The Impact of the Enlightenment on American Constitutional Law

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I. A HISTORIOGRAPHICAL INTRODUCTION

In this essay I shall discuss, first, the contrast between certain religious and philosophical ideas reflected in the system of constitutional law which emerged from the French Revolution of the eighteenth century and certain religious and philosophical ideas reflected in the system of constitutional law which emerged from the English Revolution of the seventeenth century; and second, the tensions between those two contrasting sets of ideas as reflected in the system of constitutional law which emerged from the eighteenth-century American Revolution.

The contrast between these two sets of ideas, and also the contrast between the English system of constitutional law which developed after 1640 and the French system of constitutional law which developed after 1789, have been obscured by the use of the term "Enlightenment" to embrace both sets of ideas as reflected in both types of constitutional law. Prior to the mid-twentieth century, this English term was used only occasionally.[1] In recent decades, however, it has been used indiscrimi-

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1. *See* John Lough, *Who were the Philosophes?*, *in* STUDIES IN EIGHTEENTH-CENTURY FRENCH LITERATURE 139 (J.H. Fox et al. eds., 1975). Lough points out that prior to World War II scholars generally confined the use of the term "Enlightenment" to the eighteenth-century German movement known as *die Aufklärung* and that the term "Enlightenment" "has only recently become fashionable" as a means of describing eighteenth-century philosophical thought. The French Enlightenment, as typified by the *philosophes*, was known as *le mouvement philosophique*, and the *philosophes* themselves were known as *lumières*, "lights." "Enlightened" English authors of the eighteenth century sometimes spoke of an "Age of Reason." *See* ROLAND MORTIER, CLARTÉS ET OMBRES DU SIÈCLE DES LUMIÈRES 24 (1969). As Lough notes: "Fifty years ago neither French nor English possessed an equivalent term to *Aufklärung*." John Lough, *Reflections on "Enlightenment" and "Lumières," in* L'ETÀ DEI LUMI: STUDI STORICI SUL SETTECENTO EUROPEO IN ONORE DI FRANCO VENTURI 36 (R. Ajello et al. eds., 1985). Indeed, in FRANÇOIS FURET, MARX AND THE FRENCH REVOLUTION (Deborah K. Furet trans., 1988), the translator has rendered throughout the French words *lumière* and *lumières* by the German word *Aufklärung*. François Furet uses the expression *Aufklärung* in the original French as well. FRANÇOIS FURET, MARX ET LA

nately to refer to philosophies and times as far apart from each other as those of the early seventeenth-century France of Descartes and the mid-eighteenth-century France of Diderot, as well as the England of John Milton or Matthew Hale and the England of Thomas Paine or Jeremy Bentham over a century later.[2] Indeed, some American historians have even spoken of an "American Enlightenment," which is surely a distortion.[3]

RÉVOLUTION FRANÇAISE (1986). A careful analysis of the history of the term *lumière* in the French literature of the seventeenth and eighteenth centuries by Mortier, *supra* at 13-59, supports the description given in the text here and *infra* text accompanying notes 4, 5, and 7.

Mortier indicates in passing that the past participle *éclairé* ("enlightened") was also occasionally used by the French *philosophes* as well in the expression *siècle éclairé* ("enlightened age") to refer to a progressive enlightening of European civilization. *See also* Jacques Roger, *La Lumière et les lumières*, *in* 20 CONGRÈS DE L'ASSOCIATION INTERNATIONALE DES ÉTUDES FRANÇAISES 167 (1967). The standard noun form used by the French authors, however, remained *lumière* or *lumières*.

2. *See, e.g.*, ERNST CASSIRER, THE PHILOSOPHY OF THE ENLIGHTENMENT 22 (1951): "[I]t is evident that, if we compare the thought of the eighteenth century with that of the seventeenth, there is no real chasm anywhere separating the two periods. The new ideal of knowledge develops steadily and consistently from the presuppositions which the logic and theory of knowledge of the seventeenth century—especially in the works of Descartes and Leibniz—had established." Similarly, Norman Hampson, although skeptical of efforts to "push back" the dating of the Enlightenment, nevertheless attributes many "Enlightenment" characteristics to such seventeenth-century figures as Francis Bacon, Isaac Newton, and John Locke. NORMAN HAMPSON, A CULTURAL HISTORY OF THE ENLIGHTENMENT 35-40 (1968).

This gradual expansion of the notion of the "Enlightenment" is at least in part the product of efforts to engage in broad historical synthesis. *See* PETER GAY, THE ENLIGHTENMENT: AN INTERPRETATION—THE RISE OF MODERN PAGANISM (1966). Gay has asserted:

> Synthesis demands regard for complexity: the men of the Enlightenment were divided by doctrine, temperament, environment, and generations. And in fact the spectrum of their ideas, their sometimes acrimonious disputes, have tempted many historians to abandon the search for a single Enlightenment. What, after all, does Hume, who was a conservative, have in common with Condorcet, who was a democrat? Holbach, who ridiculed all religion, with Lessing, who practically tried to invent one? Diderot, who envied and despised antiquaries, with Gibbon, who admired and emulated them? Rousseau, who worshipped Plato, with Jefferson, who could not bring himself to finish the *Republic*? But I decided that to yield to the force of these questions would be to fall into a despairing nominalism, to reduce history to biography, and thus to sacrifice unity to variety.

Id. at x.

As if responding directly to Peter Gay's call for synthesis, Lough states:

> To write about the literature and thought of such an age by putting the words *Enlightenment* and *Lumiéres* on the title-page and spraying them around in the text may appeal to publishers who are always on the look-out for fresh devices which will help to sell their wares, but it is scarcely in accordance with the requirements of scholarship. There is in fact much to be said for going back to the old title *French Thought in the Eighteenth Century* and *La Pensée Française au XVIIIème Siècle* and for producing a text which takes fully into account the almost infinite variety of the ideas produced in the economic, social and political conditions in the last hundred years or so [of] the *ancien régime*.

Lough, *Reflections*, *supra* note 1, at 56. *Cf.* William Doyle's admonition: "[N]othing would have surprised contemporaries more than the tendency of some recent historians to identify [the Enlightenment] with the whole of eighteenth-century thought. Those who thought themselves 'enlightened' believed they were a small band of crusaders against widespread ways of thinking, habits, and institutions that were not." WILLIAM DOYLE, ORIGINS OF THE FRENCH REVOLUTION 83 (2d ed. 1988).

3. *See, e.g.*, HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA (1976). May identifies four types of "Enlightenment" at work in America in the eighteenth and early nineteenth centuries. These are (1) the Moderate Enlightenment, which "preached balance, order and religious compromise"; (2) the Skeptical Enlightenment, which took a jaundiced if not cynical view of human perfectibility; (3) the Revolutionary Enlightenment, which engaged in millenarian thinking and held "the belief in the possibility of constructing a new heaven and earth out of the destruction of the

The concept of a historical period or a mode of thought called the "Enlightenment" also suffers from a weakness characteristic of intellectual history generally, namely, the Hegelian tendency to assume that ideas have a history of their own, that new ideas grow out of old ideas, more or less independently of political, economic, religious, legal, and other social events. In reality, even the words themselves in which ideas are expressed may have different meanings in different times. For example, the theories expounded in the 1680s by John Locke, intended to explain and justify the aristocratic English Revolution, acquired a quite different significance in the eighteenth century when used by the French *philosophes* to explain and justify the revolutionary movement toward democracy.

This is not to say that there was no continuity in the development of ideas in Europe during the seventeenth and eighteenth centuries. That would be an absurd statement. It is also not to say that the great political and legal revolutions of the sixteenth, seventeenth, and eighteenth centuries, which broke out successively in Germany in 1517, in England in 1640, in America in 1776, and in France in 1789, were not themselves strongly influenced by fundamental transformations in European belief-systems. Surely, the revolutionary upheaval of our own twentieth century makes it difficult to accept the Marxian doctrine that belief-systems are only an ideological superstructure based on a material substructure. On the contrary, it seems incontrovertible that so-called material and so-called ideological factors interact with each other; neither can be said to be the mere "cause" or "effect" of the other. More specifically, Western religious and philosophical thought, which from the early sixteenth to the late eighteenth centuries moved successively from Roman Catholicism to German Lutheranism, then to English neo-Calvinism, and then to French Deism, interacted with the movement of political and legal institutions at the same times and in the same countries from monarchy to aristocracy to democracy.

