

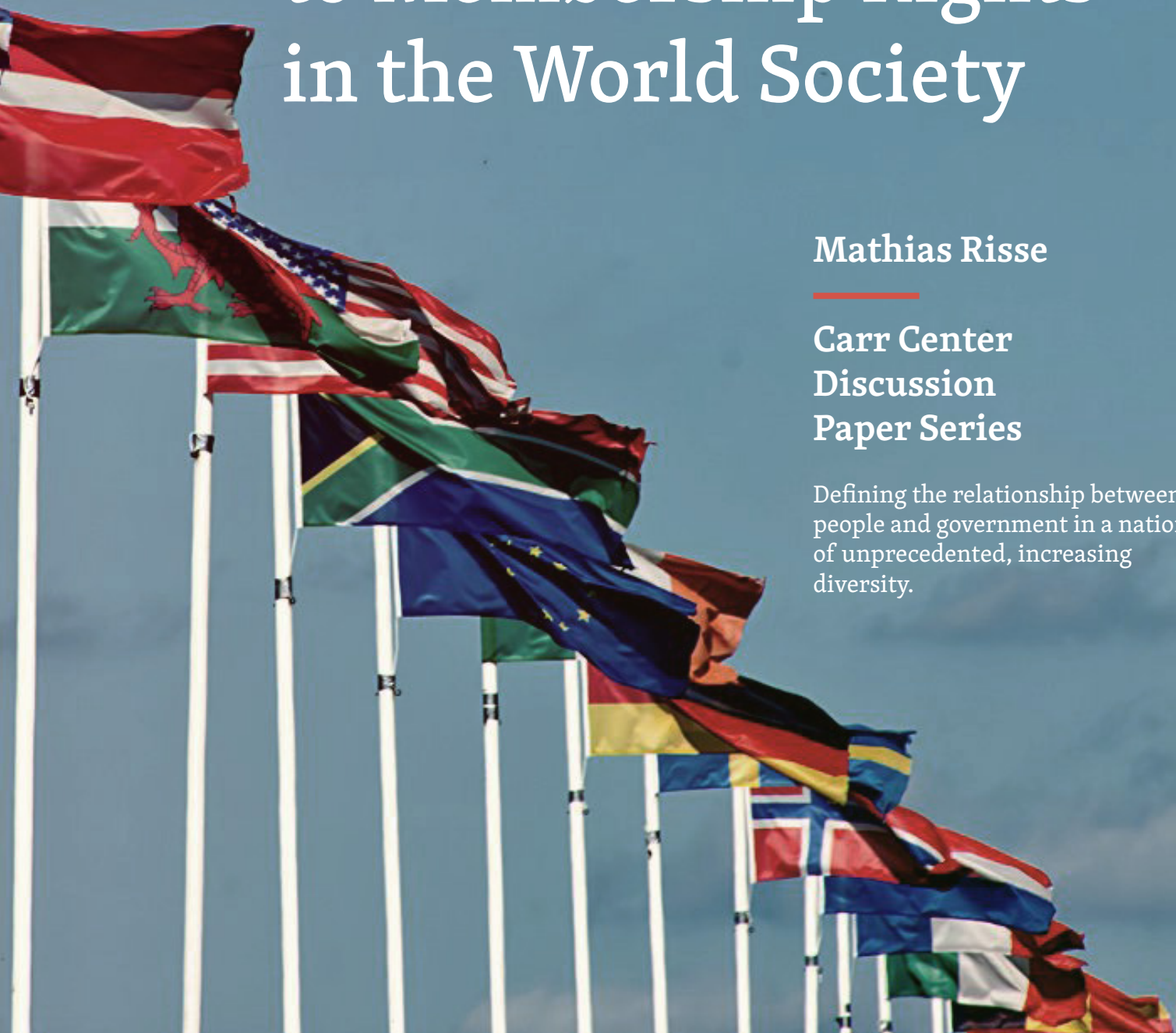
CARR CENTER FOR HUMAN RIGHTS POLICY HARVARD KENNEDY SCHOOL

From Unalienable Rights to Membership Rights in the World Society

Mathias Risse

Carr Center
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For more information on the project, its research papers, and the policy recommendations, please visit the Carr Center's website at <https://carrcenter.hks.harvard.edu>.

Sincerely,

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Table of Contents

5	The Pompeo Commission
8	The Declaration of Independence
10	Non-Domination: A Contemporary Approach
11	Natural Law, Natural Rights, Human Rights: Basic Ideas
13	Natural Law/Rights and Public Policy
14	Understanding Human Rights Beyond Natural Law/Rights
17	Conclusion
18	Literature

All men are created equal...[and] they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.

1. The Pompeo Commission

On July 8, 2019, US Secretary of State Mike Pompeo unveiled a Commission on Unalienable Rights, charged to undertake “one of the most profound reexaminations of the unalienable rights in the world since the 1948 Universal Declaration.”¹ The day before, he published an article in the Wall Street Journal on the matter.² The outdated term “unalienable” refers back to the American Declaration of Independence, which famously states that “We hold these truths to be self-evident, that all men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.” Pompeo’s article also references this sentence when he insists that a moral foreign policy should be grounded in a conception of human rights organized around these rights to life, liberty, and the pursuit of happiness.

The Commission is officially tasked to reexamine human rights in a genuinely philosophical manner. Pompeo’s questions include these:

What does it mean to say or claim that something is, in fact, a human right? How do we know or how do we determine whether that claim that this or that is a human right, is it true, and therefore, ought it to be honored? How can there be human rights, rights we possess not as privileges we are granted or even earn, but simply by virtue of our humanity belong to us? Is it, in fact, true, as our Declaration of Independence asserts, that as human beings, we – all of us, every member of our human family – are endowed by our creator with certain unalienable rights?

These questions are not supposed to be asked in isolation, but by way of reference to American founding principles, as indicated by the mention of the Declaration of Independence in the quote above. Pompeo’s article and announcement offer various reasons for such reexamination at this stage. First of all, there is a concern about proliferation that results if “ad hoc rights” are added to genuinely unalienable rights. “Loose talk” about rights

implies we are losing sight of what really matters. Secondly, institutions charged with protecting human rights drift from their mission, presumably because proliferation resulted in lack of focus. Thirdly, human rights talk runs the risk of being enlisted for “dubious or malignant purposes,” which, again, presumably becomes possible because of proliferation.

The language of unalienable rights not only takes us back to the Declaration but also to natural law, universal moral principles often (though not always) taken to reflect a divine will.

