as, first and foremost, a proclamation and justification of independence. As Philip Detweiler emphasizes, controversies over the meaning of its "self-evident" truths were not to be found in the revolutionary period or the decades immediately following.<sup>3</sup> Moreover, "the 'self-evident' truths were seldom employed by those who formulated

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<sup>1</sup> Charles Warren, Fourth of July Myths, 2 Wm. & Mary Q. 237, 237 (3d ser.) (1945).

<sup>2</sup> The Declaration of Independence para. 2 (U.S. 1776).

wartime propaganda." <sup>4</sup> Rather, Detweiler stresses that during this period, most Americans' "attention centered upon the conclusion - the announcement of independence." <sup>5</sup> Detweiler ultimately concurs with Carl Becker in his conclusion that "during the Revolution, as a matter of course, men were chiefly interested in the fact that the colonists had taken the decisive step of separating from Great Britain." <sup>6</sup>

Jefferson's well known views regarding the meaning of the Declaration, penned a year before his death in 1825, illustrate another feature of the Declaration about which there was also consensus. <sup>7</sup> The statesman explained that "with respect to our rights, and the acts of the British government contravening those rights, there was but one opinion on this side of the water. All American whigs thought alike on these subjects." <sup>8</sup> Moreover, Jefferson maintained that this unanimity of thinking extended to the opinion that "an appeal to the tribunal of the world was deemed proper for our justification" after the colonists were "forced ... to resort to arms for redress." <sup>9</sup> "This," he wrote, "was the object of the Declaration of Independence." <sup>10</sup> In his account, Jefferson insisted that discovering "new principles," presenting "new arguments, never before thought of," or saying "things which had never been said before" were not among the document's purposes. <sup>11</sup> Rather, its objective was "to place before [\*47] 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 compelled to take," but not to set forth an "originality of principle or sentiment." <sup>12</sup> Instead, the Declaration was intended to be "an expression of the American mind," formulated "to give to that expression the proper tone and spirit called for by the occasion." <sup>13</sup>

Jefferson concluded his remarks by elaborating on the foundations and character of this "expression," explaining that "its authority rests ... on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney." <sup>14</sup> Thus, the Declaration could be understood as a statement of the public mind, perhaps reflecting, as few public documents before or since, a deep and genuine consensus. Yet it must be asked, what was the precise nature of this consensus? What were the common understandings upon which the Declaration rested? Answering these questions requires an exploration of the theoretical framework of the Declaration, arguably the most important dimension for a coherent understanding of its meaning.

At one level, as Jefferson's comments suggest, these answers seem to flow naturally from the fact that the Declaration's justification for separation is cast in terms of a widely-accepted social contract theory, the premise of which is outwardly similar to that employed by John Locke in his Second Treatise. <sup>15</sup> Such a view gains support

<sup>3</sup> Philip F. Detweiler, *The Changing Reputation of the Declaration of Independence: The First Fifty Years*, 19 *Wm. & Mary Q.* 557, 558-65 (3d ser.) (1962).

<sup>4</sup> *Id.* at 558.

<sup>5</sup> *Id.*

<sup>6</sup> Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas* 226 (Vintage Books ed. 1958) (1922); see Detweiler, *supra* note 3, at 558 n.2.

<sup>7</sup> Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in *Thomas Jefferson, Writings 1500* (Merrill D. Peterson ed., 1984).

<sup>8</sup> *Id.* at 1501.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See generally John Locke, *Second Treatise of Government* (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

from the research of Philip Hamburger, who remarks that, while it is debatable whether "Locke, Sidney" or "other European writers" had the greatest influence on American thinking, it is nevertheless the case that the colonists "often extracted highly generalized notions" about natural rights, the state of nature, and the origins of government from these sources. <sup>16</sup> While educated Americans were probably "knowledgeable about the ideas espoused by particular European theorists," far more Americans "only became familiar with - or only [\*48] retained - a relatively simple approach abstracted from the details of the foreign treatises." <sup>17</sup>

In its most rudimentary form, the social contract theory postulated that individuals first lived without government in a state of nature, where they enjoyed equal liberty and natural rights (discrete portions of the natural, equal liberty), the exercise of which conformed with natural law (usually God-given and/or derived from reason). Because not all individuals obeyed the natural law and also because there was no acknowledged common superior to settle disputes that arose between individuals, governments were formed through contract by unanimous consent. As will be apparent later in this discussion, however, 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. Nevertheless, this theory provided the rough framework within which issues such as the limits of obedience to government, the obligations of the citizens to authority, the legitimate powers of government, and the need for virtue and restraint were discussed before and during the founding period.

An examination of the selections in *American Political Writing During the Founding Era, 1760-1805* <sup>18</sup> lends support to Hamburger's thesis concerning the prevalence of the social contract perspective. The collection, largely composed of essays and sermons, includes thirty-three selections that predate the Declaration; thirteen of these embrace the compact mode of thought to one degree or another in addressing the need for government, the character of natural rights, the nature of liberty, the limits of government, and other related concerns. Virtually every essay concerning the origins of government and its general character, the impending break with Great Britain, or the need for virtue and civil order employed this framework.