I believe that by examining in a historical context the interaction between religious and philosophical thought, on the one hand, and political and legal institutions, on the other, we may gain interesting and important insights into the nature of both.

II. The French and English Revolutions: Systems of Beliefs and Systems of Laws

In considering both the continuity and the discontinuity of thought in France in the seventeenth and eighteenth centuries, one may indeed say

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old"; and (4) the Didactic Enlightenment, which emphasized an "intelligible universe, clear and certain moral judgments, and progress." *Id.* at xvi. These categories seem to be a *reductio ad absurdum* of the concept of the Enlightenment.

that Descartes paved the way for the *philosophes* by his exaltation of reason. "It is reason alone," he wrote, "which constitutes us men." "Reason is by nature equal in all men . . . . And it must be noted, I say reason and not our imagination or sense."[4] By reason, Descartes meant the overcoming of doubt by rational demonstration and clear ideas. He did not quarrel with the theological tradition of his time, which distinguished such reason, called *lumen naturale, lumière naturelle*, "natural light," from faith, or *lumière spirituelle, lumière de la foi*, "spiritual light," "the light of faith." "We must believe all that God has revealed," he wrote, "although it may surpass the reach of our mind."[5] Nor did Descartes attempt to apply his philosophical "method" to the political or religious controversies of his time. He remained both a loyal monarchist and a faithful Christian, accepting divine revelation as a gift of faith, though also attempting to prove it (as St. Anselm had done over five hundred years earlier) by natural reason.[6]

A century later, however, in the minds of leading French thinkers, the Cartesian concept of *lumière naturelle* entirely supplanted *lumière spirituelle* and for the first time acquired both religious and political importance. The *philosophes*—Diderot, Voltaire, D'Alembert, Rousseau, Condorcet, and numerous others—denounced what they regarded as the superstitions and dogmas of traditional Christianity, replacing them with the rational doctrine of a Supreme Being, Nature's God, who had in the beginning created an autonomous world, which subsequently operated by its own perpetual motion.[7] At the same time, they invoked the concept of "natural light," or simply "light" or "lights," to denounce the privileges and prejudices of the aristocracy, both secular and ecclesiastical. The Cartesian doctrine of the natural equality of reason in all men became the foundation of a new philosophy of universal equality of rights, individualism, and a government based on public opinion. The state was to be founded on the principle of the essential goodness of

4. RENÉ DESCARTES, *Discours de la Methode*, *in* 1 OEUVRES PHILOSOPHIQUES DE DESCARTES 568-69 (1988).

5. RENÉ DESCARTES, *Les Principes de la Philosophie*, *in* 3 OEUVRES PHILOSOPHIQUES DE DESCARTES 107 (1989). For an adequate translation, see THE MEDITATIONS AND SELECTIONS FROM THE PRINCIPLES OF RENÉ DESCARTES (1596-1650) 143 (John Veitch trans., 1931). *Cf.* MORTIER, *supra* note 1, at 16. The distinction between "natural light" and "spiritual light" may be found also in the works of Melanchthon, who used it as a basis for his theory of natural law. *See* Harold J. Berman & John Witte, Jr., *The Transformation of Western Legal Philosophy in Lutheran Germany*, 62 S. CAL. L. REV. 1573, 1616 (1989).

6. Descartes' argument parallels Anselm's famous ontological proof of God. Anselm, however, started from the premise of faith, while Descartes started from the premise of doubt. In this context, Anselm's famous aphorism "*credo ut intelligam*" should be translated not as a purpose-clause, "I believe in order that I may understand," as it has invariably been translated in English, but as a result-clause, "I believe and so I may understand." For a comparison and close analysis of Anselm and Descartes, see ÉTIENNE GILSON, ÉTUDES SUR LE RÔLE DE LA PENSÉE DU SYSTÈME CARTÉSIEN 216-23 (1951).

7. In attacking Spinoza's pantheism, Voltaire asked: " 'How is it that [Spinoza] did not glance at these mechanisms, these agents, each of which has its purpose, and investigate whether they do not prove the existence of a supreme artisan?' " *Quoted in* HAMPSON, *supra* note 2, at 83.

human nature. The traditional hierarchy of estates, or orders, was to be replaced by a rational regime of representative democracy.[8] The phrase "Rights of Man" was used to attack aristocratic privileges.[9] These ideas found expression in 1789 in the first decree of the popularly elected National Assembly, declaring that "the feudal regime is abolished," and shortly thereafter in the adoption of the Declaration of the Rights of Man and Citizen. Ultimately, they found expression in successive French constitutions with their doctrines of civil rights and liberties, legislative supremacy, and strict separation of powers, and in the so-called Napoleonic civil and criminal codes of the early 1800s.

I have identified some of the principal religious and philosophical tenets of the French *philosophes* of the middle and late eighteenth century and some of the principal manifestations of those tenets in political and legal institutions that emerged with the French Revolution.[10] I turn now to an equally cursory exposition of tenets and institutions connected with the English Revolution of the seventeenth century.

Some historians have traced continuities between these two revolutions: both were fought partly against the Roman Catholic Church; both were fought partly against absolute monarchy; both invoked reason against religious and political authoritarianism; both were republican in one or more senses of that much abused word. Yet even in these respects they were very different from each other and in other respects flatly opposed to each other. The English Revolution—and here I refer not only to its Puritan phase but also to its Restoration phase and to its final culmination in the Glorious Revolution of 1688-89[11]—was fought not

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8. *See* Dallas Lavoe Clouatre, From Order to Class: The Delegitimation of the Conceptual Foundations of Hierarchy (1990) (unpublished Ph.D. dissertation, University of California).

9. *See* A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION 691 (François Furet & Mona Ozouf eds. & Arthur Goldhammer trans., 1989). Ferdinand Brunot asserts that Voltaire coined the expression "Rights of Man." FERDINAND BRUNOT, 6 HISTOIRE DE LA LANGUE FRANÇAISE DES ORIGINES À 1900, at 141-42 (1927). However, Brunot's citation is to a pamphlet published by Voltaire in 1768 invoking the somewhat different phrase "rights of men" as a basis for attacking papal claims of sovereignty. *See* VOLTAIRE, *Droits des Hommes et les Usurpations des Papes*, *in* 27 OEUVRES COMPLÈTES DE VOLTAIRE, MÉLANGES VI, at 193-211 (1879).

10. An earlier generation of scholars argued that the Enlightenment had little or no influence in shaping the belief-system of the French revolutionaries. *See, e.g.*, PETER GAY, THE PARTY OF HUMANITY: ESSAYS IN THE FRENCH ENLIGHTENMENT 176 (1971) ("The ideas of Voltaire, of the Encyclopedists, and of Rousseau played a relatively minor part in revolutionary speeches and thought."). This position has been effectively refuted by François Furet. *See, e.g.*, FRANÇOIS FURET, INTERPRETING THE FRENCH REVOLUTION (Elborg Forster trans., 1981). *Cf.* KEITH M. BAKER, INVENTING THE FRENCH REVOLUTION: ESSAYS ON FRENCH POLITICAL CULTURE IN THE EIGHTEENTH CENTURY 12-27 (1990); CAROL BLUM, ROUSSEAU AND THE REPUBLIC OF VIRTUE: THE LANGUAGE OF POLITICS IN THE FRENCH REVOLUTION (1986); Thomas E. Kaiser, *The Strange Offspring of Philosophie: Recent Historiographical Problems in Relating the Enlightenment to the French Revolution*, 3 FRENCH HIST. STUD. 549 (1988). Furet, quite correctly, for the most part avoids the term "Enlightenment" and speaks instead of the "*philosophes*."