The human rights community predictably reacted negatively. Ken Roth of Human Rights Watch speaks for many who are worried that the goal of this Commission is to strengthen the Trump administration’s conservative social agenda. The government is unhappy that human rights are cited to uphold reproductive freedom or protect LGBT people from discrimination (even and especially in the name of religious freedom). Roth concludes that “any confusion about human rights rests not so much with international institutions as in the Trump administration’s commitment to defend them.”³

To mention one other reaction, Eric Posner – a law professor skeptical of human rights law – observes that the language of unalienable rights not only takes us back to the Declaration but also to natural law, universal moral principles often (though not always) taken to reflect a divine will. Natural law as the 18th century understood it focused on rights to political participation (such as freedom of speech), and the protection of person and property. Contemporary human rights are broader, encompassing economic rights (e.g., rights to work and to health care), as well as rights against discrimination on the basis of race, gender, ethnicity, etc. According to the UN, human rights also include expansive rights to reproductive freedom.⁴ Moreover, contemporary human rights law de-emphasizes property rights and, to some extent, speech rights. As Posner says: “in a word,

¹ For the announcement, see <https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3/>; last accessed in August 2019.

² Pompeo, “Unalienable Rights and U.S. Foreign Policy; The Founders’ Principles Can Help Revitalize Liberal Democracy World-Wide.” Also relevant, by his own insistence, are Pompeo’s remarks at the 40th anniversary of the Claremont Institute (a conservative think tank in California) in May 2019, see <https://www.state.gov/remarks-at-the-claremont-institute-40th-anniversary-gala-a-foreign-policy-from-the-founding/>; last accessed in August 2019.

³ Roth, “Beware the Trump Administration’s Plans for ‘Fresh Thinking’ on Human Rights.”

⁴ <https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/HealthRights.aspx>; last accessed in August 2019.

it's lefty." He points out that human rights sustain a liberal international order that alienates many who do not share liberal values. Resistance came from authoritarian regimes but was not limited to them. Not only does the US now join this resistance, but the way they go about it outflanks liberals on the right. Liberals have insisted that human rights law takes precedence over national law, but then natural law would do the same. Natural law, that is, could overrule national abortion regulation.⁵

These comments indicate that neither the human rights community (represented by Roth) nor observers of that community and its neighborhood (represented by Posner) readily accept Pompeo's characterization of the committee's tasks in mostly philosophical terms. They see at best some philosophical icing on what is a political cake, and at worst, intellectual deceit from an illusion of a fair-minded investigation with an underlying political agenda that is already set. *The Economist* puts this commission into the same corner as a previous one charged with substantiating Trump's claim that his election saw massive vote-rigging, concluding that "there is not much reason to think the new commission is a good faith effort."⁶ Roth finds these fears "only intensified by Pompeo's selection of Mary Ann Glendon, a prominent scholar opposed to abortion and same-sex marriage, to head the commission."

But for now, I will go the other way and take it that the selection of a distinguished scholar as chair of the commission indicates that genuine intellectual engagement is called for.⁷ This piece is meant to be a contribution to that engagement.

To focus ideas, I assume that Pompeo hopes – or in any event, the fear in the human rights community is that he hopes – that the commission will substantiate three key conservative ideas: (1) that there is too much human rights proliferation, and once we get things right, social and economic rights as well as gender emancipation and reproductive rights no longer register as human rights; (2) that religious liberties need to be strengthened under the human rights umbrella; and (3) that the unalienable rights that should guide American foreign policy neither need nor benefit from any kind of international oversight or even an international structure within which they are in some way grounded. Judging from Pompeo's public statements on the matter, he hopes (1) – (3) will be substantiated by appeal to the Declaration of Independence as well as to natural law. I aim to show that the Declaration is of no help with this, whereas natural law is to some extent, but only in ways that reveal its limitations as a foundation for foreign policy in our interconnected age.

⁵ (1) For Posner, see <http://ericposner.com/the-human-rights-wars-heat-up/>; last accessed in August 2019, and Posner, "The Administration's Plan to Redefine 'Human Rights' Along Conservative Lines." For Posner's skepticism of human rights law, see Posner, *The Twilight of Human Rights Law*. (2) In a speech at Davos in January 2019, Brazilian President Jair Bolsonaro also rejected what Posner described as the "lefty" orientation of human rights: "We will defend family principles and true human rights; we will protect the right to life and private property," see <http://www.itamaraty.gov.br/en/speeches-articles-and-interviews/president-of-the-federative-republic-of-brazil-speeches/19992-discurso-del-presidente-de-la-republica-jair-bolsonaro-durante-la-sesion-plenaria-del-foro-economico-mundial-davos-suiza-22-de-enero-de-2020>, last accessed in September 2019. (3) Concerns about proliferation are by no means limited to right-wing politicians with autocratic tendencies. For a classic articulation of the view that human rights should be limited to civil and political rights, see Cranston, *What Are Human Rights?* For a broader understanding of human rights mindful of proliferation concerns, see Griffin, *On Human Rights*. For a recent rearticulation of this stance cognizant of the Pompeo Commission, see Tasioulas, "Are Human Rights Taking Over the Space Once Occupied by Politics?" For a survey of the philosophical concerns, see Nickel, "Human Rights."

⁶ "Rowing about Rights."

⁷ In addition to her grounding in Catholic social thought Glendon is known for her work on the genesis of the Universal Declaration of Human Rights seen from the perspective of Eleanor Roosevelt's role in this process; see Glendon, *A World Made New*. She has also written a number of essays on human rights themes, many of which reprinted in Glendon, *Traditions in Turmoil*.

Equality has precedent
over freedom; only on
the basis of equality
can freedom be
securely achieved.

– Danielle Allen –

2. The Declaration of Independence

Pompeo's *Wall Street Journal* article starts by pointing out that America's founders:

"Defined unalienable rights as including 'life, liberty, and the pursuit of happiness.' They designed the Constitution to protect individual dignity and freedom. A moral foreign policy should be grounded in this conception of human rights."

But it is important to recognize that, by the time we get to this short list of rights (in the second sentence of the Declaration), various other important thoughts have already been introduced.⁸ The first sentence is as follows:

"When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and 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, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation."

To begin with, we learn that the Declaration was written owing to "a decent respect to the opinions of mankind." The point seems to be that the kind of change that concerns everybody – such as the dissolution of political bands at the envisaged scale – entitles humankind to an explanation. The presumption would be that if no good explanation is available, the intended measure should *not* be taken. This distinctly cosmopolitan starting point is striking in light of the present isolationist and separatist tendencies in Trump's America.⁹

Secondly, what also appears in this sentence is a notion of equality. What the Declaration explains to humankind is that the new country means to claim its "separate and equal station" among other states. It leaves behind a status of domination and

joins the community of states (countries, that is) as its own entity, as an equal member. Both natural law and the will of God license that move, a move that leads the new country into a world already acknowledged as interdependent. The theme of equality reappears in the second, very long, sentence. The sentence that deals with life, liberty and the pursuit of happiness. That sentence does not explain anything about equality. Accordingly, the only understanding of equality the Declaration provides is the one obtained from the first sentence, where equality is about *non-domination*. The second sentence reads as follows:

"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, — 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."