Moreover, most of the essays that embrace the social contract approach also reflected and integrated Christian teachings, largely by reference to the "natural law" or "law of nature." For example, in a 1773 sermon given in Boston, Simeon Howard said:

In a state of nature, or where men are under no civil government, God has given to every one liberty to pursue his own happiness in [\*49] whatever way, and by whatever means he pleases, without asking the consent or consulting the inclination of any other man, provided he keeps within the bounds of the law of nature. <sup>19</sup>

Silas Downer, writing as "A Son of Liberty" in 1768, anticipated to some degree one of Jefferson's arguments in the Declaration, asserting that government "was instituted to secure to individuals that natural liberty" which "the God of nature hath given us" and which Great Britain had "deprived them of" without "right." <sup>20</sup> In sum, the thrust of the political writings prior to the Declaration and the language of the Declaration itself, whose opening passages were cast in the mold of social contract theory, illustrates the veracity of Jefferson's claim that the Declaration itself was but "an expression of the American mind." <sup>21</sup>

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<sup>16</sup> Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, [102 Yale L.J. 907, 914 \(1993\)](#).

<sup>17</sup> *Id.* at 915.

<sup>18</sup> 1 *American Political Writing During the Founding Era, 1760-1805* (Charles S. Hyneman & Donald S. Lutz eds., 1983) [hereinafter *American Political Writing*]. This two-volume work is generally considered to be the most comprehensive and representative collection of the political writings of the founding period.

<sup>19</sup> Simeon Howard, *A Sermon Preached to the Ancient and Honorable Artillery Company in Boston*, in 1 *id.* at 185, 187 (emphasis added).

<sup>20</sup> Silas Downer, *A Discourse at the Dedication of the Tree of Liberty*, in 1 *American Political Writing*, *supra* note 18, at 97, 99-100.

<sup>21</sup> Letter from Thomas Jefferson to Henry Lee, *supra* note 7, at 1501.

Just as there can be little question that the Declaration was a reflection of American consensus at the time of its drafting, there cannot be much doubt of Jefferson's claim that the document's "authority rested ... on the harmonizing sentiments of the day."<sup>22</sup> Widespread agreement prevailed concerning the most significant and more specific elements of the contract theory.<sup>23</sup> Locke's depiction of the conditions in the state of nature, for instance, was widely accepted; virtually all commentators of this era presumed that, in this natural state, men were endowed with "natural liberty." According to Ronald Peters, who closely studied the complexities of the contract theory underlying the Massachusetts Constitution of 1780, natural liberty was understood to be "a power of self-determination in respect to all things, being bounded only by the laws of nature and God."<sup>24</sup> **[\*50]** Moreover, Peters notes that the "corollary" to "natural liberty," namely, "the concept of natural equality" or "an equality of liberty" was also universally recognized at the time.<sup>25</sup> Hamburger, surveying a wider range of sermons and essays, arrived at essentially the same predominant understanding, finding that natural liberty was understood to be "the undifferentiated freedom individuals had in the state of nature or the absence of government."<sup>26</sup> He, too, indicates that an equality of liberty was assumed and that natural liberty was "understood to be subject to natural law."<sup>27</sup>

As remarked above, this understanding formed the basis for explanations of the emergence of civil government - that the need for civil government emerged when some individuals did not obey the law of nature in the exercise of their liberty, transgressing the bounds of natural law. When there was no common authority to rectify these transgressions, each individual was judge of his own cause; this prevented any exercise of equity, justice, or even personal security in society. To remedy this state of affairs, individuals contracted to form a civil government. In so doing, however, they parted with portions of their natural liberty in order to "preserve the residue."<sup>28</sup>

Given the prevalence of the social contract framework during and before the revolutionary period, it would have been noteworthy - even startling - if Jefferson had employed a different framework in the Declaration to justify or explain separation. Yet this was only a framework. Underlying this skeleton, so to speak, was a more complex theory whose terms and components - as well as their meanings, substance, and relationships - had already been

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<sup>22</sup> Id.

<sup>23</sup> While a few of the sermons and essays set forth in some detail the contractual origins of society and government and the nature and substance of natural liberty and rights, they still do not offer a comprehensive picture of the theoretical framework which prevailed during the revolutionary era. The Election Day sermon of Samuel West on the eve of the Revolution is perhaps the fullest. There he sets out to understand "the nature and design of civil government" with the end of examining the limits of civil obedience. Samuel West, *On the Right to Rebel Against Governors (Election Day Sermon)*, in 1 *American Political Writing*, supra note 18, at 410, 412. West's treatment, however, does not delve into certain complexities and refinements that are necessary for understanding the Declaration's assertion of "unalienable rights."

<sup>24</sup> Ronald M. Peters, Jr., *The Massachusetts Constitution of 1780: A Social Compact* 72 (1978). There are very substantial reasons why Peters's analysis of the Massachusetts Constitution of 1780 is highly relevant for an understanding of the Declaration. One important reason is that the Massachusetts experience from even before the Declaration to the adoption of the 1780 Constitution bore some resemblance to a "state of nature" since it lacked a formal government. See generally Oscar Handlin & Mary Handlin, *Introduction to The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780*, at 1 (Oscar Handlin & Mary Handlin eds., 1966) [hereinafter *Popular Sources*]. The very state that had taken the lead in the movement toward separation found itself in a condition where the principles of the Declaration could readily be applied in practice. (In this regard, it should be remarked as well that Massachusetts was the first state to found a new government on the consent of the governed.) Beyond this, the application of the contractual approach to the practical task of framing a government compelled an elaboration and refinement of this approach. This, in turn, offers a better understanding of what Americans at the time of the Declaration understood to be their rights and liberties.

<sup>25</sup> Peters, supra note 24, at 72 (emphasis omitted).

<sup>26</sup> Hamburger, supra note 16, at 908.

<sup>27</sup> Id.

<sup>28</sup> Id. at 931.

**[\*51]** extrapolated in much narrower circles, particularly among the educated elite familiar with modern European political theory.

