

THE ENGLISH RADICAL WHIG ORIGINS OF AMERICAN CONSTITUTIONALISM

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TABLE OF CONTENTS

I.	INTRODUCTION	131
A.	<i>“Liberalism” Versus “Civic Republicanism”: A False Debate</i>	133
B.	<i>“Whiggism”: A Restored Understanding</i>	138
II.	THE EVOLUTION OF ANGLO-AMERICAN CONSTITUTIONALISM: THE DUAL HERITAGE OF SOVEREIGNTY AND FUNDAMENTAL LAW	141
III.	VOICES OF DISSENT: THREE GENERATIONS OF “REAL WHIGS”	161
IV.	THE SUBSTANCE OF WHIG CONSTITUTIONALISM	174
A.	<i>“Black-Letter” Texts: The Whig Common-Law Tradition</i>	175
B.	<i>English Rights: The Whig Approach to History</i>	179
C.	<i>Natural Rights: The Whig Approach to Government</i>	189
V.	THE IRRELEVANCE OF BLACKSTONE	196
VI.	CONCLUSION	204

I. INTRODUCTION

Concern about “political correctness” in higher education is not a new phenomenon. In an especially candid letter to James Madison in 1826, Thomas Jefferson outlined his criteria for the appointment of a law professor at the University of Virginia:

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In the selection of our Law Professor, we must be rigorously attentive to his political principles. You will recollect that before the revolution, Coke Littleton was the universal elementary book of law students, and a sounder whig never wrote, nor of profounder learning in the orthodox doctrines of the British constitution, or in what were called English liberties. You remember also that our lawyers were then all whigs. But when his black-letter text, and uncouth but cunning learning got out of fashion, and the honeyed Mansfieldism of Blackstone became the student's hornbook, from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue. They suppose themselves, indeed, to be whigs, because they no longer know what whigism or republicanism means. It is in our seminary that the vestal flame is to be kept alive; it is thence it is to spread anew over our own and the sister States.¹

This letter is especially revealing. It demonstrates quite unambiguously Jefferson's disdain for Blackstone, a topic that will be more fully explored later in this Article. It also reveals in clear terms Jefferson's own constitutional principles, as he described them, as those of a "whig," and that Jefferson considered the choice of a "whig" as law professor to be vital in ensuring that the "vestal flame" of republicanism be kept alive at the University to which he devoted the last years of his life.

It is significant that in his letter to Madison, Jefferson expressed the key distinction in terms of "whig" and "tory": Jefferson sought a professor who had studied the sound "whig" principles of Coke, and not one of the new breed of lawyers who imbibed the "honeyed Mansfieldism" of Blackstone's *Commentaries*, with its "tory hue." The distinction was not merely academic; to an American of the Revolutionary generation, the words "whig" and "tory" had, of course, precise meanings. But use of these terms was not limited to the context of the struggle for independence, that is, to the division of the people into Patriots and Loyalists during the Revolution. The perceived division into "whig" and "tory"—the former associated with the changes the American Revolution wrought, the latter with the British monarchical system of government that the Americans had rejected—continued into the 1790s, when it animated the political struggles of the so-called "first party system" that pitted Jeffersonian Republicans against the Federalists.² And, as Jeffer-

1. Letter from Thomas Jefferson to James Madison (Feb. 17, 1826), reprinted in 12 THE WORKS OF THOMAS JEFFERSON 456 (Paul L. Ford ed., 1905).

2. Jefferson regarded the Federalists as monarchists, and he frequently called them "tory," in contrast to the "whig" principles he associated with his own "republican" party. See, e.g., Letter

son's letter to Madison so poignantly illustrates, use of the "whig" and "tory" labels persisted well into the nineteenth century, even after the Federalist party had met its demise and the Republicans had begun to split into the Jacksonian Democrats and the Whigs, the forerunners of the two major political parties in modern America.³

Recent scholarship concerning early American political and constitutional thought has sought to identify the sources of the conflict that divided Americans during the Jeffersonian period. Scholars generally have agreed that English political and constitutional traditions were enormously influential in shaping the contours of early American political and constitutional thought. They have disagreed, however, about the identity of those traditions: some emphasize the influence of a "classical" or "civic" republican tradition⁴ that they can trace back to Renaissance and even ancient political thought; others stress the influence of a more modern "liberal" tradition.

Unfortunately, debate over the relative merits of these two schools of thought often has obscured the true nature of early American thought, particularly with regard to those aspects related to the development of a uniquely American constitutionalism. Scholars—at first historians and political scientists, and more recently legal scholars—who have become more enamored with the civic republican implications of early American thought have overlooked the "whig" basis of that thought. As a result, much recent scholarship about early American constitutionalism has been seriously misguided.

A. "Liberalism" versus "Civic Republicanism": A False Debate

Before the mid-1960s virtually all historians agreed that the sources of early American ideas about government lay in a "liberal" tradition em-

from Thomas Jefferson to Lafayette (June 16, 1792), reprinted in 24 THE PAPERS OF THOMAS JEFFERSON 85 (John Catanzariti ed., 1990); Letter from Thomas Jefferson to John Wise (Feb. 12, 1798), quoted in DUMAS MALONE, JEFFERSON AND THE ORDEAL OF LIBERTY 364-65 (1972). On the first party system generally, see RICHARD BUEL, SECURING THE REVOLUTION: IDEOLOGY IN AMERICAN POLITICS, 1789-1815 (1972); JOSEPH CHARLES, THE ORIGINS OF THE AMERICAN PARTY SYSTEM (1956); RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840 (1970).

3. On the demise of the Federalist party and the transformation of the first party system of the 1790s into the second party system of the 1830s-50s, see generally HOFSTADTER, *supra* note 2; SHAW LIVERMORE, THE TWILIGHT OF FEDERALISM (1962).

4. This Article generally uses the term "civic republican" to identify the tradition that is variously called civic republican, civic humanist, classical republican, or simply republican.

phasizing individual rights.⁵ Caroline Robbins was enormously influential in tracing the importance of a number of English liberal thinkers—from Henry Neville in 1680 to James Burgh in 1774—to the thought of Americans of the Revolutionary generation.⁶

Beginning in the mid-1960s, however, challenges to this liberal consensus appeared in historical scholarship. In an article published in 1965, J.G.A. Pocock directly challenged Robbins and the liberal school.⁷ Pocock identified the seventeenth-century English theorist, James Harrington, as the central figure (or “fountainhead”) through whom the eighteenth century inherited a “civic republican” tradition of thought rooted in classical writings.⁸ This tradition emphasized the civic character of human beings: humans as “political,” in Aristotle’s sense, as citizens of the *polis*.⁹ By emphasizing the subordination of private interests to a transcendent “public good,” this tradition offered a communitarian alternative to the individualism implicit in the liberal tradition. In the late 1960s, Gordon Wood, building on the scholarship of Bernard Bailyn,¹⁰ suggested that this civic republican tradition was the most potent influence on American Revolutionary thought.¹¹ Six years later,

5. The emphasis on liberalism in early American scholarship mirrored the broader emphasis on liberalism found in the so-called consensus historians’ interpretation of American history generally. Louis Hartz’s book, *The Liberal Tradition in America*, is the seminal exposition of the liberal interpretation. LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955).