So, when we get to the short list of unalienable rights, we have already encountered the theme of equality twice, and have reason to understand it as non-domination. Rights to life, liberty and the pursuit of happiness have to be understood in such a way that they advance rather than obstruct mutual non-domination. As Danielle Allen states succinctly, the central philosophical argument of the Declaration is that "equality has precedent over freedom; only on the basis of equality can freedom be securely achieved."¹⁰ It is in order to realize freedom on the basis of equality that government exists in the first place, with the presumption being that governments are actually *needed* to that end. It is a long way from that statement

⁸ Naturally the Declaration of Independence has received an overwhelming amount of scholarly attention; for recent examples see Armitage, *The Declaration of Independence*; Maier, *American Scripture*; Jayne, *Jefferson's Declaration of Independence*; Fliegelman, *Declaring Independence*; Dupont and Onuf, *Declaring Independence*; Allen, *Our Declaration*. See also West, *The Political Theory of the American Founding*; Lepore, *These Truths*, chapters 3-4. My own discussion is influenced by Allen's.

⁹ One may think of Trump's environmental policies that oppose a basic understanding about climate change that now is widely shared among just about all other countries with a serious impact on the climate. A decent respect to the opinions of mankind in what is another matter that concerns everybody would require a radical change of directions here.

¹⁰ Allen, *Our Declaration*, 275.

to Ronald Reagan's pronouncement that "Government is not the solution to our problem, *government is the problem*."¹¹ The founders would not approve.

Jeremy Bentham referred to the American revolutionaries as "ungrateful and rebellious people" who needed to be restored to the allegiance they were breaking.¹² But at the very end of the Declaration these ungrateful and rebellious types pledge themselves to something extraordinary. The Declaration leaves its signatories and all who are pledged to it through them with far-reaching commitments to put non-domination into practice:

"And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor."

This is a dramatic pledge: creating a commonwealth shaped by non-domination is not only a shared task; it is so important that all participants who endeavor pledge their lives, fortunes and honor to it. Any government falling short of these obligations fails in its central tasks.

So, when Pompeo merely refers to the rights to life, liberty and the pursuit of happiness, he omits the non-domination framework within which they are framed. The Declaration leaves the citizens of the new nation with the task to spell out what non-domination means, an ongoing process to which each generation needs to contribute. To be sure, the list of rights offered in the Declaration is short, but this parsimony should not mislead us. The task now is to interpret what rights to life, liberty and the pursuit of happiness mean among equals. Especially the pursuit of happiness can be expected to fall into quite a range of additional, subordinate rights that are worked out in a sequence that would include the Constitution next, then legislation, and finally policy and administration of legal disputes in courts.

My remarks about the Declaration reflect a straightforward reading of what it actually says, taken as a whole. What, then, about the three conservative key themes? To what extent do they find support in the Declaration? What is most straightforward is that this cosmopolitan document does not support any aversion to international integration or even oversight. What is also rather clear is that mutual non-domination requires the

government to act in ways that advance citizens' economic status, to such an extent that they can live up to their roles as equal participants in the commonwealth. Though the 18th century would not have thought of non-domination in terms of gender emancipation, the ideal of non-domination should be interpreted as resisting any kind of discrimination. Similarly, on the face of it the Declaration does not permit any inferences regarding either reproductive rights or the status of religious freedom. But what it urges us to do is to reflect on these matters too in a spirit of non-domination.

By way of concluding this section it is worth noting that the Declaration of Independence captures a stronger ideal of equality than the Universal Declaration of Human Rights would do centuries later. The former document says that "all men are created equal." The latter talks about "equal and inalienable rights" in its preamble, states in Article 1 that all human beings are "born free and equal in dignity and rights," and in Article 2 insists that discrimination terms of the usual categories of discrimination (race, religion, sex, etc.) is impermissible. That is, the Universal Declaration does not say all people are equal: it merely says that, to the extent that they have rights, they have them equally. The spirit of the Universal Declaration is captured by Franklin Delano Roosevelt's four freedoms mentioned in the preamble: freedom of speech and belief and freedom from fear and want.¹³ The ideal of equality as non-domination in the Declaration of Independence goes much further.

The Declaration must be unmoored from the hypocrisies of its own time.

To be sure, there is a profound irony in the fact that this ideal was articulated at a time when there was no dominant political will among the liberated whites to extend their freedom to the enslaved blacks. This contradiction at the very moment of political conception reveals how big a challenge it would be to take seriously the ideal of equality as non-domination. It also shows that, for the Declaration to be a document that speaks to contemporary concerns, we must think of it as a living document. The Declaration must be unmoored from the hypocrisies of its own time, and interpretations always need to be guarded against new hypocrisies of later ages.¹⁴

¹¹ This appears in Reagan's first inaugural address, given on January 20, 1981; <https://www.reaganfoundation.org/ronald-reagan/reagan-quotes-speeches/inaugural-address-2/>; last accessed in August 2019.

¹² Bentham offers his negative assessment in his "Short Review of the Declaration;" for the quote, see Armitage, *The Declaration of Independence*, 186.

¹³ For the four freedoms, see Engel, *The Four Freedoms*.

¹⁴ For a contemporary take on the founding principles, see Lepore, *This America*.

3. Non-Denomination: A Contemporary Approach

The reconciliation of liberty and equality under one government that the Declaration asks its adherents to undertake involves two things: an analysis of the conflicts among citizens that requires the kind of neutralization involved in non-domination, and a proposal for how to think about non-domination before that background. A contemporary proposal comes from John Rawls.¹⁵

As far as Rawls is concerned, the crucial conflicts societies face today arise from the fact that their social spaces must be shared among adherents of multifarious moral doctrines with deep metaphysical and epistemological disagreements (Christians, Muslims, Buddhists, secular liberals, etc.). After millennia of disputes we understand that people inevitably and enduringly interpret human experiences differently. We cannot realistically hope that these conflicts can ever be overcome. But people must still live together in the same society. To that end, conflicts must be handled the right way, and if they are, it may not even be desirable, let alone necessary to overcome them.¹⁶

For Rawls, the notion that does the crucial work to handle the conflict (and thus reconcile equality and freedom) is *public reason*. Exercising public reason requires of citizens that they are able to justify decisions on fundamental political issues to each other using publicly available values and standards. Issues of that fundamental nature include questions about which religions are tolerated, who has the right to vote, who is eligible to own property, and what are suspect classifications for discrimination in hiring.¹⁷ One implication of this interpretation of the task the Declaration sets for us is that religious freedom has to be interpreted in such a way that religion can play only a very limited role in public life. Interactions among citizens, for basic political and economic questions, can only be decided by appeal to public values and standards. Freedom of religion is freedom

to worship as one sees fit and act on prescriptions of one's religion, within limits, but decidedly not the freedom to shape public life in the image of that religion. Accepting such limitations on one's freedom is the price to pay for life in a society that enduringly guarantees the same type and level of freedom for everybody else as well.