#### Natural Law

In many ways, the most important element of contract theory is the natural law, largely because it prescribed the boundaries or limits of natural liberty. According to Peters, "the law of nature was seen" by the Congressionalists, who comprised the majority of the New England population, "to be a part of the law of God."<sup>29</sup> The law of God could be discovered in two ways: first, as revealed in the Bible, and second, through the moral sense implanted in men by God.<sup>30</sup> The two methods of understanding were not seen as exclusive of one another; man's implanted moral sense, for instance, would reaffirm the revealed morality of the scriptures.<sup>31</sup> Peters points out that there were "specific tenets" that comprised the natural law and constituted the "natural rights of man."<sup>32</sup> These rights "were perceived in terms of freedom to act" - no individual could be legitimately prevented from exercising a natural right.<sup>33</sup> Peters further notes that "even were [an individual] to be prevented from taking an action to which he had a natural right, his right to take that action remains inviolate. By providing this normative standard, natural rights establish the basis upon which rested the moral law of the state of nature."<sup>34</sup> In determining what constituted a natural right, "reason" also came into play. Man had a right to do that which was necessary to survive within the state of nature, e.g., to support and protect his existence.<sup>35</sup> Samuel West's 1776 sermon described this role of reason in stating that "'whatever right reason requires as necessary to be done is as much the will and law of God as though it were enjoined us by an immediate revelation from heaven, or commanded in the sacred scriptures.'"<sup>36</sup>

**[\*52]** The emphasis on the divine origins of the natural law that Peters finds in Massachusetts can largely be attributed to the state's strong Congregationalist roots. Hamburger's survey, which is broader in scope, reveals both similarities and differences concerning the sources of the natural law. The similarities can be found in the underlying assumptions relating to the state of nature - that individuals possess an equality of liberty and that these individuals have a right to preserve themselves and their liberty. The differences involve the means for deriving the natural law. As Hamburger explains, the underlying assumptions regarding the state of nature provided the foundations so that individuals could "reason" as to what was needed to "preserve" their liberty.<sup>37</sup> Or, if not "reason," some derived the natural law from prudential judgments about what conditions would serve to protect this innate liberty.

Moreover, Hamburger writes, some reasoned that the natural law could be expanded to embrace certain common duties, or even a comprehensive moral code. For example, because government was necessary to preserve liberty, individuals could be said to have duties to insure that the government performed its functions satisfactorily. Or, even more expansively, some held that "man's social character" not only provided "an additional ground for arguing that individuals ... should not violate the equal rights of others," but also the basis for "a more complete set of moral rules."<sup>38</sup> In this way, "[a] natural right was simply a portion of ... undifferentiated natural liberty."<sup>39</sup> For Americans

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<sup>29</sup> Peters, *supra* note 24, at 73.

<sup>30</sup> *Id.* at 74.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 75.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (quoting Samuel West, Election Sermon, 1776, in *The Pulpit of the American Revolution* 259, 275 (John Wingate Thornton ed., Da Capo Press 1970) (1860)).

<sup>37</sup> Hamburger, *supra* note 16, at 924.

<sup>38</sup> *Id.* at 925.

<sup>39</sup> *Id.* at 919.

of the founding era, natural rights were generally cast in terms of "life, liberty and property, or life, liberty and the pursuit of happiness,"<sup>40</sup> the latter formulation of which was used by Jefferson in the Declaration. Natural rights, however, could also take more specific forms such as "the free exercise of religion," "freedom of conscience," and "freedom of speech and press."<sup>41</sup>

It is important to note that, despite their differences over the derivation of the natural law, Americans of the founding era still had ample grounds for meaningful dialogue, given their shared understanding of the conditions in the state of nature to which this natural law - however derived - would apply. First, as already indicated, early Americans generally assumed that individuals in the [\*53] state of nature enjoyed equal liberty and that these individuals were entitled to do that which was necessary to support their existence. Secondly, nearly all acknowledged that natural law set the limits to the exercise of natural liberty. Moreover, for the most part, there existed widespread agreement about what these limits on natural liberty should be.

On this point, Hamburger approvingly cites Thomas Rutherford to the effect that, despite the philosophical disagreements surrounding the sources of natural law, "these disagreements did not greatly affect what eighteenth-century men understood to be the theory's moral and political conclusions."<sup>42</sup> Rutherford argues that, while moralists see different sources of, and reasons for, obedience to the natural law, "they are agreed about the law, to which we are obliged" and "they concur in establishing the same rules of duty."<sup>43</sup> It should also be added that there was a recognition in the sermons and essays of the period that different communities might come to different judgments regarding the extent to which natural liberty should be limited or regulated. As Simeon Howard observed:

In every state, the members will, probably, give up so much of their natural liberty, as they think will be most for the good of the whole. But different states will judge differently upon this point, some will give up more, some less, though still with the same view, the publick good.<sup>44</sup>

#### Natural Rights

Howard's observation leads to another major element of contractual theory: the status of rights in the context of civil society. Peters makes much of the fact that rights were considered either alienable or unalienable. Peters states that according to the reasoning of Theophilus Parsons in *The Essex Result*, alienable rights are those of which individuals "may choose to divest themselves ... on the condition that they receive an equivalent in return."<sup>45</sup> Peters rightly concludes from this explanation that, given this understanding, "life," [\*54] "liberty," and "property," three of the most commonly asserted rights, must be considered "alienable."<sup>46</sup> "Men do as a matter of fact give up their right to live, and their liberties, and under the Constitution men could be compelled to give up their power of controlling their lives, liberties, and property."<sup>47</sup> This would be the case under the Massachusetts Constitution that Parsons and others would eventually endorse. Of course, in "surrendering" these rights,<sup>48</sup> individuals receive equivalent benefits in return, such as security and advancement of the common good, which render the surrender more than acceptable from the individual's perspective, as well as from that of the natural law.