6. CAROLINE ROBBINS, *THE EIGHTEENTH-CENTURY COMMONWEALTHMAN: STUDIES IN THE TRANSMISSION, DEVELOPMENT, AND CIRCUMSTANCE OF ENGLISH LIBERAL THOUGHT FROM THE RESTORATION OF CHARLES II UNTIL THE WAR WITH THE THIRTEEN COLONIES* (1959).

7. J.G.A. Pocock, *Machiavelli, Harrington, and English Political Ideologies in the Eighteenth Century*, 22 WM. & MARY Q. 3d ser. 549 (1965).

8. *Id.* at 551-52. In his article, Pocock argued that, through Harrington, Anglo-American political thought had inherited the civic republican tradition that, in turn, had been passed on by Machiavelli from classical writers, chiefly Aristotle and Polybius. Thus Pocock’s interpretation posited an elaborate chain of influence in the history of ideas, starting with ancient Greece and republican Rome, then passing through Renaissance Italy to seventeenth-century England, and finally reaching eighteenth-century England and its American colonies.

9. See, e.g., ARISTOTLE, *Politics*, in *THE BASIC WORKS OF ARISTOTLE* 1113, 1129 (Richard McKeon ed., 1941) (Book I, chapter 2).

10. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

11. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969). Although he argued that the ideology of the American Revolution was “grounded in the best, most enlightened knowledge of the eighteenth century”—i.e., the classical civic republican tradition—Wood also emphasized that the debate over ratification of the Constitution “transformed” that ideology, bringing an end to the classical theory of politics and inaugurating a new, uniquely American science of politics that made the assumptions of civic republicanism irrelevant. *Id.* at 32-33, 606-615. Many scholars who cite Wood’s book in support of the civic republican interpretation ignore the full implications of his thesis.

Pocock's monumental work, *The Machiavellian Moment*,¹² placed the founding of the American republic fully within a Machiavellian "civic humanist" tradition and argued that the Revolution and Constitution together ought to be considered as "the last act of the civic Renaissance."¹³

In the past fifteen years, several scholars, following the course Pocock suggested, have interpreted American political thought of the early national period in terms of the civic republican paradigm.¹⁴ More recently, this so-called "republican synthesis," virtually accepted as the gospel revisionist view among historians and political scientists,¹⁵ has appealed to legal scholars.¹⁶

Much of the appeal of civic republicanism to legal scholars undoubtedly has been its emphasis on communitarian as opposed to individualis-

12. J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975). Pocock's main thesis may be summarized as follows: Florentine political thought in the fifteenth and sixteenth centuries developed the "civic humanist" perspective that drew on Aristotle's concepts of citizenship and the mixed constitution as a balance of the one, the few, and the many. (The latter concept, refined and linked to the notion of a cycle of constitutional decay, was drawn from Polybius). From the republican theory of Machiavelli and his contemporaries emerged the ideal of active citizenship in a republic, as a response to the decay of the republic. The republic itself was self-doomed because the pursuit of individual goods was incompatible with the maintenance of civic virtue; only through something like "a partnership in virtue" among all citizens could the republic persist. Therefore, the civic humanists stressed the Aristotelian assumption that the development of the individual towards self-fulfillment was possible only when the individual acted as citizen in the *polis*, or republic. Harrington adopted this assumption in his work, *Oceana*, through which it influenced English political thought in the seventeenth and eighteenth centuries. Hence derived the Anglo-American preoccupation with "virtue," in the civic humanist sense, and with it, the concern that "corruption" (i.e., self-interested use of political power) would upset the delicate "balance" of the English mixed constitution. This theory is discussed more fully in Part II, *infra*.

13. *Id.* at 462.

14. Accordingly, these scholars generally have viewed the Federalist-Republican debates of the 1790s as a replay of the Court and Country polarity of English politics in the early decades of the eighteenth century. They have considered the clash between Hamilton and Jefferson to have mirrored the battle between Robert Walpole, the Court politician, and Viscount Bolingbroke, his Country opponent. See, e.g., LANCE BANNING, *THE JEFFERSONIAN PERSUASION* 130-140 (1978); DREW MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* (1980).

15. See, e.g., Lance Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 WM. & MARY Q. 3d ser. 3 (1986); RICHARD K. MATTHEWS, *THE RADICAL POLITICS OF THOMAS JEFFERSON: A REVISIONIST VIEW* (1984); Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 3d ser. 49 (1972); ROBERT E. SHALHOPE, *JOHN TAYLOR OF CAROLINE: PASTORAL REPUBLICAN* (1980).

16. See, e.g., Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); Symposium, *Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory*, 85 NW. U. L. REV. 1 (1989); Richard H. Fallon, *What is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989).

tic values. In translating the communal values of civic republicanism to the realm of constitutional theory, many scholars—both liberal and conservative—have downplayed the Founders' concern for individual rights and instead have stressed the concept of majority rule.¹⁷ This scholarship implies in part that government, far from being a necessary evil, is rather a benign or even a positive good in persons' lives, and that the essential function of a constitution is therefore not to limit or control, but rather to empower government.¹⁸

Meanwhile, the debate among historians and political scientists has gone beyond republican revivalism and back to a liberal revivalism of sorts. Even during the heyday of republican revivalism, Pocock did not lack critics. Responding to some in a review article, he has conceded that the political thought of the Founders—or at least, the Jeffersonians—contained tensions between liberal and republican values.¹⁹ Isaac Kramnick has gone further, suggesting that Lockean liberalism, the tradition emphasizing individual rights, profoundly influenced radical Whigs on both sides of the Atlantic by the middle decades of the eighteenth century.²⁰

Foremost among Pocock's critics, and an exponent of what Pocock calls the "neo-Lockean" interpretation, has been Joyce Appleby. Critical of attempts to interpret the American Revolution in premodern terms,

17. Compare Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991) (the "main thrust" of the Bill of Rights was "not to impede popular majorities, but to empower them") with ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 178 (1990) ("the Constitution assumes the liberties of self-government, not merely those liberties that consist in being free of government," and that the "freedom to govern" is important to the individuals in a political community).

18. See, e.g., Cass R. Sunstein, *The Republican Civic Tradition: Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). Sunstein does not entirely disregard the need to limit or control governmental power, but he argues that the way to do so is through shared commitment to certain republican principles: 1) deliberation in politics, which "civil virtue" makes possible; 2) equality of political actors; 3) universalism; and 4) citizenship, manifesting itself in broadly guaranteed rights of participation. *Id.* at 1541.

19. J.G.A. Pocock, *The Machiavellian Moment Revisited*, 53 J. MOD. HIST. 49, 69-70 (1981).

20. Isaac Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629 (1982) [hereinafter Kramnick, *Republican Revisionism*]. See also ISAAC KRAMNICK, *REPUBLICANISM AND BOURGEOIS RADICALISM: POLITICAL IDEOLOGY IN LATE EIGHTEENTH-CENTURY ENGLAND AND AMERICA* (1990). John Patrick Diggins and Thomas Pangle also have criticized the application to American thought of the Pocock argument about civic republicanism, essentially arguing instead that Louis Hartz's liberal interpretation was right after all. JOHN DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM* (1985); THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE* (1988).