However, the Declaration does not merely talk about equality, but about people being *created equal*, and as being endowed with rights *by a Creator*. While the Declaration does not presuppose any particular story about creation and creator, it does presuppose a kind of divine normativity in nature, and both the equality and the rights it introduces depend on that. To be sure, that point does not render the Rawlsian framework inapplicable as an interpretation of the task set by the Declaration. The machinery might apply even among those who endorse this kind of belief in creation because the differences among them are large enough to require the kind of reconciliation between equality and liberty that comes from the use of public reason.

But in any event, the Declaration needs to remain relevant in an age where fundamental conflicts include parties without any recognizable religious convictions. As Thomas Jefferson said about the Declaration in a famous letter to Henry Lee in 1825, "all its authority rests then on the harmonizing sentiments of the day."¹⁸ The sentiments of the 18th century required appeals to creation. The sentiments of the 21st century call for a broader basis. Accordingly, the Declaration's commitment to equality should be understood to be based on the value of common humanity, regardless of whether it is backed up by creationist foundations. To be sure, the commitment to non-domination the Declaration derives from creation is just as plausibly derived from a humanist commitment to the value of life, and nothing in the Declaration precludes such humanist commitments.¹⁹

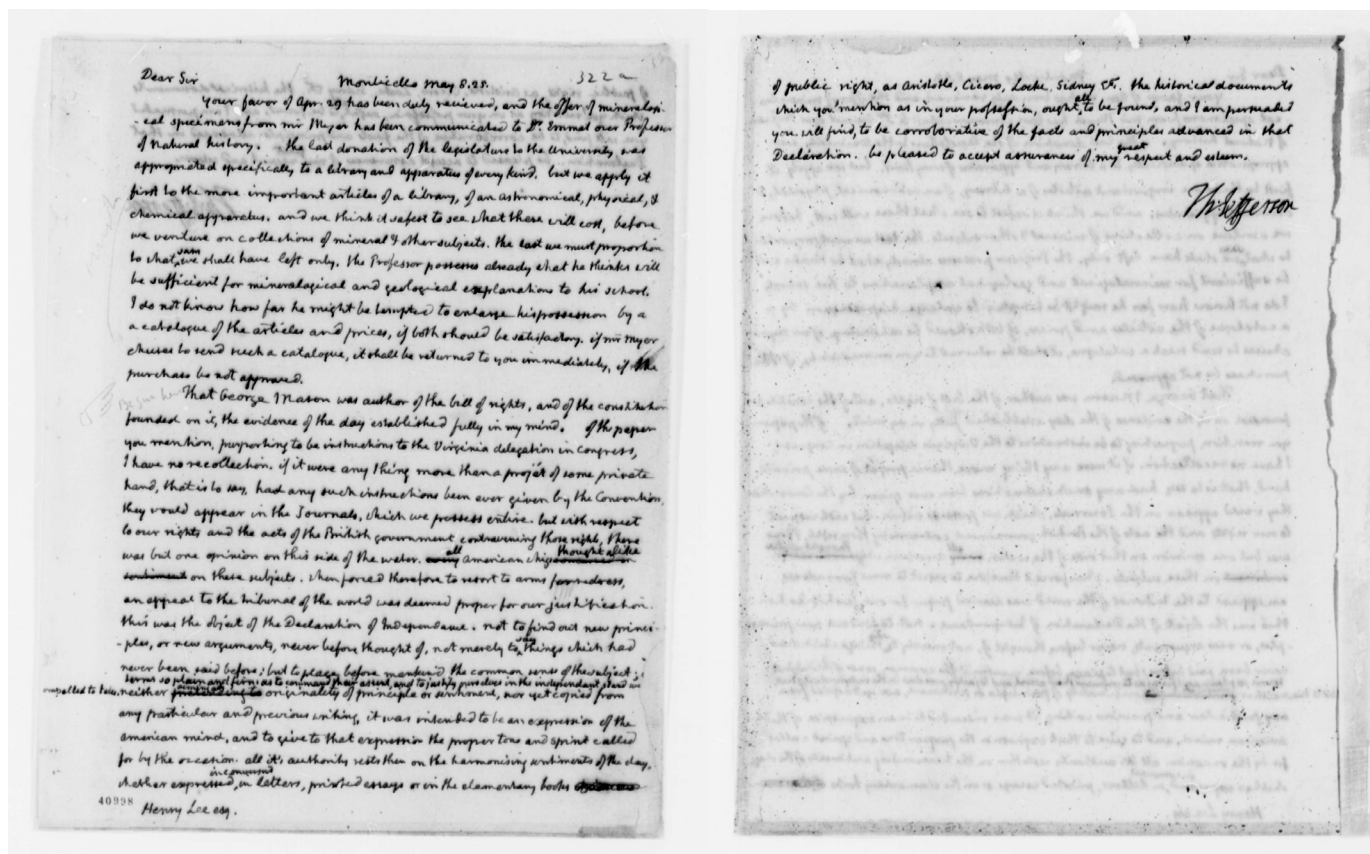
¹⁵ Here I have in mind his later work, see Rawls, *Political Liberalism*.

¹⁶ Take the Marxist understanding of societal conflict for a contrast: Marx sees the major conflict as between capitalists and working class; thinks no reconciliation is possible; but also that eventually a revolution will occur that leads to a new stage of societal organization. One might say that Rawls's understanding of conflict is a bit naïve by omitting an explicit formulation of racial tensions. And that is true, but the overall approach with its division between public-reason standpoint and comprehensive doctrines could readily be reformulated to be less naïve in that way.

¹⁷ *Publicly available values* (or public values) are those that can and must be shared among all citizens. Among them are those that inform the selection of principles of distributive justice, those related to freedom and equality of citizens, and to the fairness of the terms of social cooperation. Political equality, freedom of religion, efficiency of the economy, stability of the family (to help ensure reproduction from one generation to the next) and concern about a healthy environment are also among the public values. Non-public values in the relevant sense then are those that are internal to associations like churches or philosophical movements. *Public standards* are principles of reasoning and rules of evidence all citizens may reasonably endorse, standards drawing on common sense, generally-known facts and well-established and uncontroversial scientific insights. Justification should not depend on prophecy, or on disputed social-scientific theories (which would then be non-public standard).

¹⁸ <https://founders.archives.gov/documents/Jefferson/98-01-02-5212>; last accessed in August 2019.

¹⁹ That religion cannot play prominent roles in public life has implications how we should think about questions surrounding marriage, procreation and beginning- and end-of-life questions. But it is no straightforward process from that insight to certain conclusions since it requires sustained work to sort out which argumentative moves depend on religious assumptions and which ones do not. For the complexities involved, see e.g., George, *Conscience and Its Enemies*.