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 925 n.54.

<sup>43</sup> *Id.* (quoting T. Rutherford, *Institutes of Natural Law* 5 (Lawbook Exchange, 2d Am. ed. 2004) (1754)).

<sup>44</sup> Howard, *supra* note 19, at 188.

<sup>45</sup> Peters, *supra* note 24, at 76 (citing Theophilus Parsons, *The Essex Result*, in *Popular Sources*, *supra* note 24, at 324, 330).

<sup>46</sup> *Id.* at 76-78.

<sup>47</sup> *Id.* at 78.

<sup>48</sup> *Id.* at 76 (quoting Parsons, *supra* note 45, at 330).

Peters, consulting again the analysis of Parsons, contrasts this understanding with the character of unalienable rights,<sup>49</sup> of which there can be no equivalent for their "surrender." The author explains, "Where no equivalent can possibly be received for a particular right, the individual presumably is not free to give up the right, and it is therefore an unalienable right."<sup>50</sup> Delving into this matter more closely, Peters observes that what is truly at stake when individuals enter civil society is not the surrendering of the rights themselves, but the relinquishing of control over the exercise of those rights.<sup>51</sup> Thus, the question becomes: "When would the power to control a natural right be of such importance so as to be unalienable?"<sup>52</sup> The answer Peters provides, derived from a close analysis of Parsons's position, is that the importance of unalienable rights stems from the rights' "inherent" nature, that is, on their being "essential to the very existence as a human being of him who possesses it."<sup>53</sup> Rights of this character are "literally impossible for that individual to forfeit" control over; they are unalienable because they "cannot physically be alienated."<sup>54</sup> Thus, there are "two senses in which a right may be unalienable: when it is impossible for an individual to give it up and/or when it is impossible to receive an equivalent."<sup>55</sup>

**[\*55]** Peters remarks that the "right of conscience" can be considered the "prototypical unalienable right" because, on all counts, it qualified for this status; individuals simply could not part with the responsibility of making moral choices, nor could they receive any possible equivalent.<sup>56</sup> This right was also regarded as highly crucial because it was so closely attached to religion; it was considered to be indispensably necessary for individuals to make those moral choices upon which they would ultimately be judged by God. This moral responsibility required and presupposed that "individuals [would] have the freedom to make decisions in matters of conscience."<sup>57</sup> Samuel Stillman's understanding of the "sacred rights of conscience" apparently reflected a commonly held view, at least among the Congregationalists, regarding their status - they "can neither be parted with nor controlled by any human authority."<sup>58</sup>

The right of conscience was intimately involved in the growing controversy over the propriety of a state-established religion or, at another level, non-denominational state support for religion. By examining this controversy in greater detail, one can gain deeper insight into the matter of what was considered to constitute unjust interference by "human authority" or government.

Article II of the Massachusetts Constitution declares that "all men" have a "right as well as the duty ... to worship the supreme being."<sup>59</sup> It affirms that no punishment or harm will befall any individual "for worshipping god in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments."<sup>60</sup> The very last portion of the Article, however, includes a caveat to these positions: the individual is free to practice or exercise his religion "provided he doth not disturb the public peace, or obstruct others in their religious worship."<sup>61</sup> Yet no one seemed to take exception to this particular provision; even the unalienable status

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<sup>49</sup> Id. at 76-81 (citing Parsons, supra note 45, at 330).

<sup>50</sup> Id. at 76.

<sup>51</sup> Id.

<sup>52</sup> Id. at 77.

<sup>53</sup> Id.

<sup>54</sup> Id.

<sup>55</sup> Id. at 80.

<sup>56</sup> Id. at 79.

<sup>57</sup> Id. at 81.

<sup>58</sup> Samuel Stillman, *The Duty of Magistrates*, in *The Patriot Preachers of the American Revolution* 261, 266 (New York 1860).

<sup>59</sup> Mass. Const. of 1780, pt. 1, art. II, reprinted in Peters, supra note 24, app. at 196.

<sup>60</sup> Id.

of the right of conscience would not protect practices that might be detrimental to the community or an abridgement of equal rights.<sup>62</sup>

**[\*56]** Intense controversy did arise, however, over provision for the public support of the ministry in Article III, which was justified on the premise that "the good order and preservation of civil government, essentially depend upon piety, religion and morality."<sup>63</sup> The arguments offered against this provision varied. One variant, most forcefully presented by Philanthropos, raised concern about the limits, if any, of state power with regard to matters of conscience: if the majority could compel support for ministers because doing so would be beneficial for society, then what was to prevent the majority from, for example, incorporating its notions of Christian doctrine into the constitutional fabric on the grounds that this would redound to the common good?<sup>64</sup> Another related argument questioned whether the scope of governmental authority could legitimately extend to matters of conscience. Philanthropos summarizes this position by asserting that "the power of the legislature depends upon the right of the people. If the latter have not the right, the former cannot have the power."<sup>65</sup> The town of Westford forcefully expressed this view in its statement that "no Man Ought or of Right can be compelled to attend any religious Worship ... or maintain any ministry contrary to or against his own free will and consent."<sup>66</sup> The crux of the issue did not relate to altering the minds or the inner thoughts of individuals. Rather, it revolved around whether the positive powers accorded government in Article III (e.g., that of supporting the ministry) were among those with which individuals could legitimately be commanded to comply.<sup>67</sup> The opponents of state-supported religion regarded the unalienable right of conscience to place such powers outside the realm of public control.