11. *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 19, 24-25, 30, 31 (1983) [hereinafter BERMAN, LAW AND REVOLUTION]; *cf.* Harold J. Berman, *Law and Belief in Three Revolutions*, 18 VAL. U. L. REV. 569, 591-92 (1984) [hereinafter Berman, *Law and Belief*].

against but for the privileges of the aristocracy. Although it reduced the power of the nobility that surrounded the monarch, "the court," it exalted the landed gentry, "the country." It did not abolish the hierarchy of estates, or orders, but preserved that hierarchy within a framework of the supremacy of a House of Commons composed largely of hereditary "gentlemen" and elected by not more than two or three percent of the adult male population.[12] Moreover, Parliament, unlike the French National Assembly or subsequent French legislatures, did not purport to represent public opinion. Indeed, the very phrase "public opinion," or *l'opinion publique*, which originated both in England and in France in the early part of the eighteenth century, only acquired its political significance as a slogan of democratic opposition to royal policies and aristocratic privileges—again, in both countries—in the 1780s.[13] In France, however, after 1789, public opinion became a principal source of the legitimacy of political authority. In England, Parliament continued to derive its authority not from public opinion but from public spirit.[14] The differences between the two concepts are fundamental: French public opinion was understood to be a general consensus originating in the rational discourse of enlightened citizens, while English public spirit was

12. The figure of two or three percent is derived from a review of statistics provided by CHRIS COOK & JOHN STEVENSON, BRITISH HISTORICAL FACTS, 1760-1830 (1980). Cook and Stevenson set out in tables the number of eligible voters in the various British constituencies compared to the total population as of 1831. To give some examples: Cambridgeshire had 3,000 franchised voters compared to a population of 143,955; Cornwall had 2,500 voters compared to a population of 302,440; Devon had 3,000 voters in a population of 494,478; Lancashire had 8,000 voters in a population of 1,336,854; and Yorkshire had 20,000 voters in a population of 1,371,675. The impression formed by reading the tables given by Cook and Stevenson is confirmed by a review of the statistics provided by Namier and Brooke on the number of eligible voters in the period 1754-1790. LEWIS NAMIER & JOHN BROOKE, 1 A HISTORY OF PARLIAMENT, THE HOUSE OF COMMONS, 1754-1790 (1964). If anything, the figure of two or three percent would appear to err on the side of generosity.

13. *See* J.A.W. GUNN, BEYOND LIBERTY AND PROPERTY: THE PROCESS OF SELF RECOGNITION IN EIGHTEENTH-CENTURY POLITICAL THOUGHT (1983), especially Chapter VI, "Public Spirit to Public Opinion." Gunn corrects the conventional view that the modern concept of public opinion originated only in France. In both countries it originally referred to manners and reputation, and only in the 1770s and thereafter did it refer to political opinion. For the French development of the concept, see Keith M. Baker, *Politics and Public Opinion under the Old Regime: Some Reflections*, *in* PRESS AND POLITICS IN PRE-REVOLUTIONARY FRANCE 204-46 (Jack R. Censer & Jeremy D. Popkin eds., 1987). Baker states that Rousseau was the first to use the term regularly, starting around 1750, but without developing its political significance, and that after 1770 Jacques Necker and Jacques Peuchet systematically elaborated its political implications. *See also* Mona Ozouf, *L'opinion publique*, *in* 1 THE FRENCH REVOLUTION AND THE CREATION OF MODERN POLITICAL CULTURE: THE POLITICAL CULTURE OF THE OLD REGIME 419-34 (Keith M. Baker ed., 1987). For evidence of the important role played by discussions of public opinion in Necker's circle in the 1780s, see ROBERT HARRIS, NECKER: REFORM STATESMAN OF THE ANCIEN RÉGIME 86-87 (1979); ROBERT HARRIS, NECKER AND THE REVOLUTION OF 1789, at 287, 308-09 (1986).

14. *See* GUNN, *supra* note 13. For a good analysis of the significance of the concept of the public spirit of the aristocracy in eighteenth-century England, see M. OSTROGORSKI, 1 DEMOCRACY AND THE ORGANIZATION OF POLITICAL PARTIES 6-24 (Frederick Clarke trans., 1922). Ozouf points out that the French phrase *l'esprit public* was synonymous with *l'opinion publique*. Ozouf, *supra* note 13. It would be a mistake, however, to suppose that the French word *esprit*, in this context, is synonymous with the English word "spirit." A proper translation of *l'esprit public* would be "the public mind."

understood to be a sense of responsibility and of service to the public—a sense shared by public-spirited persons in responsible positions and represented above all in the elite House of Commons. The former was a democratic concept; the latter was an aristocratic concept.

Paradoxically, the ideology of the English Revolution was an ideology of conservatism. In all its successive phases it claimed to restore—although in fact it radically transformed—the traditions of England, including especially the English common law. It culminated with a declaration not of the universal and timeless "rights of *man*" but of the "true, ancient, and indubitable rights of *Englishmen*."

The development of English religious and philosophical thought in the seventeenth century bore a close relationship to the transformation of English political and legal institutions. By the same token, it differed sharply from those aspects of eighteenth-century French religious and philosophical thought that became associated with the French Revolution. First, English thought was deeply influenced by Calvinist theology. The English Puritans, despite strong differences of belief among different branches, different sects, and indeed different congregations, shared the belief that human history is wholly within the providence of God, that it is primarily a spiritual story of the unfolding of God's own purposes. This strong belief in divine providence led them to view England as God's elect nation, destined to reveal and embody God's mission for mankind. Second, the English Puritans believed that God willed and commanded what Milton and others called "the reformation of the world." Third, the Puritan concept of reformation of the world was closely connected with an emphasis on law as a means of such reformation. A fourth element in the Puritan belief-system that strongly affected the development of English political and legal institutions was its emphasis on the corporate character of Christian communities. Calvinist Puritanism was essentially a communitarian religion—the congregation of the faithful was to be "a light to all the nations of the world," "a city on a hill." This, in turn, led to an emphasis not only on hard work, austerity, frugality, discipline, self-improvement, and other features of what has come to be called the Puritan work ethic, but also on public responsibility, public service, cooperation, charity, and other qualities associated with the concept of public spirit. The adoption of a theory of absolute liability for breach of contract by the English courts in the seventeenth century was a characteristic legal reflection of the seventeenth-century Puritan belief-system.[15]

15. In *Paradine v. Jane*, the traditional theory of contractual liability based on fault was vigorously argued and rejected. For the report of the case, see Style 47, 82 Eng. Rep. 519 (1647). Most discussions of the case use only the report in Aleyn 26, 82 Eng. Rep. 897 (1648); however, the report in Style needs also to be read in order to grasp the full significance of the case. The point is developed in Harold J. Berman, *The Religious Sources of General Contract Law: An Historical Perspective*, 4 J. L. & RELIGION 103 (1986).

Finally, and most directly connected with the English Revolution, Calvinist political theory declared that government by representative leaders of the community—"the elders," "the lower magistrates"—is superior to government by a single ruler—the prince. John Calvin had written that the best form of government is either "aristocracy or a system compounded of aristocracy and democracy," such as "the Lord established among the people of Israel." The theological bases of this theory of tempered aristocracy were the doctrines of the sinfulness of man, his fundamental selfishness and lust for power, on the one hand, and of the salvation of "the elect," on the other.[16]

In the course of the seventeenth century all these features of English Puritanism became absorbed into Anglican theology as well, although in Anglicanism, and in English political theory, they lost some of their original Puritan fervor and some of their Puritan theological foundations.