Thomas Jefferson to Henry Lee, Jr., May 8. -05-08, 1825

4. Natural Law, Natural Rights, Human Rights: Basic Ideas

Natural law, natural rights, and human rights are all based on the idea that human beings inhabit a cosmopolis, a shared space of humanity with its own moral principles. Those moral principles impose obligations to desist from wrong and do what is right in ways not always overridden by loyalties to local communities. As David Boucher says, "while natural rights and human rights are quite different, even though they may have similar objectives and policy goals, they are nevertheless related in that they are part of the same historical process by which the one develops into the other."²⁰

One way of understanding these notions is as follows. Natural law and natural rights are both grounded in ideas about a reality outside of human beings, and in that sense are closely related. Natural law captures principles of right and wrong without in the first instance formulating them in terms of what individuals can demand. By contrast, natural rights are possessed by the individuals that hold them. Human rights are formulated by way of reference to those who hold them, and thus without explicit reference to any ground outside of humanity based on which

individuals would hold them. The shift to a direct reference to human beings captures a profound post-Kantian skepticism about our ability to identify a safe foundation for morality outside of humanity.²¹

However, there is another way of understanding the notions of natural law, natural rights and human rights. In this second approach, the term "natural" (as it applies to laws or rights) contrasts with "associative" and "transactional." The manner in which natural laws or rights are derived does not dwell on membership in associations or transactions like promises or contracts that individuals have made. Instead, natural laws/rights have justifications that depend on attributes of persons and facts about the nonhuman world that are "natural" in a way that can be captured without making references to membership or transactions central in ways that undermine the universal acceptability of the rights thus generated. In this case, then, if human rights are fully defined and defended in terms of a common humanity, or a distinctively human life, they will be natural rights. In both ways of understanding "natural" rights,

²⁰ Boucher, *The Limits of Ethics in International Relations*, 245.

²¹ Kant's Categorical Imperative (the core element of his moral philosophy) grounds morality in rationality and thus derives it from within the human world (and potentially from within the world of other rational creatures), rather than from the world around them; see Korsgaard, Kant.

their force is meant to be recognizable by all reasonable people independently of provisions of positive law.²²

Today this second understanding of natural law/rights is more common among philosophers than the first. However, it normally does not advertise itself along such lines lest it be confused with the narrower tradition of natural law/rights thinking that dominated Western political thought for centuries, a tradition for which a grounding of morality in reality outside of humanity was essential. There are two especially influential brands of such thinking in Western intellectual history. One is a Thomist-Aristotelean account, the other an early modern account associated with Hugo Grotius, Thomas Hobbes, John Locke and others. The key difference is that for Aristotle and Aquinas, human sociability was prior to individual decisions, whereas for Grotius and Hobbes, civil (and thus genuinely human) society was solely the creation of an act of will, driven by instincts for survival. The natural place for humans to live, in Aristotle's mind, was the *polis*. Aquinas broadly agreed, *mutatis mutandis*. Natural law provided the principles by which the resulting living arrangements would be morally assessed.

By contrast, the "state of nature" in Hobbes, Grotius, or Locke is intended to demonstrate how something came to be, which could easily be otherwise, and which, in certain parts of the world, most obviously America and Africa, indeed was otherwise. They saw humans as autonomous individuals bearing natural rights. It was for the protection of these rights that people found political communities in the first place. Individuals would possess rights in ways in which natural law could not be possessed. But to underscore their grounding in something in reality outside of human choices, these rights would often be seen as inalienable. Voluntarily renouncing them was so contrary to human nature that no clear-minded person would do so.

Within both traditions a divine will played a central role, making nature the way it is and providing the ultimate source of obligations. A reference to God and the 'god-likeness' of humans would also support the kind of equality stated so distinctly in the Declaration of Independence. And crucially, the non-domination would come from the 'god-likeness' specifically that is an essential part of the Christian tradition, rather than from any more structural features of what natural law/rights is all about.²³

In more recent times a version of the Thomist-Aristotelean view was rearticulated in the work of Germain Grisez, John Finnis, Joseph Boyle, Robert George and others. Their "new natural law theory" (which they themselves do not think of as anything new, but as the correct way of reading Aquinas) insists that the primary meaning of "natural" in "natural law" is "reasonable." They introduce principles of practical reasonableness, with reasonableness in one's conduct being the highest human good. By appealing in such a manner to practical reason, they make sure they do not enlist an underlying description of human nature to immediately derive prescriptions (which would leave this approach vulnerable to the naturalistic fallacy).²⁴

The very fact that the latter are *human* rights rather than *natural* rights indicates a shift from a focus on the source of rights to those who hold them.

The natural law/rights tradition so understood (thus in the first sense I introduced at the beginning of this section) has an uneasy relationship with contemporary human rights. The very fact that the latter are *human* rights rather than *natural* rights indicates a shift from a focus on the source of rights to those who hold them, to sidestep the foundational questions central to this tradition. Elizabeth Anscombe famously insisted that without a continued belief in God as law-giver the notion of obligation becomes merely metaphorical, like saying criminality continues to exist in the absence of criminal law.²⁵ In much the same way, natural law advocates may well argue that talking about human rights without tying them to a foundation in reality outside of humanity, and ultimately to a divine will as source of obligation, renders human rights talk rather empty. And indeed, what defenders of human rights who wish to entirely relinquish the natural law/right tradition owe us is a different defense of human rights.

²² For this second understanding of natural, see Risse, *On Global Justice*, chapter 5. What this second understanding also allows is an understanding of human rights as overlapping with natural rights, in the sense that some human rights are natural, but not all. On the first understanding, it would not make sense to speak this way. This is very much the conception of human rights that I have proposed and introduce below.

²³ For a brief description of these two traditions, see Pagden, "Human Rights, Natural Rights, and Europe's Imperial Legacy."

²⁴ See Finnis, *Natural Law and Natural Rights*; Finnis, *Aquinas*. For extended defenses, see George, *In Defense of Natural Law*. For brief introductions, see Finnis, "Aquinas and Natural Law Jurisprudence"; George, "Natural Law, God, and Human Dignity."

²⁵ Anscombe, "Modern Moral Philosophy."

The ancient sources of the natural law/right tradition (think of Aristotle, the Stoics or Cicero) were formulated without access to a religious tradition organized around divine revelation. The point of reformulating these Greek and Roman sources within the Christian tradition of revealed religion was to argue that human reasoning could secure certain insights and prescriptions whose obligations were ultimately based on divine will. But while divine revelation might in principle communicate rather detailed prescription, natural law/rights reasoning would normally not be capable of securing prescription in any detail beyond a threshold of reasonable doubt. In fact, a second difference between traditional natural law/rights and human rights as grounded in the Universal Declaration of Human Rights indeed is that the kind of reasoning that renders natural law/rights plausible would normally only license rather generic and abstract prescriptions. The appeal to rights to life, liberty and the pursuit of happiness on the Declaration of Independence is paradigmatic in this regard. As opposed to that, the Universal Declaration presents thirty articles containing numerous rights that cannot plausibly be derived directly from human nature or basic human goods without detours through specifics about living arrangements. And it is, in particular, also this second point that creates uneasiness about human rights proliferation among natural lawyers.