The answer provided by Parsons to this line of thought is of interest because it places the status of the right of conscience - as well as other unalienable rights - into a broader context. While Parsons did agree that efforts to change or compel beliefs would constitute a violation of the right of conscience, he viewed the "great error" in the argument of those opposing Article III as ""not distinguishing between liberty of conscience in religious opinions and worship, and **[\*57]** the right of appropriating money by the state."<sup>68</sup> Noting that "no such power is claimed" in Article III to direct or control "the faith" of individuals, he remarked: "The authority derived from the constitution extends no further than to submit to the understandings of the people the evidence of truths deemed of public utility, leaving the weight of the evidence, and the tendency of those truths, to the conscience of every man."<sup>69</sup>

Parsons's defense of Article III, which presumably reflected the views of a majority in Massachusetts, illustrates Peters's assessment that "the unalienable rights of man do not set great limits on the power of civil society."<sup>70</sup> Even the right of conscience, perhaps the most basic of all rights, does not "preclude political coercion in favor of religion."<sup>71</sup> Certainly one of the reasons for this position can be found in the firm and widely-shared conviction, consistent with the natural law, that the very survival of the civil order depended on cultivation of "piety, religion and morality."<sup>72</sup> In sum, to the extent that the right of conscience can be considered the prototype of unalienable

<sup>61</sup> Id.

<sup>62</sup> Peters, *supra* note 24, at 81.

<sup>63</sup> Mass. Const. of 1780, pt. 1, art. III, reprinted in Peters, *supra* note 24, app. at 196.

<sup>64</sup> Peters, *supra* note 24, at 82-83 (citing a work by Philanthropos, a widely used colonial pseudonym).

<sup>65</sup> Id. at 83 (quoting a work by Philanthropos).

<sup>66</sup> Id. at 85.

<sup>67</sup> Id. at 86.

<sup>68</sup> Id. at 87 (quoting [Barnes v. Falmouth, 6 Mass. \(5 Tyng\) 400, 408 \(1810\)](#)).

<sup>69</sup> [Barnes, 6 Mass. \(5 Tyng\) at 411](#).

<sup>70</sup> Peters, *supra* note 24, at 89.

<sup>71</sup> Id.



rights, it was understood that even unalienable rights could be narrowed or confined in the civil society by considerations of social needs and the common good.

While Peters stresses the distinction between alienable and unalienable rights, Hamburger primarily distinguishes between natural and acquired rights. During the founding period, he notes, while Americans only "occasionally" drew distinctions between these two types of rights, the grounds for the distinction were clear and widely shared.<sup>73</sup> Natural rights were those that could be derived from the natural liberty individuals enjoyed in the state of nature, whereas acquired rights, such as habeas corpus and trial by jury, "did not exist in the state of nature."<sup>74</sup> The acquired rights were also "civil rights" protected by constitutions and laws, "rights that could exist only under civil government."<sup>75</sup>

Hamburger's work, a major contribution to this area of study, provides a better understanding of how those of the founding period [**\*58**] and beyond viewed the relationship between natural rights and the natural law. As previously noted, natural rights, which can be understood as portions of natural liberty, were bounded or confined by the natural law. Hamburger explains that this was well understood at the time of the founding, so that normally any assertion of a natural right implicitly carried with it the realization that the exercise of that right was limited by the natural law.<sup>76</sup> In other words, for Americans of the founding period "natural rights did not suggest the existence of expansive rights without substantial restrictions."<sup>77</sup>

This realization helps to explain the attitudes of late eighteenth-century Americans towards natural rights - attitudes that seem "unsystematic, contradictory, and even paradoxical" to modern scholars.<sup>78</sup> Focusing on the freedoms of speech and press, Hamburger contrasts the difficulties modern students have in reconciling the language of the First Amendment, where these freedoms are couched in absolutist terms, and the ready willingness of the founding generations to accept limitations on them.<sup>79</sup> This disparity can be explained by the fact that these eighteenth-century Americans understood that the natural rights, including freedom of speech and press, carried with them the limitations of the natural law. In this way, "Americans [of this period] frequently said or assumed that certain types of speech or press - including blasphemous, obscene, fraudulent, or defamatory words - lacked or should lack constitutional protection."<sup>80</sup>

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<sup>72</sup> Mass. Const. of 1780, pt. 1, art. III, reprinted in Peters, *supra* note 24, app. at 196.

<sup>73</sup> Hamburger, *supra* note 16, at 918.

<sup>74</sup> *Id.* at 920-21.

<sup>75</sup> *Id.* at 921-22.

<sup>76</sup> *Id.* at 956.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 910.

<sup>79</sup> Hamburger points to Alexander Meiklejohn, who found a "'paradox' or 'apparent self-contradiction'" in the fact that "the First Amendment 'does not forbid the abridging of speech' and yet, 'at the same time, it does forbid the abridging of the freedom of speech.'" *Id.* at 912 (quoting Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 21 (Oxford Univ. Press 1965) (1948) (emphasis omitted)). Hamburger also deals with Leonard Levy, who sought to resolve the seemingly schizophrenic positions of the founding generation regarding freedom of the press by turning to the common law and the doctrine of seditious libel; according to Hamburger, Levy argued "that they understood freedom of the press to be defined by the traditional common law restraints upon the press, including seditious libel prosecutions." *Id.* at 911 (citing Leonard W. Levy, *Emergence of a Free Press* (1985)). But, as Hamburger points out, Levy's explanation is at best partial and does not deal with the question of "how eighteenth-century Americans reconciled their highly restrictive laws with their claim that the freedom of speech and press was a natural right." *Id.* at 912.

<sup>80</sup> *Id.* at 935.

