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# THE INTELLECTUAL ORIGINS OF THE CONSTITUTION: A LAWYERS' GUIDE TO CONTEMPORARY HISTORICAL SCHOLARSHIP

*Suzanna Sherry\**

*In the past twenty years, historians have greatly enriched our knowledge of the eighteenth-century ideas that underlie the Constitution. Much of this scholarship has been devoted to rediscovery of eighteenth century "republicanism" and an examination of its role in the drafting and ratification of the Constitution. Some legal scholars, including Frank Michelman, Cass Sunstein, and Mark Tushnet, have begun to explore the implications of republicanism for modern constitutional law. Yet, for most teachers of constitutional law, the historical literature on republicanism has been unfamiliar and fairly inaccessible. The following article, which is an adaptation of the introductory chapter of a forthcoming textbook on the history of the Constitution,\*\* attempts to synthesize the historical literature. We reprint it here in the hope that readers will be encouraged not only to think about the relevance of the "new learning" to contemporary constitutional concerns, but also to explore the historical works for themselves.*

The historical roots of the American Constitution begin in Britain. The Magna Carta was Britain's only written form of constitution for almost five hundred years, from 1215 until the 1689 Bill of Rights. During those centuries a tradition of constitutionalism nevertheless flourished. Those opposed to the exercise of royal or parliamentary authority often based their arguments on Britain's unwritten "ancient constitution," or common law, custom, and tradition. They sought to establish that the king's own powers were derived from, and thus subordinate to, this earlier law. Though these arguments were usually unsuccessful, the notion of constitutional limitations on governmental authority became part of English rhetoric and political philosophy. By the beginning of the seventeenth century, appeal to the "ancient constitution," which had allegedly existed since "time immemorial," was a standard form of political argument.

The momentous events of the seventeenth century catapulted

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\*\* D. FARBER & S. SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION (1989) (forthcoming from West Publishing Co.).

English constitutionalism into the modern era, but in forms ultimately unacceptable to the American colonists. The Interregnum, the Glorious Revolution of 1688 (ending the reign of the Stuarts), and the 1689 Bill of Rights and its companion acts, settled both the limits on royal prerogative and the absolute supremacy of Parliament. Limited government came to mean the Crown limited by Parliament and the rights of the people safeguarded by the vaunted "mixed constitution." A balance among the monarchic (Crown), aristocratic (Lords), and democratic (Commons) elements was thought to ensure the preservation of liberty, and no further checks on parliamentary supremacy were thought necessary. The British constitution was thus both a description of existing institutions—including laws, customs, and traditions as well as the balance of power—and a declaration of fundamental principles. Neither aspect of the constitution served much to limit Parliament.

Throughout this period, political philosophers tried to spell out the principles on which the system was (or in their view should have been) based. The Enlightenment's rationalist rejection of the divine right of kings, Cromwell's assumption of power, and the Glorious Revolution's ouster of the Stuarts, opened new avenues for discussion about notions of sovereignty and power. Competing visions of both the basis for or origin of sovereignty (was sovereignty based on raw power or consent of the governed?) and its ultimate location (did it reside in Parliament or in the constitution?), led Hobbes and Locke, Blackstone and Bolingbroke, Harrington and Montesquieu, to devise and refine intricate and conflicting theories of government based on rational Enlightenment principles, rather than on the pre-Enlightenment religious tradition.

The American colonies, settled in the early seventeenth century and coming of political age in the eighteenth, thus inherited diverse and sophisticated theories of government. Throughout the eighteenth century, however, American development and interpretation of these political theories began to diverge from their British sources. Although the Americans relied heavily on British thinkers, they were selective in their philosophical inspirations and radical in their applications.

Three basic circumstances shaped the prism through which the colonists viewed British political philosophy: political exclusion, geographic situation, and the resulting perception of cultural uniqueness. Together, these factors allowed (and sometimes demanded) that Americans develop their own political culture.

The colonies' political and geographic isolation led them, sometimes in spite of their own intentions, to establish cohesive

communities that were often more egalitarian than the relatively hierarchical English structures. It led them, especially after the mid-1760s, to favor theories that stressed natural law rather than civil or socially-created law, in order to dispute the validity of their political dependency. It led them to embrace English opposition theories that rejected the conventional view of absolute legislative supremacy. It evoked a new emphasis on a "constitution" as a limiting principle, gradually superseding its traditional character as a description. It enabled them to adopt Enlightenment rationalism with enthusiasm by ignoring or rejecting aspects inconsistent with their circumstances.

Separated from England by a vast ocean, confident that the continent would yield virtually unlimited land, and oppressed by English rule but largely unencumbered by the political realities of large-scale self-government, the colonists came to view themselves and their institutions as uniquely virtuous and uniquely rational—and in particular peril from the corrupting force of England. Echoing the sentiments of many of his countrymen, John Adams wrote in 1765:

The liberties of mankind and the glory of human nature is in their keeping. America was designed by Providence for the theatre on which man was to make his true figure, on which science, virtue, liberty, happiness, and glory were to exist in peace.<sup>1</sup>

By the 1760s, this divergence of colonial political theory from its British antecedents began pointing ineluctably in the direction of separation from Great Britain. By the time of the Revolution, the American social and political structure so differed—in both the ideal and the real forms—from that of Great Britain, that Americans could view themselves as restoring rather than destroying, maintaining rather than altering, political liberty and the social order through revolution. This essay tells the story of these interwoven strands of political philosophy and their uniquely American interpretations. It is the story that forms the background against which the American Constitution was written and ratified.

Contemporary historians disagree about the amount of influence various philosophical sources exerted on Americans between 1760 and 1787. Until the late 1960s, most historians thought that the philosophical inspiration for the American Revolution came almost solely from the work of John Locke. The Constitution was similarly seen primarily as a product of Lockean liberalism. Depending on the historian's own political views, the Constitution was

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1. DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 282 (L. Butterfield, L. Faber & W. Garrett eds. 1961).

sometimes described as a selfish attempt to protect private property and sometimes as the brilliant start of the capitalist individualism that made America great, but always as traceable almost directly to John Locke.