5. Natural Law/ Rights and Public Policy

This last point also explains a basic tension in contemporary efforts to enlist natural law/rights reasoning in public policy. Either we are talking about natural law/rights in a traditional sense in ways that do not involve revelation, or in a sense that contrasts with associative and transactional rights; or else we fold in elements from Christian traditions (or other theologically approaches). In the former case, we only get to rather broad prescriptions. In the latter case, we can reach more specific conclusions, but only by enlisting foundations that can no longer be assumed to be broadly shared.

As far as human rights are concerned, various reactions are possible. One might say this means human rights overreach. Or one might say this means natural law/rights must be supplemented to account for human rights – which would presuppose that one can identify a point and purpose of human rights beyond what comes from natural law/rights. It lies in the spirit of Pompeo's efforts that he would favor the first reaction, and develop it by way of resisting the alleged human rights proliferation. The next section argues that the proper reaction is the latter rather than the former. But for now let me illustrate the point about

how generic natural law only leads to rather abstract prescriptions whereas it takes appeals to details of revealed religion to reach more specific prescriptions. I do so with a brief look at two passages from the work of Robert George, one of the most sophisticated Catholic intellectuals of our time and an advocate of the new natural law theory.

George writes that human rights exist “if it is the case that there are principles of practical reason directing us to act or abstain from acting in certain ways out of respect for the well-being and dignity of persons whose legitimate interests may be affected by what we do.”²⁶ And he agrees that there are such principles. The most straightforward examples he finds are the right not to be enslaved and the right of an innocent person not to be killed or maimed. When it comes to potential rights to education or healthcare, additional questions arise: who should provide precisely what to whom, and why, and with what priority, and why would it be the government that does so rather than any other entity? Such matters, says George, go beyond moral (natural law) principles and require prudential judgements – which speaks against listing them as human rights. Natural law reasoning by itself does not lead to rights to education or healthcare.

There is more to say here. In particular I would argue that a generic subsistence right would indeed plausibly be implied by natural law reasoning, and so in that sense there would be some kind of economic rights that would have to count as human rights and under particular political and economic conditions would imply also rights to education and health care.²⁷ But let us set that aside here. What seems plausible in any event that the kind of questions that George raises to create doubts about certain proposed rights counting as human rights would arise rather quickly once we go beyond plain subsistence. Natural law reasoning (in both the traditional sense of appealing to sources outside of humanity and the second sense of appealing to a distinctively human life) does have a way of remaining at rather high levels of abstraction.

However, in the domain of sexual relations George finds it easier to get quite specific. But to that effect he enlists a traditional Christian understanding of a dynamic unity constitutive of personhood. According to this understanding of personhood, a bodily self – that is, a soul deeply connected to a body – inhabits a personal body, a body deeply connected to a soul. This understanding stands in contrast with an understanding of personhood that has a non-bodily person – a detached soul – inhabit a non-personal body, a body the soul only temporarily inhabits and is not deeply connected with. The human person comes to be when the human organism does and survives until that organism does.

²⁶ George, “Natural Law, God, and Human Dignity,” 60f.

²⁷ For the classic formulation of the argument that security and subsistence rights stand and fall together, see Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*.

From this understanding of personhood, George derives rather strong implications: that marriage should be between one man and one woman because only in that way can the union between two persons (two dynamic unities of the sort explained) in a true sense happen; that gender transformations are immoral; and that abortions from the beginning on amount to the killing of a human being and should be treated accordingly. Different conclusions would be forthcoming were we to adopt an understanding of personhood that sees less of a unity between body and soul. For instance, it would then be more plausible for the soul to decide that it wants a body with a different sexuality than assigned to it at birth.²⁸

The details need not concern us, but what is crucial is that the specificity of these conclusions depends on the adoption of a theme from the Christian tradition. Again, this goes to illustrate that natural law/rights reasoning in any of the senses we encountered here will remain at a rather high level of abstraction and generality unless elements from revealed religion (or in any event, other types of reasoning) are added that have less general appeal than the basis for the natural law/rights reasoning itself aims to have.

Let us take stock. I have assumed that Pompeo hopes his Commission on Unalienable Rights will support the following positions: (1) that there is too much human rights proliferation, and once we get things right, social and economic rights as well as gender emancipation and reproductive rights no longer register as human rights; (2) that religious liberties need to be strengthened under the human rights umbrella; and (3) that the unalienable rights that should guide American foreign policy neither need nor benefit from any kind of international oversight or even an international structure within which they are in some way grounded. We have seen that the Declaration of Independence does not help with these goals. Natural law as such does support a skeptical attitude towards rights proliferation. (To be sure, the Declaration of Independence stands in the natural law tradition, but builds in a strong notion of equality as non-domination, with a clear mandate of implementing that idea in subsequent constitutional and legal design.) But to get to specific rights concerning gender emancipation and reproduction, or also to a strengthening of religious liberties along the lines Pompeo would appreciate, we would need to add elements from revealed religion with less broad appeal than natural law itself.²⁹ And that natural law does not help with (3) lies in its very nature.

Natural law, as such, mostly helps to substantiate Pompeo's concern with proliferation. But one must then ask: if natural law only delivers rights at a high level of abstraction (along the lines of "life, liberty and the pursuit of happiness"), does this mean the more comprehensive list provided by the Universal Declaration and subsequent developments overreaches? Or does it instead mean something is wrong with natural law? And if the latter, does natural law need to be supplemented with something else, or is an entirely different approach to human rights needed?

6. Understanding Human Rights Beyond Natural Law/Rights

So indeed, one response to the fact that natural law/rights will deliver a much more limited set of rights than the contemporary human rights movement with its grounding in the Universal Declaration recognizes is to adopt a revisionist attitude: there are too many human rights, and we need to cut down on that list substantially. That would be an effort to limit human rights to a list of genuinely unalienable rights. And then it would be an open question just what the shape of that list would be (and it would be rather implausible that economic rights fall off the radar altogether, that strong religious liberties appear on the list, and that relationships and reproduction would be regulated in the spirit of an old-fashioned gender binary). But there are three alternatives to that approach, each of them more plausible than this move.

The generic motivation for all three of these views is that in our intensely interconnected world where governance has lots of possibilities that can be developed in various ways and create their own winners and losers, we need more moral clarity than what a limited understanding of natural law/rights can provide. In other words, there are more questions that need answers than such an approach can offer. And if we need to appeal to rights that are not strictly unalienable in a plausible sense of that term, then this would be a reasonable price to pay in light of this need for moral clarity in an intensely interconnected world. The sociological realities of the world must be recognized. The rights that would be forthcoming in such ways are by no means "ad hoc" rights; they are just not rights that can be derived either by appeal to any source of morality outside of humanity or by appeal to a distinctively human life. But in an intensely interconnected world there is no reason to expect that rights so derived would deliver all the rights we need to live together.