Individuals, upon entering civil society, surrendered their natural rights, save for those that "were reserved by a constitution or, much [\*59] less securely, were left unimpeded by their other civil laws." <sup>81</sup> However, the understanding that civil laws should reflect the natural law secured the benefits in civil society of those natural rights that were surrendered. Thus, "if physical natural liberty was subject to natural law already in the state of nature, and if civil laws reflected natural law, then the imposition of civil laws did not reduce natural liberty." <sup>82</sup>

This is not to say that there were no complications involved in determining the fidelity of the civil law to natural law. Understandably, given the general character of the natural law, there could be differences of opinion about how it applied to specific situations or conditions. Furthermore, civil laws, which applied to specific circumstances or conditions in the context of the civil society, necessarily had to be more specific and detailed than the natural law. <sup>83</sup>

While they recognized this paradox, early Americans simply assumed that their governments' constitutions would be structured upon "the natural law principles of equal liberty and self-preservation." <sup>84</sup> Yet this assumption did not amount to naivete; Americans were aware of the fact that "the people might adopt a constitution that did not adequately preserve their natural liberty or that otherwise failed to conform to the implications of natural law." <sup>85</sup> Consequently the natural law provided the "means by which the people could measure the adequacy of their constitutions." <sup>86</sup> What if, then, the people judged their constitution inadequate, as failing to reflect the natural law? According to Hamburger, the remedies included the amendment or alteration of the constitution - presumably by adopting a new constitution or, if the political landscape prevented such diplomatic action, "by revolution." <sup>87</sup>

#### The Declaration: Unalienable Rights and Equality

This survey of the contractual mode of thought that prevailed at the time that Jefferson penned the Declaration, though brief, is [\*60] sufficient to indicate the broad areas of agreement and to identify certain difficulties surrounding the interpretation of key provisions of the Declaration of Independence. These difficulties, as intimated at the outset, arise with regard to two relatively specific but interrelated phrases in the second sentence of the text: "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." <sup>88</sup>

A convenient point of departure is to turn again to the meaning and status of "unalienable Rights." As previously noted, Peters determined that the rights of "life, liberty, and property" could not be considered unalienable, largely because from his perspective, these are and have traditionally been controlled or regulated as if they were alienable rights. <sup>89</sup> This observation as to the rights' regulation and control is quite accurate; Americans took it for granted that a societal majority could regulate all manner of concerns relative to these rights, even to the extent of imposing capital punishment. <sup>90</sup> The major safeguard against arbitrariness with regard to the regulation of rights was due process, which was established by positive laws and which also conformed with the natural law.

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<sup>81</sup> Id. at 930.

<sup>82</sup> Id. at 947-48.

<sup>83</sup> Id. at 942-44.

<sup>84</sup> Id. at 940.

<sup>85</sup> Id.

<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> The Declaration of Independence para. 2 (U.S. 1776).

<sup>89</sup> See supra notes 45-58 and accompanying text.

<sup>90</sup> Peters, supra note 24, at 78.

But in recognizing this, Peters's hypothesis faced a difficulty in reconciling his theory with Article I in the "Declaration of Rights" of the Massachusetts Constitution. The Article reads: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." <sup>91</sup> Peters resolved this seeming inconsistency by stating that the Article cannot be interpreted to hold that "life, liberty, and property" per se are unalienable. <sup>92</sup> Rather, Peters theorizes that the supposedly "unalienable" nature of these rights lies in the "enjoying," "acquiring," and "protecting," associated with them. <sup>93</sup> Moreover, as previously illustrated, Peters demonstrates - using for this purpose the prototypical unalienable right of freedom of conscience - that in reality "unalienable" rights really did not impede [\*61] popular control in any significant way; they could not be given a meaning that would impede majorities from acting pursuant to the common good and welfare. <sup>94</sup>

Peters's analysis may be understood as an effort to square unalienable rights with the principle of popular control of government; he strives to avoid what seems to be a contradiction in the theoretical design underlying the Massachusetts Constitution, whereby unalienable rights could be interpreted to trump majority rule. Still, Peters's analysis leaves scholars to wonder in what meaningful sense unalienable rights are unalienable. For instance, to recur to his notion of unalienable rights, majorities are, and have traditionally been, free to regulate and control the "enjoying," "acquisition," and the like, associated with liberty and property. Put otherwise, the distinction Peters draws between "property" and "protecting property" in determining what is unalienable does not, in fact, endure much scholarly scrutiny. Consider, for instance, Article X of the Massachusetts "Declaration of Rights," which provides, in effect, that property may be taken for public use with reasonable compensation. <sup>95</sup> Through this Article, society's reach legitimately extends not only to control over the use of property (which as noted above is presumably alienable), but also to its possession. This lack of distinction renders it difficult to determine precisely what is unalienable.

What emerges from Peters's account is that the theory underlying the Massachusetts Constitution seeks both popular self-government and the goals attributed to the natural law, the most predominant of which is that which advances the common good and welfare. This theory that underlies the Constitution, it should be noted, does not embrace the position which has been commonly attributed, rightly or wrongly, to John Locke, and which has gained considerable currency in modern times - that there is "a body of innate, indefeasible, individual rights which limit the competence of the community and stand as bars to prevent interference with the liberty and property of private persons." <sup>96</sup>

Peters's analysis reduces unalienable rights to their essence by way of emphasizing that they constitute no barrier or hindrance to [\*62] society pursuing the common good. In my view, however, Hamburger's analysis brings us to the same conclusion in a simpler and more direct manner. Simply put, on his showing, all natural rights, both alienable and unalienable, are bounded, regulated, or controlled by the natural law. In other words, it was understood that these rights inherently embodied or contained within them the restrictions and caveats of the natural law. Obscenity, slander, and defamation, for instance, were not part of the right of freedom of speech. Likewise, individual actions or behavior contrary to the natural law were not regarded as part of liberty. Viewed in this manner, unalienable rights could be subject to regulation or control by society through positive law in accordance with the natural law - for example, in order to preserve or advance the general welfare. This notion, that

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<sup>91</sup> Mass. Const. of 1780, pt. 1, art. I, reprinted in Peters, supra note 24, app. at 196.