While Calvinist religious thought could, and sometimes did, lead to a rigid and intolerant fundamentalism, it also could, and in England did, eventually lead to a more flexible and more tolerant approach to truth. The Calvinist philosopher and immigrant Huguenot Pierre Bayle, writing in 1686, advocated a toleration of diverse religions based on the use of reason and the natural light. Bayle's concept of natural light was similar to that of other seventeenth-century theologians and philosophers. Bayle did not call into question the truth of divine revelation, known by the spiritual light of faith. He did, however, argue, as Descartes had also though in a quite different context, that all teachings, all dogmas about revelation can and should be subjected also to the test of the natural light of reason. If they failed that test, Bayle wrote, they should be considered "fragile." This led Bayle to the conclusion that within Protestant Christianity there should be toleration of diverse religious confessions.[17]

John Locke shared Bayle's view, writing in 1687 that "God has set up a candle in our souls . . . bright enough for all our purposes," and that consequently there is no conflict between reason and true faith.[18] "Light, true light, in the mind," Locke wrote, "is, or can be, nothing else but the evidence of the truth of any proposition. . . . Reason must be our last

16. For a fuller treatment of the Puritan belief-system, see Berman, *Law and Belief*, *supra* note 11, at 594-97. The reference to a "city on a hill" is taken from a sermon by John Winthrop; *see id.* at 596 n.27. The reference to Calvin's belief in aristocracy as the best form of government is taken from his *Institutes*; *see id.* at 597 n.29. *Cf.* John Witte, Jr.'s penetrating exploration of seventeenth-century Puritan influences on subsequent American constitutional ideas and institutions in *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41 (1990).

17. Pierre Bayle's principal work on religious toleration is his *Commentaire philosophique sur ces paroles de Jésus Christ: contrains-les d'entrer*. For a translation and commentary on this text, see AMIE GODMAN TANNENBAUM, PIERRE BAYLE'S PHILOSOPHICAL COMMENTARY: A MODERN TRANSLATION AND CRITICAL INTERPRETATION (1987).

18. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *quoted in* MORTIER, *supra* note 1, at 19.

judge and guide in everything."[19] This, of course, could also have been said by Descartes; for Locke, however, as for Bayle, the belief that natural light confirms the truth divinely revealed to faith by spiritual light was coupled with the restriction of divine revelation to that which is found in the Bible. Post-Biblical theological and ecclesiastical traditions, and especially disagreements among different Christian denominations concerning matters left open by Biblical revelation, were to be judged by natural reason alone.[20] Thus Locke advocated a principle of toleration of dissenting sects—a principle that was effectuated in the Toleration Act of 1689.[21] This was not, of course, disestablishment of the Anglican Church, to which Locke remained faithful, nor was it free exercise of religion such as was advocated by the French *philosophes* (and others) in the next century.

The differences between what I shall henceforth call the "English" and the "French" belief-systems, meaning those that were reflected in the political and legal institutions that emerged after the seventeenth-century English Revolution and the eighteenth-century French Revolution respectively, are vividly illustrated by a comparison of the 1689 English Declaration of the Rights and Liberties of the Subject—enacted by Parliament as the Bill of Rights—with the 1789 French Declaration of the Rights of Man and Citizen. The English Bill of Rights proceeds from historical premises. It starts by listing eleven types of illegal conduct of which the deposed monarch, James II, was guilty. It then states that "the lords spiritual and temporal, and commons . . . do . . . as their ancestors in like cases have usually done, for the vindicating and asserting of their ancient rights and liberties, declare" that certain types of royal policies and actions are illegal. These, again, are listed by number, and they correspond generally, with some additions, to the kinds of rights which King James II was charged with violating. Many of them are violations of the rights of Parliament: the king may not suspend or dispense with its laws; he may not levy taxes without its authorization; he may not keep a standing army within the kingdom in time of peace without its consent; elections of its members must be free and they must have freedom of speech; and parliaments are to be held frequently. Others

19. *Id.*

20. *See* JOHN LOCKE, THE REASONABLENESS OF CHRISTIANITY 251-56 (1811).

21. Locke wrote:

> I esteem that toleration to be the chief characteristic mark of the true Church. For whatsoever some people boast of the antiquity of places and names, or of the pomp of their outward worship; others, of the reformation of their discipline; all, of the orthodoxy of their faith—for everyone is orthodox to himself—these things, and all others of this nature, are much rather marks of men striving for power and empire over one another than of the Church of Christ. Let anyone have never so true a claim to all these things, yet if he be destitute of charity, meekness, and good-will in general towards all mankind, even to those that are not Christians, he is certainly yet short of being a true Christian himself.

John Locke, *A Letter Concerning Toleration* (1686), *reprinted in* JOHN T. NOONAN, THE BELIEVER AND THE POWERS THAT ARE 78 (1987).

concern violations of the civil rights of the subject: excessive bail, excessive fines, and cruel and unusual punishment are forbidden; trial by jury is guaranteed; and promises of fines and forfeitures of particular persons before conviction are illegal.

The 1689 Bill of Rights should be read together with the Act of Settlement of 1701, which in establishing the succession of Queen Anne to the throne also declared that judges shall have tenure "so long as they conduct themselves well"—in effect, life tenure—and may be removed only by vote of both houses of Parliament. It is presupposed in these documents that the unwritten English constitution is a historically evolving set of principles, embodied in such political and legal instruments as the Magna Carta of 1215, the Petition of Right of 1628, the Habeas Corpus Act of 1679, the Bill of Rights itself, and, perhaps above all, the common law as it had evolved and continued to evolve in the decisions and opinions of the courts.

The French Declaration of the Rights of Man and Citizen embodies quite different principles. It is not "the lords spiritual and temporal, and commons" that enacts it but "the representatives of the French people." It sets forth not "the ancient rights and liberties of Englishmen" but "the natural, inalienable, and sacred rights of man." It makes no reference to the past. Instead it sets forth seventeen "natural and imprescriptible rights of man." The first is that "men are born and remain free and equal in rights" and that therefore "social distinctions can be based only upon public utility." The second declares "liberty, property, security, and resistance to oppression" to be "natural and imprescriptible rights." The third states that "the source of all sovereignty is in the nation." Others include the propositions that the law has the right to forbid only such actions as are injurious to society; that law is the expression of the general will, in the formation of which all citizens have the right to participate; that no one may be accused, arrested, or detained except in cases determined by law and according to legal forms; that no one may be punished except by virtue of a law previously promulgated; that a person is presumed innocent until pronounced guilty; that no one ought to be disturbed because of his opinions provided they do not disturb the public order established by law; that the right to speak, write, and print freely is "one of the most precious rights of man" and may be restricted only if it is abused and only in cases determined by law; that "any society in which the guarantee of rights is not secured or the separation of powers not determined has no constitution at all"; and that "no one may be deprived of the sacred and inviolable right of property unless public necessity so requires and on condition of a just and prior indemnity."[22]

22. Other human rights listed in the French Declaration include the right of individuals to consent to taxation, either personally or through their representatives, and the right of society to demand an accounting from public employees. For a complete text of the French Declaration, see

It is apparent that the French "rights of man and citizen" are the product of minds strongly influenced by the rationalist and individualist belief-system of the *philosophes* of the previous two generations. The 1689 English "rights of English subjects," on the other hand, are the product of minds strongly influenced by the English historicist philosophy of the Puritans and the common lawyers who combined initially to lead the Revolution of Parliament.

The differences between what I have, for convenience, called the English and the French philosophies—although each had adherents in virtually all the countries of Europe—were developed dramatically and at length in the famous controversy between Edmund Burke and Thomas Paine. Burke, in his *Reflections on the French Revolution* (1790), defending the English Revolution, glorified tradition and the corporate evolution of the English people. A nation, he wrote in a famous passage, is indeed formed by a social contract but it is a contract of partnership of past, present, and future generations, not to be confused with a contract for the sale of goods.[23] Burke looked for the source of liberty not in the will of transitory majorities but in the public spirit of the leaders of the nation in Parliament and on the bench. Responding to Burke's book, Paine, in his *Rights of Man* (1791), defending the French Revolution, glorified reason—that is, the rationality of each person—and saw the nation as a voluntary association of individuals. He looked for the source of liberty in the public opinion of a given society at a given moment. Thus issue was joined not only between two men but between two belief-systems, each associated with a different set of political and legal institutions.

III. "ENGLISH" AND "FRENCH" ASPECTS OF AMERICAN CONSTITUTIONAL LAW

I turn now to the American Revolution and American constitutional law, and to a consideration of the relationship between the religious and philosophical ideas that were dominant in America during the decades prior to 1787-1791—when the United States Constitution, including the Bill of Rights, was adopted—and the political and legal institutions reflected in that constitution as well as in the earliest state constitutions.