²⁸ George, *Conscience and Its Enemies*, Part III; George, *In Defense of Natural Law*, Part II.

²⁹ That is a topic we have not discussed in the last two sections, but it should be plausible enough that in a highly pluralist society the need to curtail the relevance of religion in public life could only be superseded by appealing directly to the superiority of one religious tradition over another since only chaos would ensue if one granted the same status to all religions.

If natural law only delivers rights along the lines of “life, liberty and the pursuit of happiness,” does this mean the more comprehensive list provided by the Universal Declaration and subsequent developments overreaches?

Instead of thinking of human rights exclusively as rights individuals hold by virtue of being human, one could understand them as those rights for which there is a genuinely global responsibility.

The first alternative approach is to stick to a natural law/rights understanding of human rights but to import factual information about both domestic and international society to assess what possession of rather generic rights amounts to within contemporary economic and political structures. For instance, it is straightforward to see that a meaningful right to the pursuit of happiness would amount to much higher expectations on government in the 21st century with its intense interconnectedness than it did in the late 18th century.

A second alternative is to move away from a natural law/rights understanding of human rights altogether and instead adopt what is called a “practical,” “political,” “functional,” or “institutionalist” understanding of them. According to such views, it is the *purpose* of human rights talk in international discourse and practice (rather than any *foundations* for human rights) that defines the idea of human rights. The most plausible example of such a purpose would be the creation or preservation of an international order in which peaceful democratic societies can flourish. Human rights would be defined as those rights that are necessary to that effect.³⁰

The third approach is one I have pursued myself, to think of human rights in ways that supplements the natural rights approach. For natural rights (for present purposes understood by way of contrast with associative and transactional rights), all human beings could be duty-bearers: the implementation is a global responsibility. But we may ask: how *else* could rights become a global responsibility? Instead of thinking of human rights exclusively as rights individuals hold *by virtue of being human*, one could understand them as those rights for which there is a genuinely global responsibility. Or as one may say, one could think of human rights as *membership rights in the world society*. Human rights thus understood are rights that are indeed accompanied by genuinely global responsibilities,

rather than rights people would hold everywhere but that are accompanied only by respectively local responsibilities. (Rights of that second sort would be rights of citizens and thus a matter of social justice, rather than human rights concerns.)³¹

Such rights derive from different sources, one of which is the distinctively human life identified by natural law/rights reasoning. Natural law/rights reasoning does not appeal to contingencies other than laws of nature, general facts about human nature, or the fact that certain beings are human. A conception in terms of membership in the world society, by recognizing other sources, uses contingent facts more freely, by way of enlisting features of an empirically contingent but relatively abiding world order. Additional sources would include enlightened self-interest (one must show that certain matters give rise to rights domestically, and a self-interest argument would then show why this matter is globally urgent); interconnectedness (something may be globally urgent if somehow the world society or global order as such is causally responsible for certain problems for people in country A for which an assignment of rights would be the solution); and finally, one way in which concerns can become common within a political structure is for them to be regarded as such by an authoritative process (we can enlist procedural sources to argue that human rights express membership “as the global order sees it”).³²

Recall again that I have assumed that Mike Pompeo hopes his Commission will support the following positions: (1) that there is too much human rights proliferation, and once we get things right, social and economic rights as well as gender emancipation and reproductive rights no longer register as human rights; (2) that religious liberties need to be strengthened under the human rights umbrella; and (3) that the unalienable rights that should guide American foreign policy neither need nor benefit from any kind of international oversight or even an international

³⁰ This is done for instance in Beitz, *The Idea of Human Rights*; Rawls, *The Law of Peoples*. Beitz offers the most sophisticated version of this approach. For the ongoing debate between “moral” and “political” approaches to human rights, see Etinson, *Human Rights*.

³¹ For the notion of world society, see for instance the work of John Meyer, e.g., Krücken and Drori, *World Society*. For the connection between world society theory and various questions of philosophy, including but not limited to human rights, see Meyer and Risse, “Thinking About the World: Philosophy and Sociology.” See also Risse, *On Justice: Philosophy, History, Foundations*.

³² One other source that I have done much work with over the years is humanity’s collective ownership of the earth, but that topic is harder to motivate with the present space limitations; see Risse, *On Global Justice*, Part II. For a short summary of this whole approach, see Risse, “Human Rights as Membership Rights in the World Society.”

structure within which they are in some way grounded. Under my own conception (3) and (2) would be false. This account too would be skeptical of human rights proliferation but would have more materials to work with to show that certain rights actually are rights. Basic economic rights would definitely register. Other rights that at this stage are contested in their nature as human rights could be described in terms of the procedural sources: processes are underway to make sure these rights are properly accepted as human rights (in ways beyond what would be involved in their acceptance as civil rights).³³

7. Conclusion

For the sake of the argument and based on Pompeo's public statements on the matter I have assumed that he hopes (1) – (3) (as just reiterated at the end of the previous section) will be substantiated by appeal to the Declaration of Independence as well as to natural law. I have argued that the Declaration is of no help with any of this, owing to its distinctively cosmopolitan orientation and its strong understanding of equality as non-domination that in turn leads to a strong mandate to implement non-domination in legislation and social practices, a mandate to which those who are pledge to the Declaration devote their lives, fortunes and honor.

Natural law can be understood in either the traditional sense of aiming to locate foundations for moral principles in reality outside of human nature and choice, or the more contemporary sense of drawing on a distinctively human life in ways that derives rights in ways that do not turn on considerations of an associative and transactional manner. Either way, natural law/rights does generate concerns about non-proliferation and supports a curtailing of any list of human rights (though not all the way down to excluding all economic rights, including a basic right to subsistence). But we have also noted that natural law advocates the need to enlist considerations beyond those provided by natural law/rights to reach more specific conclusions, such as conclusions about marriage or reproduction.

Natural law by its very nature (no pun intended) is global in reach. But in our times of intense global interconnectedness it can only mean to ignore our economic and political reality to dismiss all rights that cannot be derived by natural law/rights reasoning as "ad hoc." So, appeals to natural law are of some help with Pompeo's purposes, but only in ways that reveal its limitations as foundation for foreign policy in our interconnected age.