Appleby has argued that the evolving tradition of economic liberalism, expressed in the writings of Adam Smith and others who emphasized individual self interest, was an important contributing force to Revolutionary ideology.²¹ Appleby has gone so far as to argue that “the principle of hope,” a forward-looking confidence in commercial prosperity through an expanding free market economy, was the essence of Jeffersonian Republicanism and of its challenge to the civic republicanism of the Federalists.²² Thus, the historiographical debate has come full circle, back to liberalism, leaving students of early American political thought with two opposed traditions—or rather, revisionist interpretations—on which to draw.²³

The problem for constitutional scholars is that neither of these interpretations fully comprehends the “whig” ideas that early Americans, and particularly the Jeffersonian Republicans, professed. The debate Pocock and his critics generated has distorted early American ideology by forcing scholars to interpret the Founders’ ideas solely in terms of one or another of these two competing traditions. By thus imposing a modernist gloss on eighteenth-century writings, this false debate has caused scholars to lose sight of the “whig” essence of the Founders’ thought. Rather than moving us closer to understanding the intellectual world of Jefferson, Madison, and their contemporaries, the debate has moved us further away.

The failure to comprehend fully the political thought of the Founders has compounded the difficulty in comprehending fully the “whig” aspects of early American constitutionalism. An argument that the basic

21. Joyce Appleby, *The Social Origins of American Revolutionary Ideology*, 64 J. AM. HIST. 935 (1978). In an article that sought to demonstrate “what is still American” in the political thought of Jefferson, Appleby focused on the influence of the French philosopher and *economiste*, Destutt de Tracy, on Jefferson, whose high regard for de Tracy’s works in political economy indicates the extent to which his mature thinking on the subject was indeed “liberal.” Joyce Appleby, *What is Still American in the Political Philosophy of Thomas Jefferson?*, 39 WM. & MARY Q. 3d ser. 287 (1982). De Tracy surpassed Adam Smith in his espousal of free-market principles and criticized Smith’s agrarianism, suggesting instead that the labor of the manufacturer and merchant capitalist was “not more or less *essentially productive*” than that of the farmer. ANTOINE DESTUTT DE TRACY, COMMENTARY AND REVIEW OF MONTESQUIEU 213-14 (Thomas Jefferson trans., Philadelphia 1811); see also ANTOINE DESTUTT DE TRACY, TREATISE ON POLITICAL ECONOMY (Thomas Jefferson trans., Georgetown 1817).

22. JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S (1984).

23. Compare Banning, *supra* note 15, with Joyce Appleby, *Republicanism in Old and New Contexts*, 43 WM. & MARY Q. 3d ser. 20 (1986). For another recent critique of the “civic republican” interpretation, see PANGLE, *supra* note 20, at 23-39.

function of constitutions, as understood by Americans of the Founders' generation, was to empower "the people" to govern, overlooks the essence of whig theory, which emphasized the perpetual need to limit governmental power, even in a republic. The object of constitutionalism is, after all, to control or to limit governmental power.²⁴

Another sign of the artificiality of the "republican revival" lies in most scholars' failure to cite the primary sources, the writings of early Americans themselves or the writings of those earlier theorists (whether "liberal" or "republican") who influenced them. Most scholars, rather than grappling with the seventeenth- or eighteenth-century sources themselves, simply cite either Pocock or his critics,²⁵ thus perpetuating the problem of misunderstanding.

B. "Whiggism": A Restored Understanding

Recent scholarship thus has demonstrated the difficulty of trying to pigeonhole early American thought. If all the scholars are right, in some sense, then the true sources of the Framers' ideology—the key to what was uniquely "American" in their political and constitutional thinking—may lie in the blending of the liberal and civic republican traditions.²⁶ The debate over the two rival interpretations of early American political thought, however, has distorted the similarity between the two traditions. Since the concept of autonomy was vital to both the liberal and civic republican paradigms, scholars can discuss the political ideas of the radical Whigs of mid-eighteenth century England from either perspective.²⁷ Starting from either libertarian or civic humanist assumptions,

24. See *infra* notes 28-31 and accompanying text.

25. The failure to cite primary authorities perhaps is understandable because of the difficulty in accessing these works, many of which have not been reprinted in modern editions and which therefore are available only in rare book collections. Several of the older works also are written in a style that is difficult for the modern reader, though surely not much more difficult than Pocock's *Machiavellian Moment*. Pocock's work generally—and that book in particular—is like the emperor's new clothes, universally applauded but rarely comprehended.

26. Ralph Ketcham has argued that Jeffersonian Republicanism is best viewed as "transitional," and that the effort to define it wholly in terms of either the civic republican or the liberal interpretations misses the mark. Jefferson, Ketcham argues, was "at once intrigued by the new ideas of enterprise, prosperity, and personal liberty that attracted forward-looking Anglo-Americans of his day, and enthralled by the classical and civic republican prescriptions" of Country polemicists of early eighteenth-century Britain. Ralph Ketcham, Book Review, 42 WM. & MARY Q. 3d ser. 399, 402 (1985) (reviewing JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER (1984)).

27. Consider, for example, the treatment of John Trenchard and Thomas Gordon, authors of the early eighteenth-century tracts, *Cato's Letters*. Compare POCOCK, *supra* note 12, at 467-74 (interpreting *Cato's Letters* as an "unmistakably Machiavellian and neo-Harringtonian critique of cor-

these radical Whigs all reached the same conclusion: members of society always must keep a watchful eye on government, for the corrupting influence of power always threatens the autonomy vital to a well-ordered society of free individuals. This conviction defined the political stance of what people in the eighteenth century called an "Independent" or "Real" Whig.

This Article seeks to offer a fresh perspective on the sources of early American constitutional thought by examining, on its own terms, the essence of "whig" ideology and its origins in English radicalism. When Jefferson, Madison, and their contemporaries described themselves as "whigs," they used the term in a fairly precise sense, the full meaning of which was known to eighteenth-century Americans, but which is obscured in our day. As they used the word, "whig" described a deeply held set of attitudes about the nature of society, the law, and government, attitudes that shaped Americans' conceptions of what today we call "constitutionalism."

Constitutionalism is, as one historian has observed, "a very old concept—perhaps as old as government itself." It is rooted in "a simple idea: that power requires restraint."²⁸ But because restraint assumes various forms in different periods of history and in different societies, the form of constitutionalism has changed significantly over the past several centuries. Modern American constitutionalism bears little resemblance to its ancient and medieval antecedents. Indeed, as a distinguished scholar of the subject has suggested, although its antecedents may be found in older doctrines of fundamental law, the idea of constitutionalism did not achieve its modern form in the English-speaking world until "law" came to be understood as positive, rather than based in custom. This understanding developed in England during the seventeenth century.²⁹

Constitutionalism is linked with the distrust of political power and the need to disperse otherwise concentrated power. Thus, the concept emerged historically as a reaction against the concentration of power that

ruption") with ROBBINS, *supra* note 6, at 120-25 (interpreting *Cato's Letters* as essentially libertarian).