The American Revolution has two faces. From one perspective, it

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VINCENT MARCAGGI, LES ORIGINES DE LA DÉCLARATION DES DROITS DE L'HOMME DE 1789, at 227-31 (2d ed. 1912).

23. Society is indeed a contract. . . . [B]ut the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico, or tobacco . . . to be dissolved by the fancy of the parties. . . . It is a partnership in all science; a partnership in all art; a partnership in every virtue and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 84-85 (J.G.A. Pocock ed., Hackett Publishing Co. 1987) (1790).

appears as a war of secession, fought by the colonists to secure for themselves the same rights that their English cousins enjoyed in the mother country. It was this aspect of the Revolution that was emphasized in the Declaration of Rights of the First Continental Congress of 1774, which demanded for the colonists "all the rights, liberties, and immunities of free and natural-born subjects within the realm of England."[24] Many of these "rights, liberties, and immunities" had been denied to them. Under British imperial law, the American colonists were not entitled to the English common law as a matter of right, but only to those parts of it which the Privy Council considered to be applicable to their condition. They were not entitled as a matter of right to the benefit of such common-law statutes as Magna Carta, the Petition of Right, the Habeas Corpus Act, the Bill of Rights of 1689, or to any other statutes that were enacted before settlement of the colonies, nor were they entitled to the benefit of post-settlement statutes unless the colonies were specially named in them. They were not entitled to trial by jury. Moreover, their governors were appointed by the Crown, and their judges were subject to removal by the Crown. In short, they were under royal prerogative powers which Parliament had successfully fought to abolish at home in the period from 1640 to 1689 but which Parliament had insisted be exercised in the overseas colonies. Perhaps most important of all, the colonists were not represented in Parliament. According to this point of view, they fought the War of Independence to secure for themselves the political and legal institutions which had been forged in the fires of the English Revolution. This was the "English" face of the American Revolution.

From another perspective, however, the American Revolution appears not as a movement to assert the rights of colonists to English forms of government and English law, but rather as a movement to establish a new kind of government and law which would be essentially different from English law. Thomas Jefferson, who was an exponent of the latter view, said some years after the Revolution, "I deride . . . with you the ordinary doctrine, that we brought with us from England [and hence were entitled to] the common law rights. This *narrow notion* was a *favorite* in the first moment of rallying to our rights against Great Britain. But it was that of men who felt their rights, before they had thought of their explanation. The truth is, that we brought with us the rights of men, of expatriated men."[25]

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24. *See Declaration and Resolves of the First Continental Congress, in* 1 DOCUMENTS OF AMERICAN HISTORY: TO 1898, at 82-85 (Henry S. Commager & Milton Cantor eds., 10th ed. 1988). In the *Resolutions of the Stamp Act Congress* (1765), a similar demand was made upon the British Government: "His Majesty's liege subjects in these colonies are intitled to all the inherent rights and liberties of his natural born subjects within the kingdom of Great Britain." *Id.* at 58.

25. *Quoted in* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 105 n.1 (3rd ed. 1858).

Jefferson's philosophy of the natural and equal rights of all men, and of the right of the majority of the community to overthrow a government which does not protect such rights—so vividly expressed by him in the Virginia Bill of Rights of June 12, 1776, and in the first paragraph of the Declaration of Independence—links the American Revolution not to the English Revolution, whose ideology was essentially traditionalist and whose political structure was essentially aristocratic and corporate, but rather to the subsequent French Revolution, whose ideology was essentially rationalist and whose political structure was essentially democratic and individualistic.

It is a striking fact that Burke and Paine, from completely opposite ideological standpoints, could both support the American cause. Burke saw it primarily as a War of Independence. Paine saw it as a Revolutionary War. It would be a grave mistake, however, to suppose that each American colonist who supported the American cause fell on one side of this ideological division or the other. On the contrary, most of them, probably, and certainly many of their leaders—men such as John Adams, James Wilson, and James Madison—somehow accommodated the tension between the two perspectives.

These three—Adams, Wilson, Madison—each of whom played a major role in shaping American constitutional law at its formation—were men of strong Protestant Christian convictions. None of them accepted the dogmatic rationalism and individualism that was characteristic of the Deistic thought of such men as Franklin, Paine, or Jefferson.[26] Nevertheless, they enthusiastically supported democratic political institutions and the natural rights and liberties of the individual against aristocratic privilege and monarchical prerogative, although they also supported substantial constitutional restraints upon the will of the majority. Finally, all three believed firmly in the English common law with its strong element of historicity, of continuity between past and future. In sum, they combined and reconciled, albeit each in his own way, liberal ideas that were preached by the French *philosophes* and their English and American sympathizers and which ultimately found reflection in the constitutional law of the first French Republic, on the one hand, and, on the other hand, conservative ideas—in the Burkean sense—that had been preached by supporters of the seventeenth-century English Revolution such as John Milton and Matthew Hale and which had found reflection

26. In the 1770s, Benjamin Franklin proposed that the Deistic Society of London, which he had been instrumental in creating, be transformed into a "church" replete with liturgy and a "priest of nature." The Society flourished through much of the late 1770s and early 1780s, and included as participants such figures as Thomas Paine, Dupont de Nemours, and, in all likelihood, the English radicals Richard Price and Joseph Priestley. David Williams, who served as a "priest of nature," preached regularly in the Society's "chapel." On the activities of this Society, see Nicholas Hans, *Franklin, Jefferson, and the English Radicals at the End of the Eighteenth Century*, 98 PROC. AM. PHIL. SOC'Y 406 (1954).

in the development of English constitutional law in the late seventeenth and eighteenth centuries.

The surprising fact that both sides in this great religious-philosophical and political-legal debate could appeal to the writings of John Locke is due to the greatly neglected fact that those writings could be construed *either* as a justification of the aristocratic, traditionalist, and communitarian English Revolution *or* as a foundation of the democratic, rationalist, and individualist program eventually embodied in the French Revolution.

A. The Declaration of Independence

The ambiguity of the American Revolution is symbolized by the Declaration of Independence of July 4, 1776, which Donald Lutz has rightly compared to a "covenant" or "compact" to which the United States Constitution is the "charter."[27] It is best known, perhaps, for its opening paragraph, undoubtedly written by Jefferson, which is in what I call the "French" mode: Deistic in its reference to Nature and Nature's God; rationalistic in its declaration of self-evident universal truths; individualistic in its affirmation of the equal rights of all men to life, liberty, and the pursuit of happiness; and democratic in its assertion of the right of the people to establish the kind of government that represents their will. In these respects, and in its subsequent assertion of certain specific civil rights and liberties, the American Declaration of Independence served as a model for the French Declaration of the Rights of Man and Citizen of 1789. On the other hand, the main body of the Declaration of Independence is closely modelled on the English Declaration of Rights of *1689*. In the English style, it presents a bill of particular grievances, a list of specific violations by King George III—quite comparable to those of James II—of the political and civil rights of the colonists. It is of some interest that in a contemporary American edition of Blackstone's *Commentaries on the Laws of England*, at a point where Blackstone wrote about the 1689 English Bill of Rights, the American editor inserted a footnote stating that "[t]he American student who has read with care the Declaration of Independence will see that the framers of it had this [1689] declaration in mind and intended to keep strictly within the precedent."[28]

Perhaps John Adams is the person who best represented, both in thought and in action, the combination of these two aspects of the American Revolution.[29] In his writings generally, and especially in his letters,

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27. DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 114 (1988).

28. *Quoted in* EUGEN ROSENSTOCK-HUESSY, OUT OF REVOLUTION: THE AUTOBIOGRAPHY OF WESTERN MAN 645-46 (1938).