APPENDIX A:

The Universal Declaration of Human Rights (abbreviated)

1. Right to Equality
2. Freedom from Discrimination
3. Right to Life, Liberty, Personal Security
4. Freedom from Slavery
5. Freedom from Torture and Degrading Treatment
6. Right to Recognition as a Person before the Law
7. Right to Equality before the Law
8. Right to Remedy by Competent Tribunal
9. Freedom from Arbitrary Arrest and Exile
10. Right to Fair Public Hearing
11. Right to be Considered Innocent until Proven Guilty
12. Freedom from Interference with Privacy, Family, Home and Correspondence
13. Right to Free Movement in and out of the Country
14. Right to Asylum in other Countries from Persecution
15. Right to a Nationality and the Freedom to Change It
16. Right to Marriage and Family
17. Right to Own Property
18. Freedom of Belief and Religion
19. Freedom of Opinion and Information
20. Right of Peaceful Assembly and Association
21. Right to Participate in Government and in Free Elections
22. Right to Social Security
23. Right to Desirable Work and to Join Trade Unions
24. Right to Rest and Leisure
25. Right to Adequate Living Standard
26. Right to Education
27. Right to Participate in the Cultural Life of Community
28. Right to a Social Order that Articulates this Document
29. Community Duties Essential to Free and Full Development
30. Freedom from State or Personal Interference in the above Rights

³³ Chapters 12 and 13 in *On Global Justice* spell this out for a human right to essential pharmaceuticals and for labor rights as human rights. I am genuinely not sure about gender emancipation and reproductive rights understood as human rights. They might be better understood as domestic civil rights. But my approach can also accommodate a global movement to see them as human rights in terms of efforts to establish new human rights in the right procedural way.

Literature

- Allen, Danielle. *Our Declaration: A Reading of the Declaration of Independence in Defense of Equality*. New York: Liveright, 2015.
- Anscombe, Elizabeth. "Modern Moral Philosophy." In *Virtue Ethics*, edited by Roger Crisp and Michael Slote, 26–44. Oxford; New York: Oxford University Press, 1997.
- Armitage, David. *The Declaration of Independence: A Global History*. Cambridge: Harvard University Press, 2008.
- Beitz, Charles R. *The Idea of Human Rights*. Oxford: Oxford University Press, USA, 2011.
- Boucher, David. *The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition*. Oxford: Oxford University Press, 2009.
- Cranston, Maurice. *What Are Human Rights?* London: Bodley Head, 1973.
- Dupont, Christian Y., and Peter S. Onuf, eds. *Declaring Independence: The Origin and Influence of America's Founding Document*. Charlottesville, Va: Library, 2008.
- Engel, Jeffrey A., ed. *The Four Freedoms: Franklin D. Roosevelt and the Evolution of an American Idea*. Oxford; New York: Oxford University Press, 2015.
- Etninson, Adam, ed. *Human Rights: Moral or Political?* Oxford: Oxford University Press, 2018.
- Finnis, John. "Aquinas and Natural Law Jurisprudence." In *The Cambridge Companion to Natural Law Jurisprudence*, edited by George Duke, 17–56. New York: Cambridge University Press, 2017.
- . *Aquinas: Moral, Political, and Legal Theory*. Oxford England; New York: Oxford University Press, 1998.
- . *Natural Law and Natural Rights*. Oxford: Clarendon Press, 1980.
- Fliegelman, Jay. *Declaring Independence: Jefferson, Natural Language, and the Culture of Performance*. Stanford: Stanford University Press, 1993.
- George, Robert P. *Conscience and Its Enemies: Confronting the Dogmas of Liberal Secularism*. Wilmington: Intercollegiate Studies Institute, 2016.
- . *In Defense of Natural Law*. Oxford; New York: Oxford University Press, 2001.
- . "Natural Law, God, and Human Dignity." In *The Cambridge Companion to Natural Law Jurisprudence*, edited by George Duke. New York: Cambridge University Press, 2017.
- Glendon, Mary Ann. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House, 2002.
- . *Traditions in Turmoil*. Ann Arbor, MI: Sapientia Press Ave Maria University, 2006.
- Griffin, James. *On Human Rights*. Oxford: Oxford University Press, 2008.
- Jayne, Allen. *Jefferson's Declaration of Independence: Origins, Philosophy and Theology*. Lexington: University Press of Kentucky, 1998.
- Korsgaard, Christine M (ed.). *Kant: Groundwork of the Metaphysics of Morals*. Cambridge: Cambridge University Press, 2012.
- Krücken, Georg, and Gili S. Drori, eds. *World Society: The Writings of John W. Meyer*. Oxford: Oxford University Press, 2010.

Lepore, Jill. *These Truths: A History of the United States*. S.I.: W. W. Norton & Company, 2019.

———. *This America: The Case for the Nation*. New York: Liveright, 2019.

Maier, Pauline. *American Scripture: Making the Declaration of Independence*. New York, NY: Vintage, 1998.

Meyer, John W., and Mathias Risse. "Thinking About the World: Philosophy and Sociology." *Carr Center Discussion Paper Series 2018-005*, 2018.

Nickel, James. "Human Rights." In *Stanford Encyclopedia of Philosophy*, 2019. <https://plato.stanford.edu/entries/rights-human/>.

Pagden, Anthony. "Human Rights, Natural Rights, and Europe's Imperial Legacy." *Political Theory* 31, no. 2 (2003): 171–99.

Pompeo, Michael R. "Unalienable Rights and U.S. Foreign Policy; The Founders' Principles Can Help Revitalize Liberal Democracy World-Wide." *Wall Street Journal*. July 7, 2019.

Posner, Eric. "The Administration's Plan to Redefine 'Human Rights' Along Conservative Lines." *Washington Post*. June 14, 2019.

———. *The Twilight of Human Rights Law*. Oxford; New York: Oxford University Press, 2014.

Rawls, John. *Political Liberalism*. Expanded edition. New York: Columbia University Press, 2005.

———. *The Law of Peoples: With "The Idea of Public Reason Revisited."* Cambridge: Harvard University Press, 2001.

Risse, Mathias. "Human Rights as Membership Rights in the World Society." In *Human Rights, Democracy, and Legitimacy in a World of Disorder*, edited by Silja Voeneke and Gerald Neuman. Cambridge: Cambridge University Press, 2018.

———. *On Global Justice*. Princeton: Princeton University Press, 2012.

———. *On Justice: Philosophy, History, Foundations*. Cambridge: Cambridge University Press, 2020.

Roth, Ken. "Beware the Trump Administration's Plans for 'Fresh Thinking' on Human Rights." *Washington Post*. July 11, 2019.

"Rowing about Rights." *Economist*, August 10, 2019.

Shue, Henry. *Basic Rights: Subsistence, Affluence, and US Foreign Policy*. Princeton: Princeton University Press, 1980.

Tasioulas, John. "Are Human Rights Taking Over the Space Once Occupied by Politics?" *New Statesman*, August 26, 2019. <https://www.newstatesman.com/2019/08/are-human-rights-taking-over-space-once-occupied-politics>.

Thomas Jefferson to Henry Lee, Jr., May 8. -05-08, 1825. Manuscript/Mixed Material. Retrieved from the Library of Congress. <https://www.loc.gov/item/mtjbib025396/>.

West, Thomas G. *The Political Theory of the American Founding: Natural Rights, Public Policy, and the Moral Conditions Of Freedom*. Cambridge: Cambridge University Press, 2017.

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