28. GEORGE DARGO, *ROOTS OF THE REPUBLIC: A NEW PERSPECTIVE ON EARLY AMERICAN CONSTITUTIONALISM* 15 (1974).

29. CARL J. FRIEDRICH & ROBERT G. McCLOSKEY, *Introduction* to *FROM THE DECLARATION OF INDEPENDENCE TO THE CONSTITUTION: THE ROOTS OF AMERICAN CONSTITUTIONALISM* at vii, ix (Carl J. Friedrich & Robert G. McCloskey eds., 1954).

accompanied the consolidation of modern nation states.³⁰ It was, in other words, a reflection of Lord Acton's famed maxim, that all power tends to corrupt and that absolute power corrupts absolutely. Modern Anglo-American constitutionalism, moreover, took shape during that period associated with the rise of individualism.³¹ The exercise of individual freedom presupposes the existence of institutions that provide the restraint without which all power—of the individual, the group, or the state—tends to be abused. The most effective institution to provide the necessary restraint on the power of the state, in the modern era, is the constitution.

Jefferson, Madison, and their contemporaries identified as "whig" a form of constitutionalism based on a profound distrust of concentrated political power and, with it, an especially intense devotion to the ideal of limited government. This "Whig tradition of political pessimism," as one historian has called it, had its direct antecedents in English opposition thought of the seventeenth and eighteenth centuries.³² Whig constitutionalism arose primarily from the notion of a "higher," or fundamental, law—a traditional conception in English law—to which certain opposition writers appealed in order to counter the arguments advanced by the proponents of the relatively modern concept of sovereignty.³³ The source of American whig constitutionalism lies in the uneasy tension between these two nearly opposite concepts in the mainstream of English constitutional development, and in the dissenting views of British "Real Whigs," views that the resolution of that tension spawned.

Parts II and III of this Article sketch in very broad terms the English

30. CARL J. FRIEDRICH, *LIMITED GOVERNMENT: A COMPARISON* 14 (1974).

31. *Id.* at 32 (To individualism, "constitutionalism owes the distinguishing feature of modern, in contrast to ancient and medieval, constitutionalism.").

32. GERALD STOURZH, *ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT* 96-97, 104 (1970).

33. Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843, 849-50 (1978). In tracing the origins of the notion of an unwritten fundamental law in American constitutionalism, Grey also has emphasized the role of legal and political theories from the Enlightenment, particularly those found in the great treatises on the law of nature and nations written by Pufendorf, Burlamaqui, Vattel, and Rutherford. These natural law ideas, Grey argues, "renewed and fortified, particularly for Americans, the traditional English conception of fundamental law when it lost institutional support in the eighteenth-century English politics." *Id.* at 850. The influence of Enlightenment thought, however, is outside the scope of this Article, which focuses on the influence of the radical English Whig historical, political, and common-law traditions. How Enlightenment thought further shaped the ideas that Americans derived from these traditions remains an important question that deserves further scholarly attention.

background essential to a full understanding of American whig constitutionalism and of early American ideas about a constitution—ideas that, after all, concerned the English Constitution as it had developed by the mid-eighteenth century. Part III suggests that the antecedents of early American thought may be traced to those lines of development that departed from the mainstream of eighteenth-century English constitutionalism; in other words, Part III suggests that Americans of the Revolutionary generation were influenced by their English contemporaries who were the radical, “Independent,” or “Real” Whigs.

Part IV of the Article outlines the substance of English radical Whig thought, identifying the fundamental ideas found in the works of three separate but interrelated groups of writers influential in early America: Whig common-law lawyers, Whig historians, and Whig philosophers of government. Drawing on many of the books that Americans of the Revolutionary generation read, this Section presents a synthesis of each of these aspects of English radical Whig thought.

Finally, Part V of the Article addresses the question implicit in Jefferson’s 1826 letter to Madison: why he and many of his contemporaries viewed Blackstone’s *Commentaries* as “tory” and, hence, essentially irrelevant to the American legal and constitutional tradition. In explaining precisely how Blackstone departed from the radical Whig tradition, this Part of the Article identifies that aspect of English radical Whig constitutionalism that became the basis for what is unique in American constitutional law.

II. THE EVOLUTION OF ANGLO-AMERICAN CONSTITUTIONALISM: THE DUAL HERITAGE OF SOVEREIGNTY AND FUNDAMENTAL LAW

Two major lines of development are discernible in Anglo-American constitutionalism: one that ends in the essential distinguishing feature of the English Constitution, Parliamentary sovereignty,³⁴ and the other that ends in the essential distinguishing feature of American state and federal constitutions, the concept of the constitution as a higher law that limits the legislative power.³⁵

These two constitutional concepts are virtually antithetical. Parlia-

34. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 37 (8th ed. 1915) (Parliamentary sovereignty is “the dominant characteristic” of the British constitution).

35. See, e.g., F.A. HAYEK, THE CONSTITUTION OF LIBERTY 176-78 (1960).

mentary sovereignty is just that: Parliament is “an absolutely sovereign legislature,” with the right to “make or unmake any law whatever,” and “no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.”³⁶ The concept of the constitution as higher, or fundamental, law, on the other hand, expressly places limits on the power of the legislature. As it has evolved in America, the concept has linked two almost opposite values—a libertarian concern for the protection of individual rights, and a democratic concern for the preservation of majority will—together with the basic notion, often referred to as “popular sovereignty,” that all legitimate political power derives from the people. The use of the constitution as an instrument for effectuating popular sovereignty is illustrated most dramatically by the peculiarly American doctrine of judicial review, which affords the judiciary the power to declare legislative acts unconstitutional, and thus to treat them as null and void.³⁷ Thus, popular sovereignty as manifested in America has reached a result quite different from that of Parliamentary sovereignty in Britain. Indeed, one legitimately may ask whether “popular sovereignty” is a misnomer and not, properly speaking, a form of sovereignty at all.

To understand fully the distinction, one must first understand the concept of sovereignty, as it had evolved by the time of the English Civil War, in the mid-seventeenth century.

Sovereignty, a comparatively modern notion unknown to the medieval world, is the idea that there must exist, somewhere in the body politic, a single, undivided, final power, higher in legal authority than any other power—a power itself subject to no law other than the law of nature and

36. DICEY, *supra* note 34, at 37-38. Because Parliament is sovereign, it is “neither the agent of the electors nor in any sense a trustee for its constituents,” Dicey adds, *id.* at 45, citing as the best illustration of this principle the Septennial Act of 1716. By that statute, 1 George I. st. 2, ch. 38, the Parliament then sitting extended its legal duration from three to seven years. “There are countries, and notably the United States,” Dicey notes, “where an Act like the Septennial Act would be held legally invalid,” but under the British constitution, Parliament made “a legal though unprecedented use” of its powers. *Id.*

37. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). The tension between libertarian and majoritarian concerns is manifest in the recurring debate between advocates of greater judicial activism and advocates of greater deference to the legislature. This debate in recent years has focused largely on the issue of nontextual, or unenumerated, constitutional rights, such as the right to privacy. Thomas C. Grey, for example, has suggested the legitimacy of a “noninterpretive” mode of review that would permit judges to enforce principles of liberty and justice even when they do not find the normative content of those principles within the text of the Constitution. See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

of God. The idea derived from elements found in classical political theory, Roman law, and medieval thought, but it came into English thought most directly through sixteenth-century writings, especially those of Jean Bodin, that sought to defend monarchical supremacy.³⁸