29. In a stimulating article on custom and reason in eighteenth-century American legal thought, James Whitman argues that John Adams (like other revolutionary lawyers) "confused" the common

he denounced the extreme views of such men as Paine and Rousseau.[30] Yet he could sign the Declaration of Independence with enthusiasm and could remain a close lifelong friend of Thomas Jefferson. His own operative political philosophy at the time of the outbreak of the American Revolution is best reflected in the Massachusetts Constitution of 1780, of which he was the principal draftsman.[31]

B. State and Federal Constitutions

In late 1775, the Second Continental Congress resolved that the colonies draft constitutions that would "establish some form of government" independent of the Crown. In September 1776, a popularly elected Pennsylvania constitutional convention, presided over by Benjamin Franklin, adopted such a constitution. Thomas Paine was among those who participated in its drafting, and, not surprisingly, it reflects what I have called "French," or "liberal," conceptions. It is divided into a

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law with natural law. He adduces as evidence Adams' statement in 1765 that "the foundations of British laws and government [are to be found] in the frame of human nature, in the constitution of the intellectual and moral world." James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1321 (1991). To suggest, as Whitman does, that Adams and his fellows were guilty of an "unclear mingling" and of "unreflectively conflating" common law (or customary law) and natural law (or reason) neglects the possibility that the "mingling" was clear and the "conflating" was reflective. *Id.* at 1322, 1323. In fact, Adams consciously combined the historical theory on which the English law was based with a moral theory of human nature such as was expounded by the "enlightened" philosophers of his time. As Whitman implicitly recognizes, the split between the three major schools of jurisprudence—positivism, natural-law theory, and the historical school—only materialized in the nineteenth and twentieth centuries. *Cf.* Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779 (1988).

30. Writing to his wife in March 1776, Adams criticized Paine in the following terms:

> Sensible men think there are some whims, some sophisms, some artful addresses to superstitious notions, some keen attempts upon the passions, in this pamphlet. But all agree there is a great deal of good sense delivered in clear, simple, concise and nervous style. His sentiments of the abilities of America, and of a difficulty of a reconciliation with Great Britain, are generally approved. But his notions and plans of continental government are not much applauded. Indeed this writer has a better hand in pulling down than building.

Quoted in J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY 172-73 (1936). Adams used far less temperate language in a subsequent letter to Benjamin Waterhouse, describing Paine as "mongrel between pig and puppy, begotten by a wild boar on a bitch wolf." *Quoted in* EDWARD HANDLER, AMERICA AND EUROPE IN THE POLITICAL THOUGHT OF JOHN ADAMS 176 (1964).

Writing to Richard Price in April 1790, Adams observed: "The Revolution in France could not be indifferent to me; but I have learned by awful experience, to rejoice with trembling. I know that encyclopedists and economists, Diderot and d'Alembert, Voltaire and Rousseau, have contributed to this great event more than Sidney, Locke, or Hoadly, perhaps more than the American Revolution; and I own to you, I know not what to make of a republic of thirty million atheists." A quarter century later, Adams wrote to Thomas Jefferson: "I have never read reasoning more absurd, sophistry more gross, in proof of the Athanasian creed or transubstantiation than the subtle labors of Helvétius or Rousseau to demonstrate the natural equality of mankind." Both letters are quoted in ZOLTÀN HARASZTI, JOHN ADAMS AND THE PROPHETS OF PROGRESS 81 (1952).

31. John Adams took pride in his role in the drafting of the Massachusetts Constitution. Writing to a friend shortly after its ratification he stated: "There never was an example of such precautions as are taken by this wise and jealous people in the formation of their government. None was ever made so perfectly upon the principle of the people's rights and equality. It is Locke, Sidney, and Rousseau and De Mably reduced to practice, in the first instance." *Quoted in* HARASZTI, *supra* note 30, at 80.

"Declaration of Rights" and a "Frame of Government." The Declaration of Rights proclaims in broad terms freedom of worship, speech, press, and assembly; the right to jury trial; the right to counsel in criminal cases; protection against unreasonable searches and seizures; and other liberties and rights. The Frame of Government provides for a unicameral legislature elected annually by all taxpayers, with proportional representation, so as to "make the voice of a majority of the people the law of the land"; an executive consisting of a council of twelve persons, also directly elected, to serve no longer than three years, with continual rotation; and a judiciary to be appointed by the president of the council, with judges of the supreme court to serve for a term of seven years. A popularly elected Council of Censors was to be chosen every seven years to review the constitutionality of legislative and executive actions, to take quite limited steps to correct any that were in violation of the constitution, and, if necessary, periodically to call constitutional conventions to propose amendments for submission to the people.[32]

The Massachusetts Constitution of 1780, drafted originally by John Adams, resembles the Pennsylvania Constitution of 1776 in certain respects. Its Preamble proclaims a radically democratic theory of government,[33] and its Declaration of Rights contains a list of "natural and inalienable" civil rights and liberties.[34] Its Frame of Government, however, provides for a bicameral legislature, with strict property qualifications for membership in the House of Representatives and even stricter property qualifications for membership in the Senate.[35] Moreover, the governor, although directly elected, was required to have landed prop-

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32. For a text of the Pennsylvania Constitution of 1776, see 5 AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS 3081-92 (Francis N. Thorpe ed., 1909). For a helpful guide to the circumstances leading up to the drafting and ratification of the Pennsylvania Constitution, see SELSAM, *supra* note 30.

33. The Preamble of the Massachusetts Constitution of 1780 states:

> The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.
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> The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.

3 AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS 1888-89 (Francis N. Thorpe ed., 1909).

34. Article I of the Massachusetts Declaration of Rights begins: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." *Id.* at 1889.

35. To be elected to the House of Representatives one must have been seised of a freehold estate worth at least one hundred pounds or owned any other ratable estate of at least two hundred pounds. To be elected to the Senate, one must have been seised of a freehold estate worth at least three hundred pounds or have owned any other ratable estate worth at least six hundred pounds. *See id.* at 1897, 1898. The House and Senate also reflected different theories of representation. Representation in the House was determined upon the basis of "equality," which translated into a system of representation proportional to the population. Representation in the Senate, however, was

erty in the Commonwealth of the value of at least one thousand pounds. Also, despite a provision calling for absolute separation of legislative, executive, and judicial powers, the governor was given the right to veto legislation, subject to being overridden by a two-thirds majority of that branch of the legislature which originated the legislation.[36] Moreover, the judiciary was given life tenure—again, an important restraint not only on the executive but also on the legislative power.[37]

The Massachusetts Constitution of 1780 also differed substantially from the Pennsylvania Constitution of 1776 in its provisions on religion, which transplanted to Massachusetts the English principle of an established church (in practice, it was the Congregational Church), coupled with toleration of all (Protestant) Christian denominations. All government officers were required to swear their belief in "the Christian religion." In addition, the Massachusetts Constitution in several provisions declared that "piety, religion, and morality" as well as "wisdom, knowledge, [and] virtue" are "necessary for the preservation of [the people's] rights and liberties" and provided for the appointment of Protestant teachers by the towns and for the support by the legislature of religious educational institutions, including Harvard College.[38] These provisions reflected the framers' strong belief that Christian values were needed as a foundation for a public spirit, or public virtue, that would guide and balance public opinion.

Thus the Massachusetts Constitution combined the strong "liberal" belief (as it would later be called) that, as stated in the Preamble, "the body politic is formed by a voluntary association of individuals" and that whenever the natural rights of the individuals who comprise the body politic are not protected "the people have a right to alter the government," with the equally strong "conservative" belief that the will of the majority must be balanced by an elite leadership, based not on heredity as such but on economic wealth and public spirit.

Indeed, the need to balance the power of the one, the few, and the many was a constant theme in the writings of John Adams. It was expressed also as the need to balance the power of the legislative, executive, and judicial branches, as well as the need to balance, within the legislative branch, the power of two chambers whose members were selected according to different principles.

This was *not* separation of powers in the sense advocated by Montes-

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determined upon the basis of taxation: the more taxes a given electoral district contributed, the larger would be its delegation in the Senate.

36. For the provision establishing the veto power of the Massachusetts governor, see *id.* at 1893-94.

37. All "judicial officers," according to the Massachusetts Constitution, were to "hold their offices during good behavior." *Id.* at 1905. This was the conventional language for life tenure, derived from the English Act of Succession of 1701. *See supra* p. 320.

