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Making sense of the State Department's new Commission on Unalienable Rights

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When Thomas Jefferson declared that we're all born with unalienable natural rights to life, liberty, and the pursuit of happiness, little could he have known that more than 200 years hence, another secretary of state (Jefferson later became our first) would create a Commission on Unalienable Rights to provide the secretary with "fresh thinking about human rights" and propose "reforms of human rights discourse where it has departed from our nation's founding principles of natural law and natural rights."

The reaction to Secretary of State Mike Pompeo's announcement late last month was swift, especially on the Left. Was this move a response to the United Nations' obsession with so-called economic and social rights — rights to jobs, housing, healthcare, and the like — which dominate international human rights discourse and practice today? Or was this talk of our nation's founding principles, natural law, and natural rights actually code, signaling that in the future the State Department would focus less on protecting women's and LGBT rights? Or was it both?

Let's take those concerns in order, after a little theory.

Although the secretary speaks indifferently of natural law and natural rights, they're not the same. True, natural rights emerged historically from natural law. Consistent with a prominent religious strain of natural law still evident, Jefferson spoke in the Declaration of Independence of "the Laws of Nature and of Nature's God" and also of our rights as "endowed by [our] Creator." But those theological invocations were exceedingly general, suited properly for the varied beliefs of his day. In truth, a product of the Enlightenment (English, Scottish, and continental), America stands basically in the natural rights tradition.

Properly understood, our natural rights are grounded not in prescriptive natural law, handed down by a lawgiver, much less in any religious beliefs, but in universal human reason, as John Locke and most of the Founders repeatedly held. They held too that liberty—the right to pursue happiness by our own subjective lights, consistent with the equal rights of others—was the very essence of our natural rights, as the Declaration of Independence's famous second paragraph makes clear. Rights come first: the equal rights of all, no one bound to another; politics and law second, to secure those rights.

That brings us to our first concern: Might this commission question modern social and economic rights? It might, for they're not natural rights. They're created through legislation, requiring redistributive schemes that bind some to others. Unlike natural rights to freedom, they can't be made universal.

Were that to happen, it would be good. Found in the U.N.'s Universal Declaration of Human Rights, these "entitlements" arose from political compromises between postwar progressives and some of the world's worst tyrannies. But as demand for them grows, governments grow and our natural right to liberty yields. More sinister still, the original compromises that created these "human rights" have enabled totalitarian regimes, sitting at the human-rights table, to boast about these "rights" as evidence of their legitimacy.

But what about women's and LGBT rights, the wider concern over this commission? No surprise, since Princeton's Robbie George, a noted natural law theorist, co-founder of the National Organization for Marriage, and a leading voice in Catholic circles who has long argued against gay rights, played a central role in the commission's creation. If the commission urges the secretary to downplay gay rights, that could seriously hamper the department's human rights work, especially in countries with draconian anti-gay laws and practices.

Here the distinction between natural law (especially if theologically based) and natural rights to liberty looms large. It's quite possible, for example, to square gay rights and religious liberty, as we at the Cato Institute did with amicus briefs defending, on equal protection grounds, the liberty of same-sex couples to marry and, later, the liberty of bakers, on religious freedom grounds, to decline to participate in same-sex weddings. The basic principle in both cases was the same: liberty.

Turning to women's rights, the difficulty on abortion, at least, concerns the question of whether the unborn child has rights. For that reason, our so-called Mexico City policy conditions the receipt of U.S. funds by foreign nongovernmental organizations on their certifying that they will not promote abortion as a method of family planning. Yet here too the rationale is liberty: There's no right to the receipt of such funds, but neither should American taxpayers, like the bakers just noted, be compelled to subsidize practices they abhor. Abortion aside, much of the remaining women's-rights agenda should find ample support in the natural right to liberty.

In sum, this endeavor to seat human rights discourse in America's founding principles is important, but it must be done right, failing which it will undermine those principles.

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