The emergence of the notion of sovereignty in English political thought coincided with the significant political reality of the sixteenth century: the enhanced power and prestige of the monarchy under Henry VIII and his successors. Parliament played a vital role in the concentration of authority in the Tudor monarchy. The institution, which modern historians most accurately refer to as "the king's parliament of England," had its origins in the great councils and assemblies, of varied composition, that English kings called from time to time in the twelfth and thirteenth centuries.³⁹ Medieval kings summoned parliaments, albeit irregularly, because of considerations of "practical necessity": they convened great councils and assemblies that consisted of men whose goodwill and support (financial and otherwise) were necessary to the success of their plans. Because the "king in parliament" could accomplish more than could the king alone, the monarchs most ambitious of authority made the most use of parliaments; as Bertrand de Jouvenal notes, Henry VIII was both a great authoritarian and "one of the most 'parliamentary' of English Kings."⁴⁰

At the time of the Reformation, before the notion of sovereignty had been fully articulated, the traditional view of law and government was one permeated with notions of custom and "natural law," derived from classical and medieval writers. Aristotle had taught that there was a distinction between "special law," the written law that governed a particular community, and "general law," those unwritten equitable principles "supposed to be acknowledged everywhere."⁴¹ Aristotle, in the *Rhetoric*, accordingly advised advocates that when they had no case according to the written law, they should "appeal to the universal law, and insist on

38. BERTRAND DE JOUVENAL, *SOVEREIGNTY: AN INQUIRY INTO THE POLITICAL GOOD* 181-85 (1957). De Jouvenal quotes the late sixteenth-century jurist, Charles L'Oyseau, who defined sovereignty as "of unlimited power and authority," but who also found "very important limits" in the laws of God and of nature and in "the fundamental laws of the state." *Id.* at 182, 184 (quoting CHARLES L'OYSEAU, *TRACTE DES SEINGNEURIES* 25, 9 (1609)). See also BAILYN, *supra* note 10, at 198-99.

39. G.O. SAYLES, *THE KING'S PARLIAMENT OF ENGLAND* (1974).

40. DE JOUVENAL, *supra* note 38, at 176, 178.

41. ARISTOTLE, *Rhetoric*, in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 9, at 1317, 1359 (Book I, Chapter 10).

its greater equity and justice."⁴² And, in his *Politics*, Aristotle expressed a preference for limited monarchy, or "kingship according to law," because, law being "reason unaffected by desire," the "rule of the law . . . is preferable to that of any individual."⁴³

Like Aristotle, Cicero had taught that good laws and the best constitutional arrangements come through experience, "based upon the genius, not of one man, but of many" and founded "not in one generation, but in a long period of several centuries and many ages of men."⁴⁴ True law thus was in accord with customary practice and was informed by what Cicero, later echoed by Aquinas, had called "right reason in agreement with nature . . . of universal application, unchanging and everlasting . . . one eternal and unchangeable law . . . valid for all nations and all times," and above which there was God, "the author of this law, its promulgator, and its enforcing judge."⁴⁵

This Ciceronian conception of higher law pervaded the political thought of the Middle Ages, as Edward S. Corwin has shown.⁴⁶ It received its classic statement in medieval English law in the great treatise written by Bracton, Henry of Bratton, a judge of the King's Bench in the reign of Henry III. "The King himself," wrote the author, "ought not to be subject to man, but subject to God and to the law, for the law makes the King."⁴⁷ This medieval view of the supremacy of law survived the Renaissance and, as Thomas Grey notes, retained much of its influence despite the enhancement and centralization of state power of the Tudor era.⁴⁸

The constitution was, as Charles Inglis described it nearly two centuries later, "that assemblage of laws, customs, and institutions which form the general system according to which the several powers of the state are distributed and their respective rights are secured to the different members of the community."⁴⁹ According to this view of law and govern-

42. *Id.* at 1374 (Book I, Chapter 15).

43. ARISTOTLE, *supra* note 9, at 1201-02 (Book III, Chapter 16).

44. CICERO, *De Re Publica*, in DE REPUBLICA AND DE LEGIBUS 112, 113 (Clinton W. Keyes trans., 1928) (Book II, paragraph 2).

45. *Id.* at 211 (Book III, 34).

46. EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 17-23 (1955).

47. HENRY DE BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE [ON THE LAWS AND CUSTOMS OF ENGLAND], at f.5b (Twiss ed., 1854), *quoted in* CORWIN, *supra* note 46, at 27.

48. Grey, *supra* note 33, at 851.

49. Charles Inglis, *The True Interest of America . . . Strictures on a Pamphlet Intituled Common Sense . . .* (Philadelphia 1776), *quoted in* BAILYN, *supra* note 10, at 175.

ment, Parliament did not, strictly speaking, *make* law; it rather *discovered*, and then *enunciated*, the law. The problem of "unconstitutional" law was unknown because all law, by definition, was constitutional—that is, all law was Common Law. And Common Law was "the perfect ideal of law; for it is natural reason developed and expounded by a collective wisdom of many generations."⁵⁰

This traditional view, while perfectly suited to the feudal system of well defined reciprocal rights and duties, was not well suited to the legal dynamism that Reformation legislation represented. Neither customary practice nor "natural law" suggested that Henry VIII ought to be made supreme head of the Church of England, yet the Act of Supremacy made him so "by authority of this present parliament."⁵¹ And, in so doing, the statute significantly readjusted the existing arrangement of governmental institutions, laws, and customs that together had formed the "constitution."

Because only Sir Thomas More and a few others opposed Henry's break from Rome, the Reformation afforded little need, hence opportunity, for the development of a theory of justification. At his trial, More raised fundamental questions about the English Constitution that were nevertheless troublesome. The judges adroitly avoided the basic issue, whether the act of Parliament was unlawful.⁵² They could have turned to St. German's *Doctor and Student* dialogue, written a few years earlier, for an answer, but did not—perhaps because it went too far. Indeed, the student's answer hit on a key notion, that King in Parliament was omnicompetent and omnipotent in "all temporal things."⁵³ Once it is admitted that Parliament may, for example, ordain by statute the type of clothing a priest may wear, it is not too great an abstraction to suggest that virtually all matters of religion may in effect fall subject to statute.

Englishmen in the Tudor period were not apt to criticize their monarch and, accordingly, were not apt to suggest that the political realities of their time were extraordinarily unprecedented. Ironically, then, in a time of profound social and political change, the notion of sovereignty

50. CORWIN, *supra* note 46, at 34 (quoting FIGGIS, DIVINE RIGHT OF KINGS 228-30 (2d ed. 1914)). Sir Edward Coke held this attitude toward the common law. 2 EDWARD COKE, INSTITUTES *179 ("The common law is the absolute perfection of reason.").

51. Supremacy Act (1534), in 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 311 (Carl Stephenson & Frederick G. Marcham eds. & trans., 1972).