Beginning in 1967 with the publication of Bernard Bailyn's *The Ideological Origins of the American Revolution*, historians began identifying additional philosophical sources for both the Revolution and the Constitution. For the last two decades, many historians have argued that classical republicanism, especially in the form passed down through English Opposition thought of the seventeenth and early eighteenth century, had a greater intellectual influence on the American Revolution. While this "republicanism" (both "republicanism" and "liberalism" are defined later in this essay) is currently the predominant school of thought, some historians still stress Locke's influence to a greater or lesser degree. Moreover, there is great debate about the timing of the transformation from classical republicanism to Lockean liberalism; some historians believe it was virtually complete by 1787 and others contend that even today America is still at least somewhat republican.

In this essay, I have chosen to present a version of the most popular historiographical approach: that classical republicanism was the most significant influence until after the Revolution, but by 1787 Lockean liberalism overshadowed republican sentiment. I have also tried, however, to give fuller descriptions of the various influences in order to allow readers to draw their own conclusions in tracing the different schools of thought reflected in our political and constitutional system.

Eighteenth-century political writers could draw on a familiar but diverse body of works. This diversity is perhaps best illustrated by the contents of Thomas Jefferson's library. Jefferson was almost certainly the best-read American of the eighteenth century. His library contained almost 5000 volumes in 1815 when he sold the entire collection to the Library of Congress. It is a tribute to him, and an illustration of the many influences on the American Constitution, that his library contained the work of every writer mentioned in this essay. While his collection was unique, it contained works that were well-known sources of inspiration for many Americans. Speaking the eighteenth-century language of corruption and conspiracy, of virtue and vigilance, Americans drew on a multitude of philosophical sources to construct their own science of politics.

They learned perhaps the most from the "Country" or Opposition party of England. Members of that party, which existed in various forms from the early seventeenth century through the

tumultuous period of the American Revolution, looked primarily to James Harrington (the author of a 1656 Utopian tract titled *The Commonwealth of Oceana*) for their ideas. Elements of Harrington's philosophy can be traced back through Niccolo Machiavelli to the ancient republics, and forward through John Trenchard and Thomas Gordon (the authors of *Cato's Letters*, published between 1720 and 1724), Viscount Bolingbroke (Henry Saint-John) and James Burgh. Throughout most of the seventeenth century, the Opposition party consisted primarily of Whigs opposed to royal encroachments on parliamentary authority. After the Glorious Revolution of 1688 removed the Stuarts, put the Whig party in power, and established the supremacy of Parliament, the "Country" party included those few Whigs who felt not enough had been done, and some Tories who opposed the new "Court" party now in power.

Variously called Old Whigs, Real Whigs, and Commonwealthmen, the Opposition party had few adherents in Great Britain after the Glorious Revolution of 1688. Whig ideas were tremendously influential in America, however: in the pamphlets that served as the primary vehicle of popular political expression during both the pre-Revolutionary period and the ratification struggle after the Constitutional Convention, many writers took either Whiggish pseudonyms or, in imitation of the English Whigs, classical ones.

A related source of American political ideas was the Continental Enlightenment philosophers. Only Montesquieu and Rousseau are well known today, but Americans also read and relied on such forgotten Enlightenment figures as Grotius, Pufendorf, Vattel and Burlamaqui. Montesquieu—who was the most frequently cited of any philosopher during the ratification period—in turn drew on the English Bolingbroke as well as on his own Continental contemporaries.

One of the more influential philosophers is also one of the most difficult to categorize. John Locke, whose *Two Treatises of Government* was first published in 1690, has been allied both with and against some of the Old Whigs. He has been hailed as the spirit of 1776 but not of 1787, as the spirit of 1787 in contrast to 1776, of both and of neither. His work has been praised as bringing the Enlightenment to America, castigated as leading Americans into a narrow and short-sighted vision of politics, and relegated to the status of a minor influence on the revolutionary or constitutional periods. Whether or not Americans drew their inspiration directly from his writings, Locke's ideas wound through American thought

of both periods. Different aspects of his theories were prominent at different times.

Finally, Americans looked to the magnificent English common lawyers: Coke, Bracton, and Blackstone. From the early seventeenth century to the eve of the Revolution, Americans could turn to these English lawyers, judges, and commentators for a principled historical explication of English common law. Many prominent figures of the Revolution and more than half the delegates to the Constitutional Convention were lawyers or legally trained—and to Americans in the latter half of the eighteenth century, to be legally trained meant to be steeped in the thought of English common law. The most important lesson Americans learned from the common lawyers, however, was methodological rather than substantive. They admired Blackstone's *Commentaries*, for example, not so much for its content as for its scientific method of drawing general principles from the vast body of judicial decisions.

These different strands of thought contained myriad variations and nuances, and were often inconsistent with one another. Americans added their own inventions. From this seamless web grew more theories, with different patriots espousing different views at different times. The history of the American Constitution is in large part the history of ideas. The rest of this essay surveys the ideas that inspired America between 1774, when the Revolution began to seem inevitable, and 1787, when fifty-five men sat down in Philadelphia to write a constitution.

## I

For most eighteenth-century Americans, politics could be reduced to its essential character: a constant struggle between power and liberty. They looked at history—at the history of the ancient republics, at the history of Europe, and, increasingly, at the history of England—and saw a pattern of government tyranny stifling the liberty of the people. The source of this tyranny was corruption. Until the early 1770s, Americans considered themselves fortunate to be under English rule, for the English “mixed constitution” was a safeguard against corruption. More and more influenced by the “Country” party, however, Americans began to see corruption even in England. In 1774, a writer in the *Philadelphia Pennsylvania Packet* described the English constitution as “the mighty ruin of a once noble fabrick.”<sup>2</sup> Such was the result of corruption.

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2. *Philadelphia Pennsylvania Packet*, Aug. 8, 1774, quoted in G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 32 (1969).