<sup>92</sup> Peters, supra note 24, at 78.

<sup>93</sup> Id.

<sup>94</sup> Id. at 81-82.

<sup>95</sup> Mass. Const. of 1780, pt. 1, art. X, reprinted in Peters, supra note 24, app. at 198 ("And whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.").

<sup>96</sup> George H. Sabine, A History of Political Theory 529 (3d ed. 1961).

rights claimed to be "unalienable" may still be subject to regulation and control, corresponds with Peters's conclusion.

To return to the Declaration and its assertion of unalienable rights, the text seems clear enough: there exist unalienable rights, namely "Life, Liberty and the pursuit of Happiness," that "Governments are instituted" "to secure."<sup>97</sup> From this assertion, it is but a short step to the proposition

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.<sup>98</sup>

In light of what Peters and Hamburger have written, these particular passages pose no basic problems.

However, there is another view concerning the status of the unalienable rights, one that directly bears upon Peters's analysis of unalienable rights and effectively confronts his reservations. This view is linked to an interpretation of the "all men are created equal" clause. In the decade leading up to the issuance of the Declaration, an understanding began to take root that Americans were a people separate from the English, that under the existing arrangement there were "two peoples" joined only in their allegiance to the King. This theory is reflected in that portion of the first sentence of the [\*63] Declaration which requires notice of independence "when ... it becomes necessary for one people to dissolve the political bands which have connected them with another."<sup>99</sup> Logically following this statement is an assertion that this "one people" is going "to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them."<sup>100</sup>

This language would suggest that the assertions that follow this sentence in the Declaration should be read in a "corporate" sense, that is, that with the "all men are created equal" clause, Americans were asserting an equality as a people with the British. In this context, the "unalienable rights" asserted in the document are those that belong to the people in their corporate or collective capacity. As such, these rights are unalienable in the sense set forth by Peters: they cannot be parted with (i.e., transferred to another people), nor can they be controlled or regulated by another people. In this account, it is critical to note that once the government was established, these rights ("life," "liberty," "pursuit of happiness") lost their unalienable status. A majority, or whatever sovereign power there would be, in keeping with the natural law, could regulate these rights as they related to individuals, in order to promote the well-being of society.

There is abundant evidence to support this corporate view. A common theme in the sermons and political essays leading up to the Revolution is that the colonists were not being treated as equals with their British counterparts. The belief prevailed among the colonists, as Stephen Hopkins asserted in 1764, that they were "justly and fully entitled to equal liberty and freedom with their fellow subjects in Europe."<sup>101</sup> This point was most forcefully averred by an anonymous pamphleteer, Britannus Americanus, when he wrote two years later that the "indefeasible rights" of the "people of New England" are the same as those of "Old England," "they being fellow subjects, and standing upon equal footing."<sup>102</sup> British policy clearly did not reflect this equality, which proved to be the major source of discontent that eventually led to separation.

Despite this, there are still grounds for interpreting the "all men are created equal" clause outside the corporate context. For starters, if the equality of men was to be understood in the corporate context, the [\*64] phraseology of

<sup>97</sup> The Declaration of Independence para. 2 (U.S. 1776).

<sup>98</sup> *Id.*

<sup>99</sup> The Declaration of Independence para. 1 (U.S. 1776).

<sup>100</sup> *Id.*

<sup>101</sup> Stephen Hopkins, *The Rights of Colonies Examined*, in 1 *American Political Writing*, *supra* note 18, at 45, 49.

<sup>102</sup> Britannus Americanus, in 1 *American Political Writing*, *supra* note 18, at 88, 89.

the Declaration seems to pose some difficulties. "All men" means all men, perhaps best understood as the entire universe of men, undifferentiated with regard to national or social groupings or identification. If the corporate view had been intended, then one would assume that Jefferson might have devised some other way of conveying this meaning, employing perhaps a phraseology that would have better reflected the equality between Americans, who identify themselves as "one people," and the British nation. Moreover, the assertion of the equality of all men - and equality between them, not a corporate equality - comports with the widely accepted contractarian understanding that men enjoy equal liberty in the state of nature, and that this equality is basic for understanding many of the injunctions of the natural law. As Hamburger explains, "None had a moral right to exercise his liberty in a way that infringed the equal freedom of another person."<sup>103</sup> The upshot of this explanation is that the reference to "all men" being "created equal" accords with the predominant mode of thinking in a context quite apart from the corporate or collective interpretation.

However, it is clear that even if the clause is given the most expansive meaning - applying to men in an undifferentiated fashion - its purpose is to advance the proposition that the Americans (presumably like other peoples) are as entitled to as many unalienable rights as the British. Consequently, even under this all-inclusive understanding, the corporate view is, in effect, not very far from the surface. This much is evident from the political landscape at the time the Declaration was written, as well as the document's express purpose and the internal logic of its argument.

In the final analysis, one should not lose sight of the fact that, in discussing the complexities surrounding rights, it makes little difference whether the corporate or the undifferentiated interpretation is accepted. Both views present essentially the same understanding of rights, the origins of government, and the substance and role of the natural law. Most important, both interpretations are alike in viewing the Declaration's purpose as that of establishing popular self-government in which majorities rule in conformance with the natural law.