52. See J. Duncan M. Derrett, *The Trial of Sir Thomas More*, 79 ENG. HIST. REV. 450 (1964).

53. CHRISTOPHER ST. GERMAN, THE DOCTOR AND STUDENT 303-319 (W. Muchall ed., 1874).

evolved very cautiously. Indeed, as originally formulated, the notion of sovereignty entailed some important limitations appropriate to its classical and medieval origins. Sovereign meant supreme, but not arbitrary, to sixteenth-century writers: the laws of God and of nature and the constitution limited the authority of the sovereign. Even a sovereign prince as powerful as Henry VIII could not, in theory, transgress his duties to God. Neither could he transgress his obligation to respect natural law and the natural rights (including private-property rights) of his subjects, nor his obligation to act in accordance with the fundamental laws of the realm.⁵⁴

The tension between Reformation legislation and the traditional view of the nature of law, though felt, was mitigated also by conservatism in other areas, particularly the common-law rules concerning the alienability of land. The Parliament that threw off the Pope could not create an action of ejectment for freeholders.⁵⁵ Nevertheless, Sir Thomas Smith in his *Commonwealth of England*, written near the middle of Elizabeth's reign, wrote of Parliament as if it were omnipotent: "The most high and absolute power of the realme of Englande, consisteth in the Parliament. . . . The Parliament abrogateth olde lawes, maketh newe . . . and hath the power of the whole realme, both the head and the body."⁵⁶ This is so, Smith reasoned, "[f]or everie Englishman is entended to bee there present either in person or by procuracy and attornies."⁵⁷ And, in the case of *Wimbish v. Taillebois*, in his dictum on the nature of the transfer of property by the Statute of Uses, Chief Justice Montague saw the statute, not as an act of government, but as an enunciation of the transfer of property between private persons and registered in the "high court" of

54. DE JOUVENAL, *supra* note 38, at 185.

55. By the fourteenth century, lessees were granted an action against those who dispossessed them, known as the action *de ejectione firmæ*, or simply the action of ejectment. It was a trespass action and, accordingly, resulted in money damages for the successful plaintiff. In the sixteenth century, the king's courts made this remedy even more attractive by giving the dispossessed lessee who won an ejectment action specific recovery of the land. The action was so far superior to the real actions available to freeholders that dispossessed freeholders took advantage of the action through the expedient of a fictitious lessee. This practice continued well into the nineteenth century. In 1833 all real actions other than ejectment were abolished, but the fictions were not abolished until 1852. See generally JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 254-55 (2d ed. 1979); see also THEODORE E.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 373-74 (5th ed. 1956).

56. THOMAS SMITH, DE REPUBLICA ANGLORUM 48-49 (L. Alston ed., 1906), quoted in CORWIN, *supra* note 46, at 41.

57. *Id.*

Parliament.⁵⁸

There is something both quite conservative and quite revolutionary in the reasoning of Smith and Montague. It was conservative in that they couched it in the language of the medieval doctrine of taxation as a free and spontaneous gift to the King.⁵⁹ There is no suggestion of absolute power for Parliament to legislate, no suggestion of sovereignty, to indicate that the judges faced the realities of an omnipotent state. Yet in the concept of consent lay the seeds of the notion of sovereignty, and its synthesis into the notion of popular sovereignty. This implication of the fiction of virtual consent was, though not perceived as such at the time, truly revolutionary.

Unlike the Tudor monarchs, who had consolidated their actual power without making novel theoretical claims to sovereignty, the first Stuart monarch, James I (who was less successful in obtaining the cooperation of Parliament) asserted for himself an absolute legal authority. Against his claims, the common law jurists and the Parliamentarians responded by appealing to the traditional English conception of fundamental law. By Charles I's reign, both sides of the great constitutional controversy were debated in these terms: Parliamentarians like Edward Coke and John Pym argued that fundamental law limited the King's as well as Parliament's authority, while Royalists argued that this same fundamental law guaranteed the broad scope they claimed for the royal prerogative

58. *Wimbish v. Taillebois* (C.B. 1553), reported in THE COMMENTARIES OR REPORTS OF EDMUND PLOWDEN 38 (Edmund Plowden ed., London 1816). George Wimbish and his wife Elizabeth sued Elizabeth Taillebois for trespass on land that Taillebois claimed as her property. The land in question had been part of a manor that had been owned by Taillebois' husband, George, who was also the grandfather of Elizabeth Wimbish. George Taillebois had granted the manor to a number of feoffees, to the use of himself and his wife in special tail, and then sometime thereafter he died. The suit primarily raised the question whether Elizabeth Wimbish, who was the next heir after the widow Taillebois, was rightful owner of the land because the widow Taillebois had defeated her title by being party to a fraudulent transfer. Although most of the justices kept closely to the technical details of the case, Chief Justice Montague delivered dictum on the effect of the Statute of Uses. Montague adhered to the older, medieval theory of legislation, which viewed a transfer of property by general statute not as a sovereign act but rather as a conveyance of land made by each individual owner and registered in the high court of Parliament: "[T]he Parliament, (which is nothing but a Court) may not be adjudged the Donor. For what the Parliament did was only a Conveyance of the Land from one to another, and a Conveyance by Parliament does not make the Parliament Donor . . . for when a Gift is made by Parliament, every Person in the Realm is privy to it, and assents to it. . . ." *Id.* at 59. On the case generally, see Edward T. Lampson, *Some New Light on the Growth of Parliamentary Sovereignty: Wimbish v. Taillebois*, 35 AM. POL. SCI. REV. 952 (1941).

59. This notion of taxes as "gifts" died hard. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 24-28 (1985).

against parliamentary interference.⁶⁰

Early in the Stuart period, in the context of the great debate over fundamental law, the doctrine of the "ancient constitution" received its classic formulation. It was, as J.G.A. Pocock has shown, "the work of common lawyers," and it was shaped by assumptions deeply planted, it seems, in the minds of everyone trained in the study of the common law of England.⁶¹ The common lawyer assumed, first, "that all the law in England might properly be termed common law"; second, "that common law was common custom, originating in the usages of the people and declared, interpreted and applied in the courts"; and third, that since all custom was by definition immemorial, "any declaration of law, whether judgement or (with not quite the same certainty) statute, was a declaration that its content had been usage since time immemorial."⁶² Thus legal history became but "a series of declarations that the law is immemorial," and the idea of immemorial law became fixed as "one of the cardinal political ideas of Stuart England."⁶³ The idea cut both ways, as defenders of royal prerogative were as apt to repair to the standard of immemorial law; but it became particularly cogent in the hands of the common lawyers.

The foremost advocate of the supremacy of the common law against the pretensions of the Stuart monarchs was Sir Edward Coke, who in his long career served, successively, as crown attorney, chief justice of the Common Pleas, chief justice of the King's Bench, leader of the House of Commons, law reporter and commentator on the law of England. Although as Elizabeth's attorney general, Coke had shown a conspicuous subservience to the royal interest, it was in his clashes as judge with James I that Coke established his place in Anglo-American constitutionalism.

Coke's basic doctrine was "that the King hath no prerogative, but that which the law and the land follows', and that of this the judges and

60. This paragraph and much of what is outlined in the succeeding several paragraphs largely follow the excellent syntheses of Stuart constitutional development found in CORWIN, *supra* note 46, at 41-57, and Grey, *supra* note 33, at 851-56.