Primarily derived from Opposition theory, the term corruption did not have only the rather limited meaning that we assign it today, of moral subversion. It meant virtually any distortion of the proper balance of power, orchestrated by forces within the government. Any part of government could become corrupt. Parliament was corrupt when it became dependent on the King, whether that dependency arose from individual indebtedness or institutional subordination. Evidence of the Crown's corruption lay in its increasing use of patronage, ministerial persuasiveness and electoral influence—rather than the constitutionally mandated (but clumsy) “prerogative”—to achieve its goals notwithstanding parliamentary objections. A writer in the Boston *New England Chronicle* described royal corruption:

It is upon this principle that the King of Great-Britain is absolute; for though he doth not act without the parliament, by places, pensions, honours and promises, he obtains the sanction of the parliament for doing as he pleases. The ancient form is preserved, but the spirit of the constitution is evaporated.<sup>3</sup>

The language of the colonists, like the writings of the Opposition party, was peppered with code words for the symptoms of corruption: placemen, standing armies, bishops, aristocrats, luxury, monopolies, stock-jobbers. Although each term originally had a specific meaning, they came to be used almost as epithets, hurled at enemies for their emotive effect.

Although English and American Whigs thought that power tended inevitably toward corruption, the corrosive effect of corruption was not viewed as random or unchanneled. Taught by the Enlightenment to reject the workings of Providence as a sufficient explanation, eighteenth-century writers blamed the ways of men. Americans, like their “Country” teachers, saw in the English government a deliberate conspiracy against liberty. Thomas Jefferson wrote of “a deliberate, systematical plan of reducing us to slavery.”<sup>4</sup> William Henry Drayton described “a conspiracy against the rights of humanity.”<sup>5</sup> As every modern criminal lawyer knows, the existence of a conspiracy allows every false move to be branded as a high crime. Thus the American colonists were suspicious or “jealous” of every parliamentary or royal act, however minor, that might be taken as a step in the conspiracy.

Good Whigs on both sides of the Atlantic knew that certain

3. Boston *New England Chronicle*, Sept. 5, 1776, quoted in G. WOOD, *supra* note 2, at 33-34.

4. Jefferson, A Summary View of the Rights of British America (1774), in 1 PAPERS OF THOMAS JEFFERSON 125 (Julian Boyd ed. 1955) [hereinafter PAPERS OF JEFFERSON].

5. Charge to the Grand Jury, Charleston, Apr. 23, 1776, quoted in G. WOOD, *supra* note 2, at 39.



forms of government provided some protection against corruption. Any device that made the legislature more accountable to its constituents offered some hope. Members of the Opposition party called for shorter parliamentary sessions, which would have afforded a more frequent opportunity for the electors to throw out corrupt legislators. They also demanded the right to instruct their representatives, in order to control their votes on particular issues.

Another method of discouraging legislative corruption lay in the nature of the legislature itself. The English Parliament had, over the centuries, become less directly representative. Rather than a group of individual members speaking for their local constituents, Parliament had become a national legislature. Edmund Burke described it favorably:

Parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole, where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole.<sup>6</sup>

Burke's theory was especially grating to the colonists, because it served as a justification for their exclusion from Parliament. Following Burke, England could argue that Americans did not need direct representation in Parliament because they had "virtual representation": members of Parliament were in fact looking out for colonial interests although not actually elected by the colonies.

Most Americans, following the "Country" rejection of Burke's deliberative assembly, held instead that representatives in Parliament were "creatures" only of the constituents who elected them, and were strictly accountable to those electors. The colonies thus rejected the British theory of "virtual representation." In creating their own colonial assemblies, they tried to avoid a Burkean legislature. As a result, colonial assemblies were condemned by their British contemporaries as

plain illiterate husbandmen, whose views seldom extended farther than to the regulation of highways, the destruction of wolves, wildcats, and foxes, and the advancement of the other little interests of the particular counties which they were chosen to represent.<sup>7</sup>

Despite the American rejection of virtual representation, however, colonial assemblies were badly malapportioned.

"Country" ideology also recommended another device to guard against distortion of the balance of government: strict sepa-

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6. E. Burke, Speech to the Electors of Bristol, *quoted in* B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 163 (1967).

7. Smith, *History of the Late Province of New York, from its Discovery to . . . 1762*, 4 *COLLECTIONS OF THE NEW-YORK HISTORICAL SOCIETY FOR THE YEAR 1829*, at 309 (1829), *quoted in* B. BAILYN, *supra* note 6, at 165.

ration of powers. Both Bolingbroke and Montesquieu spoke of the independence of the different branches of government, and often suggested that keeping the functions of each branch separate would help prevent mingling of power and the resulting loss of liberty. The "mixed constitution," by contrast, established a more interactive system of checks and balances. Each branch represented a different segment of society (the Crown, the aristocracy, and the masses) rather than exercising a different function. Restraint and harmony, for the dominant English party (the "Court" party), came from the relations among the personnel and constituencies of the different branches of government. Americans preferred Montesquieu's vision of separate functions. Americans thus believed that the English constitution did not sufficiently guard against corruption. Again, however, the theory was an imperfect representation. In both Montesquieu's description of an ideal constitution, and early American practice, the authority and powers of each branch were not rigidly separate.

Corruption not only destroyed the liberties of a people, it sapped their strength. A polity subverted by corruption was unable to repel foreign invasions or to protest further subversion of the constitution by the government. Once enslaved by a corrupt regime, a republic ceased to exist. Ancient Greek and Roman republics, and contemporary Polish and Danish republics, had perished in this way. By the early 1770s, Americans were certain that the English republic was in imminent danger of the same fate. They thus rebelled to save themselves from the English conspiracy against liberty.

If corruption was the predator, liberty was the victim. Liberty meant many things, and in speaking of it Americans often used the ideas not only of Opposition thinkers but of Locke and Montesquieu. Sometimes they fused these into a single, value-laden concept with interchangeable meaning and great rhetorical effect. When Patrick Henry galvanized Virginians by demanding liberty or death, his listeners could interpret his words as encompassing a number of interrelated ideas.