In making this connection between the corporate and undifferentiated theories regarding rights, one must not overlook the fact that many of the specific grievances against the King, comprising **[\*65]** the main body of the Declaration, involve measures that undermine the common understanding of colonial self-government. In keeping with its purpose, the theory underlying the arguments of the Declaration does not in any way enshrine individual rights in the sense they are generally understood today. It may be inferred that the drafters accepted the natural law's mandate for due process that would serve to curb arbitrary and capricious government. Many of the specific grievances listed in the Declaration relate directly to breaches in due process as it had come to be understood in the common law. Moreover, these guarantees of due process involved individual acquired rights; the drafters subscribed to the proposition that these acquired rights could be changed or amended by majorities in furtherance of the common good.

The last step in this analysis of the Declaration turns to the question that has recurred in one form or another over the course of American history: How inclusive was the "all men are created equal" clause intended to be? In light of the subsequent controversies that have arisen over this clause, an important aspect of this question involves how the "one people," the "nation," or the political community was conceived by those who drafted the Declaration. Historically speaking, a people comes to define itself through a process or evolution with which the theory underlying the Declaration does not deal. The contractarian theory, this is to say, simply assumes that there is a people who wants to be a united political body. As such, the Declaration itself does not purport to grapple with the questions surrounding key issues: What are the limits to the community? Who stands outside its bounds and why? Moreover, contract theory is largely ahistorical, taking no cognizance of the complex processes by which communities come to identify themselves, much less the traditions, cultural norms, and beliefs that have determined the hierarchy within the community or society which, in turn, is determinative of who should rule.<sup>104</sup> To put this in

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<sup>103</sup> Hamburger, *supra* note 16, at 927.

<sup>104</sup> Regarding this point, Edmund Burke writes: "As in the abstract, it is perfectly clear, that, out of a state of civil society, majority and minority are relations which can have no existence; and that in civil society, its own specific conventions in each incorporation, determine what it is that constitutes the people, so as to make their act the signification of the general will ... ." Edmund Burke, *Further Reflections on the Revolution in France* 167 (Daniel E. Ritchie ed., Liberty Fund 1992) (1790).

more specific terms, it seems evident that drafters of the Declaration thought that mature, white males - particularly those with a stake in the community - would comprise the law-making portion of the [\*66] community. Such a view was, so to speak, a "given" of their time - a "given" that was probably shared by the largest excluded group: mature, white women. But restricted suffrage did not mean that women and children were in any way to be denied the advantages of civil government, nor were they to be treated in a manner inconsistent with the natural law.

Slavery did involve difficulties on this score. Slaves, unlike women and children, were not considered by many to be members of the community. Thus, they could be, and were treated, as a separate group, apart from the society and not entitled to equal liberty.<sup>105</sup> In addition, the institution of slavery posed the thorny problem that its very existence served as a reason to exclude slaves from participation in the political process, since they were under the control of their master and in no position to render independent judgments.<sup>106</sup> These considerations serve simply to highlight the fact that social contract theory has little to say about the criteria for inclusion into the community or full participation in political processes. Being able to exercise independent judgment and having a stake in the society, for instance, are criteria for inclusion that are independent of the theory used to declare independence. What that theory does hold is that if majorities - no matter how small a portion of the population that may initially be - want to extend full membership and political rights to those initially excluded, they are free to do so.

### Conclusion

Taken as a whole, the foregoing analysis emphasizes that the Declaration of Independence is part of a continuous American political tradition of deliberative self-government that emerged and flourished during the colonial period. This is to say, the Declaration does not prescribe the ends or goals which government is obliged to realize; it does not assert rights that are inviolable, rights which cannot be modified or altered by deliberative majorities for society's well-being. Rather, consonant with the principles of the prevailing [\*67] contractarian theory, it asserts that when a government violates natural rights and contravenes or ignores the natural law, "the People" have "the Right ... to institute new Government ... as to them shall seem most likely to effect their Safety and Happiness."<sup>107</sup>

Moreover, there is no inherent conflict between the ideals of the Declaration and the United States Constitution. On the contrary, given the inadequacies of the Articles of Confederation, the Declaration even anticipates that the people will form a new government to meet their needs. The institutions and processes established by the Constitution, it can be said, are designed to allow for the reflection and deliberation necessary for a people intent upon operating within the confines of the natural law.

Finally, this approach to the meaning of the Declaration points to the significant role and function of the natural law in political thinking both before and during the founding period. At its core is the understanding that natural rights are discrete portions of a natural liberty which, in turn, is modified, limited, or conditioned by the natural law. Many of the contemporary controversies surrounding the Declaration and its place within the American political tradition are, to a large extent, due to the disparagement of the natural law, or even a denial of its existence, that began seriously in the United States in the nineteenth century and continued with increasing force throughout the twentieth. Therefore, without a recognition of the centrality of natural law to the founding generation, there can be little genuine understanding of the rights asserted in the Declaration.

<sup>105</sup> See, e.g., Peter Kolchin, *American Slavery, 1619-1877*, at 3 (1993); Peter J. Parish, *Slavery: History and Historians* 132 (1989).

<sup>106</sup> Cf. *Dred Scott v. Sandford*, 60 U.S. 393, 403-04 (1856) (holding that "a negro, whose ancestors were imported into this country, and sold as slaves, [could not] become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen" because "they are not included, and were not intended to be included, under the word 'citizens' in the Constitution").

<sup>107</sup> The Declaration of Independence para. 2 (U.S. 1776).

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