38. *See* 3 AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS, *supra* note 33, at 1889-90, 1906-08.

quieu on the basis of his misreading of English parliamentarism and taken up by Voltaire and others. For the French *philosophes*, the powers to be separated were primarily the executive and the legislative; the judiciary was to be independent of the executive but entirely subordinate to the legislative branch, having the function merely of applying legislation to specific cases. For the Americans, however, the judiciary was a balance *both* to the legislative *and* to the executive branches. Judges were understood to have a law-shaping function through the doctrine of precedent. It was presupposed that the English common law survived, at least in part, in the constitutional law of the new republic. Eventually, the law-shaping function of the judges was enhanced by their power to refuse to enforce statutes that violated the constitution.

In general, seventeenth-century aristocratic and conservative English ideas played a role in the early development of American constitutional law at least equal to democratic and liberal ideas that were preached in the eighteenth century by the French *philosophes*—as well as by English and other European reformers—and that ultimately came to prevail in French constitutional law. This was true of most of the early state constitutions[39] and especially of the United States Constitution of 1787. The bicameral legislature is one example. The members of the U.S. Senate, elected for long terms and, at first, by the state legislatures, were supposed, like the members of the House of Commons, to represent the nation as a whole, while the members of the House of Representatives, like the members of the French Estates General, were supposed to represent their particular constituencies. The Supreme Court is another example. It was, indeed, a kind of House of Lords—which is also, in fact, the supreme judicial body in England. Likewise, the president, who like the senators was at first elected indirectly, was, in foreign policy at least, a kind of monarch, albeit not a hereditary monarch.

Even the written constitution played—and plays—a role in American law that is similar in some respects to the role of the unwritten constitution in English law. It is true that its language is fixed; yet the meaning of the words is subject to development by judicial interpretation—development in the light of earlier judicial interpretations. And so a Burkean historicity enters into American constitutional law, and one may say that the United States Constitution represents a partnership of the generations over time.

Yet the same persons who carried over and adapted English traditions to the new republic—men such as Wilson and Madison—also introduced into the United States Constitution, in modified form, democratic and

39. New Hampshire, New Jersey, New York, North Carolina, Georgia, and Virginia were the other states to draft constitutions in the late 1770s in response to the resolution of the Second Continental Congress. Pennsylvania and Massachusetts are discussed here because of the striking differences they present between the operational beliefs of their authors, especially Paine and Adams.

liberal ideas associated with the eighteenth-century, Europe-wide reform movement whose underlying belief-system was most effectively articulated by the French *philosophes* and which culminated in the French Revolution. These included not only the idea of a written constitution, a modified doctrine of separation of powers, and the theory of a government directly responsible to the opinion of the electorate, but also, and even more striking, guarantees of freedom of religion, speech, press, and assembly. Indeed, the entire Federal Constitution gives political and legal expression to the eighteenth-century concept that all persons, by virtue of their human nature, possess certain universal and equal rights to life, liberty, and property, which it is the obligation of government, if not always to protect, at least never to repress.

IV. THE "RADICALISM" OF AMERICAN CONSTITUTIONAL LAW[40]

A part of the "radicalism" of the American Revolution is that it brought forth, ultimately, federal and state constitutions which combined the conflicting belief-systems—in a nutshell, Puritanism, traditionalism, and communitarianism versus Deism, rationalism, and individualism—that found expression in the seventeenth-century English Revolution and the eighteenth-century French Revolution, as well as the conflicting political systems associated with those belief-systems—again in a nutshell, aristocracy based on public spirit versus democracy based on public opinion. The Americans seized the dilemma by both horns. What was radically new in American constitutional law was not restricted, however, to this synthesis of seeming opposites. The new American republic also introduced constitutional principles which were neither "English" nor "French" nor a combination of the two, and, indeed, which had never existed before in the West in anything like the same form. One of these was American federalism.[41] Closely related to it was a principle that might be called continentalism—the implicit provision for an expanding polity of continental scope, with unlimited mobility and unlimited absorption of immigrants. A third principle was the establishment of a government of delegated powers. A fourth was the institution of judicial review of the constitutionality of legislation. This list, which is hardly exhaustive, indicates areas of inquiry that lie beyond the scope of this essay. American constitutionalism—the word itself is an American

40. The title of this section is adapted from GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992) [hereinafter WOOD, RADICALISM]. Wood, however, sees little if any "radicalism" in the constitutional law that emerged from the Revolution, at least at the federal level.

41. *See* VINCENT OSTROM, THE MEANING OF AMERICAN FEDERALISM: CONSTITUTING A SELF-GOVERNING SOCIETY (1991). Ostrom shows the depth of the meaning of federalism as understood in late eighteenth-century America, including its basis in the religious concept of covenant (*foedus*). The theory of federalism reflected in *The Federalist*, he writes, challenged traditional concepts of sovereignty and reflected instead "a theory of concurrent, compound republics that enables democratic societies to reach out to continental proportions." *Id.* at 97.

invention—introduced something quite new into the Western political and legal tradition, something that is not embraced in the concept of the "Enlightenment" however broadly defined.

It is necessary to stress this because in recent decades efforts of many American historians to identify what was truly "radical" in the American Revolution have tended to focus attention on what has been called the "republican synthesis," that is, a more or less universal adherence to "republicanism" by Americans who supported the Revolution. As "republicanism" was first defined, in the 1960s, it consisted not only of a rejection of monarchy in favor of an elective system, but also of a belief in civic virtue, the public good, organic community, and Puritan virtues.[42] In their adherence to republicanism in this broad sense, the most diverse figures of the Revolutionary era were joined: John Adams and Thomas Paine, James Wilson and Samuel Adams, James Madison and Benjamin Franklin, Thomas Jefferson and Alexander Hamilton, the aristocratic Livingstons of New York and the democratic Pennsylvanians of 1776.[43] In the "republican synthesis" the conflict between what I have called here "English" and "French" ideas was submerged in the common idealism of the revolutionaries.[44] Indeed, the conflicting English and French backgrounds of American religious, philosophical, political, and legal thought were—and still are—hardly discussed by the American historians of the Revolution, although at various points a coincidence of some

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42. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 46-90 (1969) [hereinafter WOOD, CREATION]. "The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution." *Id.* at 53. The term "republican synthesis" was first used by Robert Shalhope in *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49 (3d ser. 1972).

43. *See* WOOD, CREATION, *supra* note 42. In his most recent book, however, Wood is somewhat more cautious, distinguishing between "republicanism" and "democracy," although still insisting at one point that "democracy was an extension of republicanism." WOOD, RADICALISM, *supra* note 40, at 231; *see infra* text accompanying note 47. Much depends, of course, on the definition not only of republicanism but also of democracy. In *The Federalist* No. 10, James Madison sharply contrasted the two. He wrote:

> [D]emocracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. . . .
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> The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, . . . the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government. . . .
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> [T]he . . . advantage which a republic has over a democracy . . . consist[s] in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and to schemes of injustice . . . [and] in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority. . . .

THE FEDERALIST PAPERS No. 10, at 126-28 (James Madison) (Isaac Kramnick ed., 1987).

44. The emphasis on "republicanism" was itself a historiographical reaction to a school of thought originated by Louis Hartz, who argued that liberalism was the "consensus" of American political thought in the eighteenth century, with priority given to individualism and property rights. *See* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF POLITICAL THOUGHT SINCE THE REVOLUTION (1955).

of the most salient features of eighteenth-century American republicanism with English Whig conceptions has been noted.