The simplest meaning of liberty was individual liberty, namely the capacity to exercise natural rights. Even that definition, however, concealed basic ambiguities. With their focus on the looming destruction of natural rights, neither the English nor the American Whigs spent much time describing the rights themselves. The second of *Cato's Letters*, the Opposition tract read by virtually every literate American of the period, said that liberty was "the Power which every man has over his own Actions, and his Right to enjoy

the Fruit of his Labour, Art, and Industry.”<sup>8</sup> Various writers identified the right to conscience (primarily religious liberty) as an inalienable right. All the rights protected by the English common law and “ancient constitution”—including jury trials and other procedural protections, and some freedom of speech—were held to be inalienable rights. In part, eighteenth-century natural lawyers did not need to specify particular rights because they believed them to be self-evident, or, in historian Bernard Bailyn’s words, “inherent in people as such, . . . [and] distilled from reason and justice.”<sup>9</sup>

Perhaps the most thorough discussion of natural rights available to the founding generation was Locke’s account of natural law. According to Locke, in the state of nature (prior to political society and government), all men began as equals: equally free from being under the authority of another, and equally vulnerable to the “invasion” of another. This vulnerability and the consequent disruption of men’s natural liberty led men to leave the state of nature and enter into a compact to form civil or political society. In entering into the social compact, men ceded to their governors some rights. There are, however, certain natural and inalienable rights that cannot be ceded.

From this account of the origins of political society Locke derived his theory of government. Government is a compact with limited purposes and limited effects. For classical republicans—most typified in this instance by Aristotle—government and society are not distinct, but merge into a single concept: a “regime,” with pervasive involvement in the lives of citizens. For Locke, in contrast, the only legitimate purpose of government is the purpose for which it is formed: to protect citizens in the enjoyment of their natural and inalienable rights. These rights include, to a greater or lesser extent, life, liberty—in a narrower sense than the general capacity to exercise all natural rights—and property.

But what did Locke mean by life, liberty, and property? Certainly Americans took him to include freedom of conscience and freedom from arbitrary laws. Locke also noted that even after entering into the civil compact, each man still has “Liberty to dispose, and to order his Person, Actions, Possessions and his whole property, within the Allowance for those Laws under which he is.”<sup>10</sup> Thus liberty in society is somewhat narrower than it is in the state of nature. Regardless, the right to self-preservation never can be

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8. 2 J. TRENCHARD & T. GORDON, CATO’S LETTERS 245 (1723).

9. B. BAILYN, *supra* note 6, at 77.

10. J. LOCKE, TWO TREATISES OF GOVERNMENT 341-42 (P. Laslett rev. ed. 1963) (3d ed. 1698).

legitimately stifled, although it is possible to read Locke as allowing government to limit the means by which this right can be exercised.

Locke's theory of property rights is especially complex. Although each man has a natural right to the fruits of his own labor, there are limits to the amount that any individual may accumulate. Property is originally given to man (by God) in common. It is only by his own labor that a man acquires individual property rights. Labor thus became the basis for all property rights, and Locke saw two limits on acquisition: no individual can acquire more property than he can improve by his labor, nor more than he can use. Nothing should be allowed to spoil, or "perish . . . uselessly."<sup>11</sup> Moreover, Locke's premises that man must live in society, and that the principle of self-preservation necessarily implies the preservation of society, led him to attach the proviso that a man can only acquire property by his labor if "there is enough, and as good left in common for others."<sup>12</sup>

The Lockean theory of limited acquisition was consistent with other influences on American ideology. Many eighteenth-century thinkers considered property a political or civil right, rather than an inalienable natural right. An early English radical declared in 1647:

The Law of God doth not give me property, nor the Law of Nature, but property is of human constitution. I have a property and this I shall enjoy. Constitution founds property.<sup>13</sup>

Government regulation of property rights—sometimes to the point of confiscation—was thus permissible and extensive. In the New England colonies, for example, public post roads were established by narrowing existing privately-owned thoroughways, and then giving back to the owners the strips obtained by the narrowing. As historian Forrest McDonald has described it, the colonial government "compensated landowners for taking part of their land by letting them keep the remainder of their land."<sup>14</sup>

Locke's limits on property rights were especially comfortable for the American colonists because that side of Locke mirrored a more important influence on American definitions of liberty: classical republicanism. According to prevailing "County" ideology of classical republicanism, the purpose of property ownership was to

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11. *Id.* at 318.

12. *Id.* at 306.

13. Speech by Henry Ireton (1647), *quoted in* J. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 375 (1975).

14. F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 23 (1985).

benefit the community as a whole rather than the individual owner. Owning land instilled in the owner many of the virtues necessary for active citizenship: an attachment to the community, self-sufficiency, stability, and wisdom. Thus Jefferson advocated abolishing primogeniture (whereby only the oldest son could inherit real property), in order to broaden the base of citizenship. Land ownership, when accompanied by labor and improvement, also benefited the community by increasing productivity and plenty. Since land ownership was primarily for the benefit of the community, individual owners were expected to obey the community's regulations.