61. J.G.A. POCOCK, *Burke and the Ancient Constitution*, in *POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* 202, 209 (1973) [hereinafter POCOCK, *Burke*]. See also J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 233-34 (1957) [hereinafter POCOCK, *ANCIENT CONSTITUTION*].

62. POCOCK, *Burke*, *supra* note 61, at 209.

63. *Id.* at 209-210.

not the king were the authorized interpreters.”⁶⁴ Following earlier case precedents in which common-law judges imposed limits on ecclesiastical authority, in *Fuller's Case*, for example, Coke reported that the construction of the statute setting up the court of High Commission “belongs to the Judges of the Common Law.”⁶⁵ The implications of *Fuller's Case* were profound, when one considers that it imposed common-law limitations on the sort of broad jurisdiction over “all temporal things” that St. German’s *Doctor and Student* earlier had suggested belonged to the sovereign power.

Even more profound implications of the notion of the primacy of the common law may be found arising from Coke’s celebrated declaration in *Dr. Bonham's Case*, decided in 1610. The Royal College of Physicians, under color of authority from an act of Parliament, had punished, with fine and imprisonment, Dr. Thomas Bonham for practicing medicine in London without a certificate from the College. The College censors, moreover, pursuant to a provision in the statute of incorporation permitting them to do so, kept half the fine for themselves. Dr. Bonham brought an action for false imprisonment. Coke commented that the statute should be disallowed because it was contrary to the well-understood principle that no one can be a judge in his own cause: “[t]he censors cannot be judges, ministers and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, *quia aliquis non debet esse Judex in propria causa*. . . .” Coke then added his famous dictum, that an act of Parliament “against common right and reason, or repugnant, or impossible to be performed” may be declared void by the common law.⁶⁶

This rudimentary version of the concept of judicial review was nearly antithetical to the notion of sovereignty. Coke and the other common-law judges suggested that no sovereign power, strictly speaking, exists, for everywhere the common law sets limits. The common law, moreover, was especially the province of the common-law judges, argued Coke in his *Prohibitions Upon the King*, for the source of law was not natural, but rather artificial, reasoning. Law, said Coke, “is an act which requires

64. CORWIN, *supra* note 46, at 43 (citing Proclamations, 12 Coke’s Reports 74, 76 (1611)).

65. Nicholas Fuller’s Case, 12 Coke Rep. 41, 77 Eng. Rep. 1322 (1607).

66. Dr. Bonham’s Case, 8 Coke Rep. 113, 118, 77 Eng. Rep. 646, 652 (1610). For a general discussion of the case, see S.E. Thorne, *Dr. Bonham's Case*, 54 LAW Q. REV. 543 (1938). See also CATHERINE BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE* 315-16 (1957).

long study and experience, before that a man can attain to the cognizance of it."⁶⁷

Coke and the judges did not carry the banner of opposition very long: their challenge to the authority of the ecclesiastical, and later the prerogative courts was eventually quashed, and the debate shifted to Parliament. The importance of Coke and the common-law judges was not their suggestion of the notion of judicial review—the revival of that concept was left to American judges—but rather their suggestion that law was something rather artificial. That view of law, different from the classic view of an Aquinas or a Fortescue, was a key element in the resolution of the tension between fundamental law and absolutism that had been troublesome in the Tudor period. The changing view of the nature of law marked a break away from traditional "natural law" thinking, and the beginning of a shift toward the concept of legal positivism that was to be felt more fully a few centuries later. That shift, coupled with a revival of the concept of consent that Smith and Montague had earlier suggested, paved the way for the notion of Parliamentary sovereignty.

The concept of consent was integral to James Whitelocke's argument, in his 1610 Speech on Impositions, that the sovereign power of the State resided in the King *in Parliament*. Without Parliament, the King may not impose taxation; which is to say, the King may not impose without the consent of Parliament.⁶⁸ Underlying this argument was the notion of sovereign power, or *potestas suprema*, "a power that can control all other powers and cannot be controlled but by itself,"⁶⁹ which must be lodged somewhere. Also underlying the argument was the historical precedent that indicated that the powers of the King in Parliament were greater than those of the King alone. Thus, proceeds Whitelocke's argument, if sovereign power must be lodged somewhere, and if the power of the King in Parliament is greater than the power of the King alone, then the King in Parliament is sovereign. Further, since the right of imposition "hath

67. Prohibitions del Roy, 12 Coke Rep. 63, 65, 77 Eng. Rep. 1342, 1343 (1608). Coke's colloquy with James I was anticipated, some 130 years earlier, by Sir John Fortescue, Henry VI's Chief Justice, who in his *Praises of the Laws of England* had lauded the "mixed political government" of England in contrast to French autocracy. SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* 81-89 (S.B. Chrimes ed. & trans., 1942) (1545-46). Although Fortescue's work might be interpreted merely as an expression of the late-medieval idealization of the common law, its "distinctive contribution," Corwin has argued, is in its conception of the law "as a professional mystery, as the peculiar science of bench and bar." CORWIN, *supra* note 46, at 37-38.

68. James Whitelocke's Speech on Impositions, June 1610, in 2 A COMPLETE COLLECTION OF STATE TRIALS 477-519 (William Cobbett ed., London 1809).

69. *Id.* at 482.

so great a trust in it, by reason of the mischiefs [that] may grow to the commonwealth by the abuses of it" that it "hath ever been ranked among those rights of sovereign power," it followed that the power to tax resided in the King in Parliament.⁷⁰ Only in Parliament was the King "assisted with the consent of the whole State" rather than "sole and singular, guided merely by his own will."⁷¹

In placing the power of taxation in the category of sovereign powers, and thereby among the powers of the King in Parliament, Whitelocke discarded the distinction Chief Baron Fleming drew in *Bates' Case*, the distinction between legitimate and illegitimate exercises of the royal prerogative.⁷² In so doing, he implied that even if legitimately for the good of the whole people, the King may not impose without the consent of Parliament. If one applies the Smith-Montague argument that the consent of Parliament was every man's consent, one can extend Whitelocke's argument quite easily to the "no taxation without representation" argument of the American Revolution.

Whitelocke's speech thus is significant, both as a statement of the notion of sovereignty in itself and as an early statement of the notion of parliamentary sovereignty. No great leap of imagination is needed to see that the essential component of the "King in Parliament" formulation was not the King. The doctrine of the ancient constitution further aided this line of development. When James I or Charles I was thought to be claiming too wide and undefined a power, it was possible to argue that law, customs, and privileges were not derived from the monarch's will at all but rather were rooted in ancient custom. As Pocock has noted,

"Once that which was immemorial and that which was willed were set in sharp contrast to one another, an ideological gap was opened which could not be easily bridged, and the concept of the ancient constitution became alternative to and incompatible with the sovereignty of the king. The idea that it belonged to Parliament to define the content of the ancient constitution, and that all actions undertaken in its defence were legitimate, obvi-

70. *Id.*

71. *Id.* J.W. Gough has noted that the significance of Whitelocke's speech was its implication that only the King in Parliament was sovereign and that, therefore, the King out of Parliament was limited by the country's fundamental law and could not take his subjects' goods without their consent. J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 59 (1955).