In view of the extraordinary diversity of meanings that can be attached to the word "republicanism," it well deserves the comment of John Adams himself, who in 1807 wrote that "[f]raud lurks in generals. There is not a more unintelligible word in the English language than republicanism," and that he had "never understood" what it was and thought that "no other man ever did or ever will."[45]

Partly, no doubt, because of the ambiguities in the term itself and partly because of the difficulty of reconciling as an abstract matter the views of what may be called "conservative" republicans such as John Adams with those of what might be called "liberal" republicans such as Thomas Paine, the concept of republicanism has undergone substantial modification at the hands of those who pioneered it.[46] In 1992, its leading exponent developed the thesis that the true "radicalism" of the American Revolution consisted in the virtual abandonment of the republican ideals of the Revolutionary generation in favor of the democratic movement of the early 1800s.[47]

Notions of eighteenth-century republicanism, and of a conflict between republicans and liberals, were taken up in the 1980s by various American legal scholars as a basis for understanding the Federal Constitution.[48] Indeed, the editors of a leading law school casebook on American constitutional law, published in 1986, adopted the view previously expressed by some historians that the Anti-Federalists were ardent republicans, who opposed ratification of the Constitution on the ground that it limited the "opportunity to participate in public affairs" at the local and state levels and thus "threat[ened] . . . civil virtue." The Federalists, on the other

45. *Cf.* Linda K. Kerber, *The Republican Ideology of the Revolutionary Generation*, 37 AM. Q. 474 (1985); WOOD, CREATION, *supra* note 42, at 48. Wood states unconvincingly that Adams in his later years was "bewildered" and "confused" about the meaning of the term "republicanism," since he had used it often enough in his earlier years. If Adams was confused, so were others. For example, James Madison wrote: "[w]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people. . . ." THE FEDERALIST PAPERS No. 39, at 255 (James Madison) (Isaac Kramnick ed., 1987). Understood this broadly, even monarchies can be—and were—seen as republics. Montesquieu, writing in his *Esprit des Lois* (1748), asserted that England "may be called a republic disguised under the form of a monarchy." *Quoted in* WOOD, RADICALISM, *supra* note 40, at 98. Wood himself repeats this assertion when he writes that the term did become "at times virtually indistinguishable from monarchy." *Id.* at 95-96.

46. *See* Robert Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334, 335 (3d ser. 1982) ("Many scholars have either raised serious questions about . . . republicanism . . . or [have] gone beyond it. The result is an increasingly diverse and at times seemingly inconsistent body of literature that casts republicanism in an enigmatic role."). *Cf.* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 29-32 (1991).

47. *See* WOOD, RADICALISM, *supra* note 40, at 230ff.

48. *See, e.g.*, Morton Horwitz, *The Constitution in Perspective: Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987); Morton Horwitz, *History and Theory*, 96 YALE L.J. 1825 (1987); Frank Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Mark Tushnet, *The U.S. Constitution and the Intent of the Framers*, 36 BUFF. L. REV. 217 (1987).

hand, were said to have had a "liberal" philosophy which was skeptical of communitarian values and gave priority to individual interests, including, especially, private rights of property.[49] A crucial difficulty with this analysis, however, is that some of the same Founding Fathers—Adams and Wilson, for example—fit both the "republican" and the "liberal" models.[50]

Yet to say that such people were "liberal republicans"[51] is to run the risk of conflating the two models entirely and thus of obscuring the real tension that existed in Revolutionary America—and still exists today—between two conflicting systems of thought and action, one of which was inherited from the seventeenth-century English Revolution and the other of which eventually found expression in the eighteenth-century French Revolution. Adams and Wilson succeeded in accommodating that tension not only in their own minds but also in the constitutional settlements that they helped to achieve.

V. HISTORIOGRAPHICAL CONCLUSIONS

I conclude with a discussion of what the approach that I have taken in this essay can contribute to the historiography of the Enlightenment, on the one hand, and of American constitutional law, on the other.

In the past, the approaches that have dominated the historiography of the American Revolution have, to a very considerable extent, focused *either* on the history of ideas *or* on the history of institutions, without attempting to bring the two together in any systematic way. The major defect of both these approaches lies chiefly in their separation. More recently, some scholars have sought to show more systematically the effects of the ideas of those who made the Revolution on the legal institutions that were created in the following generation. These admirable efforts have, however, themselves suffered from the defects of the earlier historiography.

The ideological approach confronts the difficulty of establishing the relative historical importance of particular sets of ideas. On the basis of a study of philosophical, religious, political, and other literature of the time, the intellectual historian seeks to sort out the very wide variety of

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49. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 2-7 (1986).

50. John Adams, for example, argued strenuously for the protection of private property, a seemingly "liberal" idea, but at the same time was a staunch advocate for governmental support of education, a seemingly "republican" idea. James Wilson was a strong believer in civic virtue and was skeptical about the primacy of private property rights, seemingly "republican" ideas, but was at the same time one of the strongest advocates for the ratification of the U.S. Constitution and its creation of a federal republic. Different scholars have labeled different historical personages as "liberal" or "republican." *Compare* Horwitz, *History and Theory*, *supra* note 48, at 1831 (Adam Smith was a republican) *with* ISAAC KRAMNICK, REPUBLICANISM AND BOURGEOIS RADICALISM: POLITICAL IDEOLOGY IN LATE EIGHTEENTH-CENTURY ENGLAND AND AMERICA 8-11 (1990) (Adam Smith was a liberal).

51. Ackerman opts for this solution. ACKERMAN, *supra* note 46.

ideas expressed, and to characterize those most widely held. But this scholarly enterprise is seriously handicapped by the inherent fluidity of ideas. Also, a given author of ideas—John Adams, for example—may hold different ideas at different times, and may even hold conflicting ideas at the same time. Moreover, it is a misguided enterprise to characterize ideas taken out of the context of the circumstances in which they were uttered and the problems to which they were addressed. This is especially true of ideas that constituted the philosophies not of professional philosophers but of political actors.

It is probably due, at least in part, to such defects that the history of ideas—so-called intellectual history—tends to resort to broader and broader categories. As we have seen, great debates have taken place between those who stress the importance of "republicanism" in late eighteenth-century America—a word that has eventually been defined so broadly that it could be translated simply as "patriotism"—and those who stress the importance of "liberalism"—a word that, in turn, has been defined so broadly that it could be characterized simply as a belief in limitations upon the power of government.

It is undoubtedly a big step forward to include in the intellectual history of America a study of the history of the European Enlightenment. Many American historians seem to have almost entirely forgotten that, except for the disfranchised Indians and blacks, all the eighteenth-century Americans were Europeans. Their leaders were steeped in European thought. But once again, if the Enlightenment is seen simply as an ideology, it becomes so broad as to include fundamentally contradictory ideologies over which conflicting political parties fought, bled, and died. It makes little sense to call both Burke and Paine, or both the eighteenth-century Deist Diderot and the seventeenth-century Calvinist Pierre Bayle, "Enlightenment" thinkers. It is historically more accurate to confine the term "Enlightenment" to the "natural light" which animated the French *philosophes* from Voltaire to Condorcet, together with their many allies in the other countries of Europe, that is, the men and women whose principal beliefs were ultimately embodied in the institutions that developed out of the French Revolution.

The institutional historians, on the other hand, have tended to pass over too lightly the passionately held beliefs, the convictions, that animated the men and women who created the political and legal institutions that emerged out of the American Revolution. In the past, this tendency was especially pronounced among legal historians, including many constitutional historians. Even today, the debate raging over the original intent of the Framers of the Federal Constitution in drafting its various provisions often neglects the background of beliefs that motivated the draftsmen, and, perhaps above all, the conflicting character of

some of those beliefs and the need to accommodate—the need to *live with*—those conflicts.

The approach that I have taken in this essay will, I hope, illuminate the new system of constitutional law established in America in the period from 1776 to 1791 by juxtaposing those constitutional principles that reflect what I have called the English and the French belief-systems: that is, the aristocratic, traditionalist, and communitarian convictions that were derived from the colonists' English heritage and the democratic, rationalist, and individualist convictions that were associated with the opposition thinkers of the later eighteenth century, especially in France but also in England itself, as well as in Italy, the Netherlands, Prussia, Austria, Russia, and other countries of Europe. The tension between these two sets of "ideas"—they were not just ideas, they were revolutionary movements—has persisted throughout our history; the balance between them has had to be struck over and over again until the most recent months, weeks, and even days.[52]

52. A longer study would have to go back to earlier—pre-seventeenth century—elements of the Western legal tradition. All modern Western conceptions of the rule of law are rooted in the Papal Revolution of the eleventh and twelfth centuries which drew on but also combined and transformed ancient Roman, Greek, and Hebrew sources. *See* BERMAN, LAW AND REVOLUTION, *supra* note 11.