Thus both Locke and the "Country" party writers found some government regulation of property appropriate. The apparent congruence between their views, however, is misleading; the differences are more significant than the similarities. Where Locke emphasized individual rights as the basis for natural law, classical republican or "Country" thought subordinated individual liberty to the needs of the community (although the needs of the community sometimes called for the exercise of individual liberty). The Continental Enlightenment philosophers also wrote copiously on natural law and natural rights, but again from a more community-oriented perspective. With their primarily classical outlook, most Americans—at least through the late 1770s—selectively embraced the less individualist aspects of Locke. This emphasis may have changed somewhat by 1787, as we shall see. But during the colonial and early independent era, the classical outlook also led Americans away from specific definitions of the content of natural rights. Individual liberty was rarely defined more specifically than (in the words of one revolutionary American) "a power of acting agreeable to the laws which are made and enacted by the consent of the PEOPLE, and in no ways inconsistent with the natural rights of a single person, or the good of the society."<sup>15</sup>

Thus colonial Americans rarely defined the content of natural rights because defining anything in terms of *individual* rights was something of a rarity. Another reason that natural rights were not well defined in the 1760s and 1770s is that individual liberty was, for many, not as important as another meaning of liberty: civil or political liberty. Political liberty was essentially the right of the people to participate in self-government. Even a cursory glance at the Declaration of Independence, for example, reveals that the rights demanded and the injuries protested are primarily public, not private. The grievances include the King's various interferences

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15. John Allen, *The Watchman's Alarm to Lord N—h* (1774), quoted in B. BAILYN, *supra* note 6, at 77.

with legislative attempts to pass laws that are "wholesome and necessary for the public good" and his obstruction of justice.

The theory, then, was that the greater the diffusion of political liberty, the more ideal the society. Americans viewed their society as more naturally adapted to liberty. American society was in fact somewhat more egalitarian than most European nations, and property (a republican prerequisite for political citizenship) was more broadly distributed. The existence of slavery was essentially ignored. The colonists felt—any evidence to the contrary notwithstanding—both uniquely free and in unique danger from the English threat to political liberty.

Political liberty in a republic was, moreover, inextricably intertwined with the purposes of republican government. At this point, some terminology must be clarified. The term "republican" has two different meanings. Eighteenth-century Americans used "republic" or "republican form of government" merely to describe the form of government: a republic was the antithesis of a monarchy. Twentieth-century historians, however, use "republican" (especially when modified by the adjectives "classical" or "Jeffersonian") to describe a whole school of thought that was prevalent at the time. The discussion of property rights shows that classical republican or "Country" ideology differed significantly from the liberalism of Locke. Note that "liberalism" also has a somewhat specialized meaning: it does not refer to the underlying ideology of the modern welfare state (one of its modern meanings) but rather to the individualistic philosophy derived from Locke that was dominant in the United States in the late nineteenth century.

The problem is that eighteenth-century Americans had no single word to describe either their own "Country" or republican outlook, or its liberal opposite, and so we must use the modern terms. In the first sentence in the preceding paragraph, for example, "republic" is used in its eighteenth-century meaning, and "republican" in its twentieth-century meaning. For the convenience of the reader, I will use "republic" only to describe the form of government, and "republican" only to label the school of thought. "Liberal" and "liberalism"—which were generally not used in the eighteenth century—are used here as the antithesis of republicanism, and not in their more common modern political usage.

Thus a republic (the type of government) can be either liberal or republican (depending on whether it is mostly Lockean or mostly "Country"). Americans, for example, were influenced by both Locke and the classical republicans in demanding changes in the form of government. Rejecting a monarchy or a mixed govern-

ment, they were determined to create a republic, or government based on the people. The type of republic they envisioned, however, depended on the extent to which they adopted Lockean or "Country" goals.

Unlike Locke, who viewed protection of individual liberty as the sole purpose of government, classical republicans thought that all government "ought to be calculated for the general good . . . of the community."<sup>16</sup> The public good, not private liberty, was the most important goal of republican government. Political liberty consisted not only in the capacity to participate in government, but also in living under a government that put the good of the community ahead of the good of any individual.

It is here that Locke's emphasis on individual liberty and the "Country" or classical republican emphasis on community are most in conflict. At least through 1776, however, there was little recognition of this conflict. American revolutionaries believed only corrupt governors, or "idiots or self-murderers" among the people, would put selfish interests ahead of the interests of the nation.<sup>17</sup>

Despite this somewhat naive belief that conflicting individual interests would not seriously hamper pursuit of the communal good, the underlying conflict still existed. For Locke, the good of the whole was defined by the good of individuals—the more freedom individuals had to pursue their own interests, the better off was the nation. For republicans, the good of the whole was more than the aggregated good of individuals. Classical republicans conceived of society in organic terms, rather than in mechanistic terms. The whole was therefore more than the sum of its parts; the community had its own existence, and its own needs. Political liberty involved more than the greatest possible amount of individual liberty. Good republican government might transform individuals; good liberal (Lockean) government merely protected them. Historian John Diggins has described the difference:

Between Machiavelli and Locke lies the dilemma of American politics. Classical political philosophy aims to discipline man's desires and raise him far above his vulgar wants; liberalism promises to realize desires and satisfy wants. The first is more noble, the second more attainable.<sup>18</sup>

Much of the American political debate in the first half-century after the Revolution centered on this dilemma and solutions to it.

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16. 1 K. ROWLAND, *THE LIFE OF GEORGE MASON, 1725-1792*, at 431 (1892).

17. Letter from John Sullivan to Mesech Weare (Dec. 11, 1775), *quoted in* G. WOOD, *supra* note 2, at 56.

18. J. DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST AND THE FOUNDATIONS OF LIBERALISM* 16 (1984).

It was in fact political liberty, in all of its manifestations, that was most threatened by the corruption of the English constitution and the excesses of Parliament. And the means by which Americans sought to protect their liberty from the corrupting force across the Atlantic was the creation and maintenance of public virtue.

In 1776, Americans believed that a republic had only one defense against the conspiracy against liberty: the "virtue" of its people. As we have seen, political liberty required both public participation in government and a government dedicated to the public good. Thus the maintenance of political liberty demanded that individuals subordinate their private interests to the welfare of the community. This willingness to sacrifice private interests to the public good was called virtue. John Adams explained the need for what he called "public Virtue" in 1776:

[P]ublic Virtue is the only Foundation of Republics. There must be a positive Passion for the public good, the public Interest, Honour, Power, and Glory, established in the Minds of the People, or there can be no Republican Government, nor any real Liberty. And this public Passion must be Superiour to all private Passions. Men must be ready, they must pride themselves, and be happy to sacrifice their private Pleasures, Passions, and Interests, nay, their private Friendships and dearest Connections, when they Stand in Competition with the Rights of society.<sup>19</sup>

Adams believed a republic to be the most fragile form of government, requiring constant vigilance against both corruption and lack of virtue.

How did a society cultivate virtue? Americans thought of themselves as naturally virtuous due to their circumstances, so they did not explore this question as fully as they might have. Their "Country" predecessors were too busy lamenting governmental corruption to spend much time on public virtue. We can, however, draw out some common themes.

Broad distribution of land ownership was essential for creating and maintaining a virtuous population, because tilling the land made men virtuous. Jefferson was perhaps the most eloquent expositor of this premise:

Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, and they are tied to their country and wedded to it's [sic] liberty and interests by the most lasting bonds.<sup>20</sup>

Those who owned land were best able to see firsthand how their private interests were bound up with the good of the community.

19. Letter from John Adams to Mercy Warren (Apr. 16, 1776), in 4 *THE PAPERS OF JOHN ADAMS* 124 (R. Taylor & G. Lint eds. 1979).

20. Letter from Thomas Jefferson to John Jay (Aug. 23, 1785), in 8 *PAPERS OF JEFFERSON*, *supra* note 4, at 426.



Despite the fact that many landowners were also slave-owners, Jefferson (himself the owner of many slaves) thought that those with property learned the lessons of virtue more easily than those deprived of property because the latter lacked a concrete connection to the community. The unpropertied class included both those too poor to own land and those engaged in trade or commerce rather than in farming. According to Jefferson, both groups were inclined to be less virtuous than the yeoman farmer.

Another means of inculcating virtue was education. A people could be taught to value liberty and to understand how serving the public good served liberty:

Where learning prevails in a community, liberty of sentiment, and zeal for the public good, are the grand characteristicks of the people. . . .

If we would maintain our dear bought rights inviolate, let us diffuse the spirit of literature: Then will self interest, the governing principle of a savage heart, expand and be transferred into patriotism: Then will each member of the community consider himself as belonging to one common family, whose happiness he will ever be zealous to promote.<sup>21</sup>

Public virtue also depended on a fundamental premise of equality. Eighteenth-century Americans meant many things by the term "equality." With Locke, they believed men were born equal because, in the most basic sense, none had any superior claim to rule over others. Despite its apparent breadth, this eighteenth-century egalitarianism was extremely limited. It did not lead many Americans to conclude that slavery was wrong. Nor did most American republicans extend equality to those who did not participate in the political process, including women, Indians, children, and sometimes those who lacked property qualifications for voting.

More important, Americans defined equality in a moral sense: they believed men to be equally bound by moral duties and equally endowed with a moral sensibility. It was this moral equality that allowed the American republicans to place their faith in the virtue of (some of) the people. Jefferson, for example, stated repeatedly that man was innately moral, innately capable of public virtue:

Man was destined for society. His morality, therefore, was to be formed to this object. He was endowed with a sense of right and wrong, merely relative to this. This sense is as much a part of his nature as the sense of hearing, seeing, feeling . . . . It may be strengthened by exercise, as may any particular limb of the body.<sup>22</sup>

Thus Jefferson, like most of his contemporaries, believed that man's

21. *The Worcester Speculator*, in *WORCESTER MAGAZINE*, Oct. 1787, reprinted in 1 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805*, at 699, 701 (C. Hyneman & D. Lutz eds. 1983).

22. Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), in 12 *PAPERS OF JEFFERSON*, *supra* note 4, at 15.

inborn moral sensibility might be brought out by the right circumstances and the right education.

There were not many, however, who had the ability—to say nothing of the wealth and the leisure—to pursue the development of virtue to the extent necessary to sustain a republic. Thus the eighteenth-century republicans on both sides of the Atlantic expected that a “natural aristocracy” would spring up to govern the country. Composed of those with extraordinary talent, the natural aristocracy would exemplify both virtue and restraint. They would put the good of the community before their own selfish interests, and thus protect liberty from the selfishness of individuals and the corruption of governors. At the same time, since they would derive their pre-eminent role from natural talents rather than from artificial distinctions, they would be in an ideal position to guide and govern the masses.

For revolutionary Americans, as for their “Country” cousins and classical republican ancestors, the best basis for a flourishing republic was to increase the supply of virtue: to make better people. In 1776, this looked like an easy task, because Americans perceived themselves to be uniquely virtuous, and therefore uniquely suited to a republic.

[In America] the moral basis of a healthy, liberty-preserving polity seemed already to exist in the unsophisticated lives of the independent, uncorrupted, landowning yeoman farmers who comprised so large a part of the colonial population.<sup>23</sup>

The main threat to this utopia came from outside, from the corrupting force in England. Once the connection to England was severed, Americans expected their natural virtue would allow them to regain the basis for their republic. As the next section shows, they were quickly disillusioned.

## II

When jealousy of their liberty and their virtue led Americans to take the extreme step of declaring to a “candid world” their grievances and their independence, they entered into the process of creating a new government with great enthusiasm but little experience. In addition to their Opposition politics, the colonial experience with British rule left the newly independent American people with two firm determinations. They would never again be subject to a monarch, and they would be careful to enact written constitutions to mark the limits of governmental authority.

Between 1776 and 1778, eleven states drafted new constitu-

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23. B. BAILYN, *supra* note 6, at 51-52.

tions—and one of these states, South Carolina, drafted two. By 1787, two more states had revised their first efforts. In 1777 the Continental Congress drafted and submitted to the states the first national constitution, the Articles of Confederation, which took effect in 1781. The colonies' first practical experience with self-government provided an influence that countered some of their ideological inheritance.

The Revolution inspired a public passion that was to confound the expectations of those who led it. Between 1776 and 1787 there took place what historian Gordon Wood has called "the democratization of the American mind." The egalitarian and anti-aristocratic rhetoric of the revolutionary writers, directed initially at English institutions, was taken as the standard of government by an ever expanding segment of the public. The reading public, and hence the politically active public, expanded to include more than the elite ranks of educated gentlemen who had comprised it in the 1760s and early 1770s. Self-government, which originally meant rule by a small, elite group of the people, gradually came to mean rule by a much broader segment of the population.

In essence, the terms "republic" (rule by the people instead of a monarch) and "democracy" (rule by the masses instead of the elite), which to the revolutionary generation had been similar but severable, became synonymous in the public mind. Many of the leaders of the Revolution were shocked by this merging of two terms which to them had opposite connotations:

For if "republic" conjured up for many the positive features of the Commonwealth era and marked the triumph of virtue and reason, "democracy"—a word that denoted the lowest order of society as well as the form of government in which the commons ruled—was generally associated with the threat of civil disorder and the early assumption of power by a dictator.<sup>24</sup>

By the 1780s, politics was no longer the exclusive domain of educated gentlemen. Moreover, the expected natural aristocracy failed to arise, depriving classical republicans of their governing class.

The new republic, no longer threatened by corruption, faced a hitherto neglected danger: "licentiousness." Licentiousness, or anarchy, occurred when the people abused their power. If the people—on whom the republic rested—were selfish individuals who put their own interests ahead of those of the community, they could wreak havoc on a system that depended on public virtue. Public liberty—especially in the sense of a government dedicated to the public good—required both a vigilance against governmental cor-

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24. *Id.* at 282.

ruption and willingness to sacrifice individual interests. A republic thus might perish as easily from its own as unrestrained selfishness as from corruption.

Both English and American Whigs had always warned of the dangers of the excesses of democracy, but it did not seem a realistic threat until after the Revolution. By the mid-1780s, however, many American thinkers were more worried about licentiousness than about corruption. Benjamin Rush, an eminent Pennsylvania doctor, commented in 1787:

In our opposition to monarchy, we forgot that the temple of tyranny has two doors. We bolted one of them by proper restraints; but we left the other open, by neglecting to guard against the effects of our own ignorance and licentiousness.<sup>25</sup>

The evidence of licentiousness took many forms. It could be seen in the economic bickering among the states which sapped the war effort and helped cause a peacetime recession in 1785-1786. It was manifest in the development of "factions": groups within the legislature with different, selfish, interests. The most common example of licentiousness was the legislature of Rhode Island, also known as Rogue Island. There they carried the trends of other states toward debtor relief, paper money, and other popular measures so far as to propose redistribution of property every thirteen years.

For those who despaired of the people's virtue, the last straw was Shays' Rebellion. The economic depression that swept the country in 1785-1786 hit rural residents hard. High interest rates and a low money supply increased bankruptcies and made it difficult for farmers to pay their public and private debts. They blamed urbanites, and especially the lawyers and the court system, for taking advantage of rural poverty: "Like Drones they fatten on the Lab'ers toil/Defraud the Widow and the Orphans spoil."<sup>26</sup> Farmers thus pressed—unsuccessfully—for various forms of debtor relief, including collection delays, court reforms, increasing the money supply (often by state issuance of paper currency), and keeping taxes low.

The crisis came to a head in rural western Massachusetts late in the summer of 1786. There a group of disgruntled farmers, led by Daniel Shays, took up arms to demand court reform and debtor relief. They drew up a list of grievances and began drilling, but were quickly crushed by the militia. Word of the rebellion spread,

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25. Address by Benjamin Rush in Philadelphia (1787), *quoted in* F. McDONALD, *supra* note 14, at 3.

26. *Aristedes*, Boston Gazette, April 17, 1786, *quoted in* J.T. MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788*, at 57 (1958).

however, and the rebels' cause was further harmed by the exaggerated accounts of their intentions. Henry Knox, serving as Superintendent of War, wrote to George Washington that the Shaysites had intended to march on Boston, loot the Bank of Massachusetts, and then march southward redistributing property. Washington did not keep this news to himself, and the rumor spread quickly. The whole rebellion—truth and fiction—was viewed by the educated elite as an example of the excesses of democracy caused by the decline in virtue. One of Washington's aides condemned the "licentious spirit prevailing among many of the people; a levelling principle; a desire of change."<sup>27</sup> Abigail Adams wrote to Jefferson that "these commotions" (meaning specifically Shays' Rebellion) were caused by "Luxury and extravagance."<sup>28</sup>

As the definition of "the people" was broadened to include those with less inclination for virtue—generally those with less wealth and education—the paradigm of classical republicanism began to collapse. No longer confident that the innate (if dormant) virtue of the people would triumph, many in the period between 1776 and 1787 turned away from the whole "Country" worldview with its theories of corruption and virtue. If the republican experiment was to be saved, a new theory of government would have to be devised, for virtue was in short supply. The problem was no longer simply governmental corruption, which would be defeated. The problem was that people were inevitably prey to selfishness and self-interest. Americans had irretrievably lost their virtue.

Some, of course, remained committed republicans. Although often no more democratic than their disillusioned brethren, they retained their faith in the virtue of the people despite disagreement with many popular measures. Rather than abandoning republicanism, they attempted to create a more virtuous public. America could be put on the right track, could regain her virtue, if only the proper steps were taken. They continued to advocate Whig measures and espouse "Country" ideology. Others, however, abandoned hope, and turned to alternative theories of government to support the republic. This difference of opinion would persist throughout the Constitutional Convention and the ratification debates, and would influence American politics well into the nineteenth century.

Those who lost faith in the people did not have to look far for inspiration. Locke's liberal individualism provided a ready-made

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27. Letter from David Humphreys to George Washington (Nov. 9, 1786), *quoted in* J.T. MAIN, *supra* note 26, at 62.

28. Letter from Abigail Adams to Thomas Jefferson (Jan. 29, 1787), in 11 PAPERS OF JEFFERSON, *supra* note 4, at 86.

theory that fit the times perfectly. Montesquieu's theory of separation of powers contained within it a new counterpoint of checks and balances. And a little-known English writer named Bernard Mandeville provided a springboard for a theory of government based not on virtue but on vice. Together, these thinkers allowed disillusioned republicans (now liberals) to construct a new "science of politics," basing government not on man as he ought to be but on man as he often is: ignoble, self-interested, and ignorant.

As we have seen, Locke's theory of limited acquisition of property was compatible with a republican perspective. His general theory of a limited-purpose government, however, provided an alternative to the republican vision of an encompassing regime. It could also serve to transform the classical republican community of citizens into a modern liberal collection of individuals.

For classical republicans, the community and the government were joined in a common endeavor of promoting individual and civil virtue. Law and morality were necessarily intertwined. Thus no part of individual life could be marked off as separate from the community, and no part of communal life was beyond the reach of the government acting on behalf of the community. This was the classical vision of government: an integrated "regime" rather than a functionally separate "government." Additionally, republicans put the community at the center, and saw individuals primarily in their role as part of a larger whole. Thus individuals were expected to subordinate their private interests to the good of the community.

Americans saw in Locke's work a way to turn this scheme on its head. His derivation of government (political society) from the state of nature allowed a conclusion that individuals were prior to, and superior to, the societies they formed. Individuals came first; their needs and rights were the basis for—and the limits of—political society. Thus instead of individuals subordinating their private interests to the needs of the community, the very purpose of the community was to give individuals the freedom to pursue their private interests. Government was thus limited to the purpose for which it was formed: protecting individuals from their neighbors' viciousness in order to permit them to engage in private pursuits.

Limiting the role of government to facilitating individual desires also meant that law and morality could now be separated. The sphere of law now included only protection of individual liberty. It no longer encompassed fostering the private or public virtue necessary to public liberty. Lockean liberalism thus transformed both the role and the purposes of government.

Transformations, however, do not happen overnight. Many

who turned to Locke still held dear the republican principle of the public good. For them, Bernard Mandeville and those who followed him provided a theoretical scheme to justify condoning individual selfishness without compromising the public good. In 1714 Mandeville published his *Fable of the Bees*, which had appeared in a shorter version in 1705. Its subtitle was guaranteed to capture the imagination of the disillusioned republicans: "*Private Vices, Public Benefits*."

Mandeville's satirical attack on the "Country" preoccupation with virtue purported to show how the selfish and unvirtuous motivations of individual bees still resulted in a productive beehive.

Millions endeavouring to supply  
Each other's lust and vanity . . .  
Thus every part was full of vice,  
Yet the whole mass a paradise[.]<sup>29</sup>

*The Fable of the Bees* scandalized Mandeville's contemporaries, but it had significant influence. Both Adam Smith and David Hume denied any reliance on Mandeville, yet their economic and political theories clearly owe a debt to his linking of private vices and public benefits. Smith explained how individual selfishness might work, as if by the workings of "an invisible hand," to promote the public economy.

Hume relied on a similar theory to advocate constructing a government based on vice:

[I]n contriving any system of government, and fixing the several checks and controuls of the constitution, every man ought to be supposed a *knave*, and to have no other end, in all his actions, than private interest. By this interest we must govern him, and, by means of it, make him, notwithstanding his insatiable avarice and ambition, co-operate to the public good.<sup>30</sup>

Hume's advice would be taken to heart by many at the Constitutional Convention.

Neither Hume nor Mandeville, however, explained how constitution writers might turn individual vices into public benefits. It was all very well to speculate that a selfish citizen could be induced to "co-operate to the public good," but in the absence of civil virtue, how could this be accomplished?

Ever innovative and adaptive, the liberals turned back to Montesquieu for the new purpose of complementing the theories of Locke and Hume. Montesquieu himself would have been horrified. He was a thorough-going republican, an admirer of Bolingbroke

29. B. MANDEVILLE, *THE FABLE OF THE BEES* 30, 33 (D. Garman ed. 1934).

30. 3 HUME'S *PHILOSOPHICAL WORKS* 117-18 (T. Green & T. Grose eds. 1886).

who feared only corruption and trusted only virtue. But in his explication of separation of powers lay the seeds of a more complex theory. For those who read carefully Montesquieu's description of the ideal form of government—and not merely his general statements about the necessity of separating the branches of government—a new doctrine of checks and balances began to emerge. The functions of the different branches might be deliberately mingled in such a way as to counter, rather than foster, individual ambition and lust for power. Montesquieu's ideal government in fact gave the three branches of government overlapping power: the legislature had the impeachment power, and the executive was given a negative on the laws. Checks and balances could be redefined as a way of mingling power to provide each branch with a safeguard against the ambitions and encroachments of the other branches.

With these rudiments of a structure of government that might combat licentiousness, those who despaired of "Country" ideology could turn to its opposite: the "Court" party, which had held power in England since the Glorious Revolution. This party, like many Americans after their own Revolution, was beginning to explore the possibility of substituting self-interestedness for virtue. Unsurprisingly, "Court" ideology embodied notions highly offensive to "Country" Whigs:

Its characteristics were a strong and stable executive representing a guaranteed Protestant monarchy in parliament, and a steady diminution of political competitiveness; its means included compromised elections, a Septennial (replacing a Triennial) Act extending the duration of parliaments, and a system of political management in which patronage played a visible if not an oversignificant part.<sup>31</sup>

Before the 1780s, almost no patriotic American would endorse such a program. By 1787, "Court" ideology, backed up by the liberalism of Locke and Hume, was at least as well-represented in the Constitutional Convention as the "Country" party—and probably more so. Whiggish republicans, Lockean liberals, and a few stray monarchists brought their different visions of government and society to Philadelphia in the summer of 1787. The Constitution they wrote thus reflects the influence of many competing views. How these views were translated into a spare and elegant document is another, and equally fascinating story.

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31. J. Pocock, *supra* note 13, at 478.



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*NOTE: This is not intended as anything close to an exhaustive listing of the voluminous literature on the ideology of the period. I have tried to include a short but balanced collection of recent books and articles. Readers are urged to consult larger bibliographies and to use the sources listed below as a method of gaining entry into the literature.*

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