72. *Bates' Case*, 145 Eng. Rep. 267 (Ex. 1606), in 1 *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY*, *supra* note 51, at 435-37. James I had imposed a duty on the import of currants, which Bates refused to pay as a tax not consented to by Parliament. The Court of Exchequer, in an opinion by Chief Baron Fleming, upheld the impost as a lawful exercise of the royal prerogative on the grounds that the legal incidence of the tax was not upon Bates but upon the foreign exporters. *Id.*

ously led to the revolutionary sovereignty of that body. . . ."⁷³

The idea that Parliament itself was immemorial—that its existence was rooted in the ancient constitution and not in the King's prerogative powers to call assemblies—further underlined Parliament's right to interpret the law by its uncontrolled ordinances and resolutions. Thus, paradoxically, the development of parliamentary thought on the ancient constitution sapped the notion of custom, on which the idea of immemorial law ultimately rested.⁷⁴

These developing arguments for parliamentary sovereignty foreshadowed Thomas Hobbes' argument in *Leviathan* that sovereign power cannot be divided. Sovereign power must be lodged in some one place, either in the King or in the Sovereign Assembly (Parliament), but not in both, for "a Kingdome divided in it selfe cannot stand."⁷⁵ Hobbes also argued that "all Lawes, written and unwritten, have their authority and force, from the Will of the Common-wealth." Laws need not be natural, or just, or reasonable; they need only be ordained by the Will of the Legislator, "for it is the Sovereign Power that obliges men to obey them."⁷⁶

Hobbes was not alone in challenging the concept of the ancient constitution in the mid-seventeenth century. Sir Robert Filmer's *Patriarcha*, written in the 1640s but not published until 1680, based the absolute authority of kings—with divine sanction—on the natural authority of fathers over children. Denying the possibility of such a thing as immemorial law, Filmer argued that every custom "at first became lawful only by some superior power which did either command or consent" to its beginning. This superior power, Filmer thought, must ultimately reside in the will of some one man; thus the original sovereign was Adam, and the absolute sovereignty which he enjoyed—being by definition unalienable—descended intact to his successor, Charles II, the lawfully constituted King of Filmer's day.⁷⁷

With Hobbes and Filmer, the modern notion of sovereignty thus reached its full development. The limits that originally had constrained sovereignty—the law of God, nature, and the constitution—had van-

73. POCOCK, ANCIENT CONSTITUTION, *supra* note 61, at 234.

74. *Id.* at 234-35.

75. THOMAS HOBBS, LEVIATHAN 88-94 (London 1651).

76. *Id.* at 137-45.

77. POCOCK, ANCIENT CONSTITUTION, *supra* note 61, at 188-89 (quoting Sir Robert Filmer, *Patriarcha and Other Political Works* 106-107 (P. Laslett ed., 1949)).

ished, leaving sovereign power restricted only by its capacity to compel obedience.

The ideas of these two very important theoretical proponents of unlimited sovereignty nevertheless won little acceptance in the arena of legal and political controversy. Despite the obvious political reality of the latter half of the eighteenth century—the dramatic rise in importance of Parliament, and particularly the House of Commons—the notion of Parliament as sovereign remained obscure. Rather, the concept of the ancient constitution, and the associated belief in immemorial law, “was the nearly universal belief of Englishmen” in the seventeenth century.⁷⁸ By the beginning of the eighteenth century the concept had become further identified with the “mixed,” or “balanced” government model. This model implied that neither Parliament nor King alone, but rather “King in Parliament,” was sovereign.

Corinne C. Weston has called other historians’ attention to the importance of Charles I’s Answer to the Nineteen Propositions, drafted in 1642 just two months before the outbreak of the Civil War, as the crucial synthesis of this model of the constitution.⁷⁹ In response to Parliament’s list of nineteen propositions for constitutional reform—including demands for parliamentary control of the militia, parliamentary choice of royal councillors and judges, and parliamentary participation in religious reform⁸⁰—the King rejected these demands as contrary to the constitution:

There being three kindes of Government amongst men, Absolute Monarchy, Aristocracy, and Democracy, and all these having their particular conveniences and inconveniencies. The experience and wisdom of your Ancestors hath so moulded this out of a mixture of these, as to give to this Kingdom . . . the conveniencies of all three, without the inconveniences of any one, as long as the Balance hangs even between the three Estates, and they run joyntly on in their proper Chanell.⁸¹

The “three estates” referred to were the King, the House of Lords, and the House of Commons, which were easily analogized to the three kinds

78. *Id.* at 54-55, 234-35.

79. CORINNE WESTON, *ENGLISH CONSTITUTIONAL THEORY AND THE HOUSE OF LORDS, 1556-1832*, at 5-6 (1965). The fuller context of the importance of the Answer to the Nineteen Propositions—that is, the relation of the idea of balanced government to what historians have called the “Country” vision in Anglo-American politics—is ably summarized by Lance Banning in *The Jeffersonian Persuasion*. Banning, *supra* note 14, at 22-25.

80. The Nineteen Propositions (June 1, 1642), *reprinted in* 1 *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY*, *supra* note 51, at 489-91.

81. WESTON, *supra* note 79, at 263 (quoting Answer to the Nineteen Propositions).

of government. The idea that there were three species of government, monarchy, aristocracy, and democracy, each with its own particular virtue and corresponding vice, and that the ideal constitution consisted of a mixture of the three, is very old, traceable back to ancient political writers, including Plato, Aristotle, Cicero, and especially Polybius. In its modern incarnation, the idea of the three species of government also came to be analogized to the functional division of powers of government between the executive and legislative. In this model the King came to be identified with the executive, the Commons with the legislative, and the Lords as the bridge between the two; and thus, as Pocock has observed, English constitutional theory was launched "on the slippery slope which led from Polybius to Montesquieu."⁸²

During the Interregnum, it had seemed that Parliament's victory in the Civil War would be paralleled by the victory of the notion of parliamentary sovereignty on the battlefields of theory. When, at his trial, Charles I challenged the authority of the High Court of Justice,⁸³ he was historically correct; yet the challenge was moot because, as Charles himself dryly recognized, he was before "a power"—a power that had become "the supreme and highest authority in England."⁸⁴ That power, though in theory unlimited, was constrained nevertheless. The trial and execution of Charles I marked one of the two extreme extensions of the notion of parliamentary sovereignty; the other, the so-called Glorious Revolution of 1688, ended with the deposition of James II and the accession of William and Mary. Between the two events, during the Commonwealth and the Restoration periods, the persistent, reassuring concept of the ancient "mixed," or "balanced," constitution provided a stable point of reference for all sides in the continuing constitutional struggles—whether between the Parliament and the Army prior to Oliver Cromwell's assumption of sovereignty as the Protector, or between the Parliament and the King after the monarchy had been restored with the accession of Charles II.

Consider, for example, the debate that led to the Exclusion Crisis late in the reign of Charles II. Between 1678 and 1683, the last five years of

82. J.G.A. POCOCK, *Machiavelli, Harrington, and English Political Ideologies in the Eighteenth Century*, in *POLITICS, LANGUAGE AND TIME*, *supra* note 61, at 104, 131. The balanced government model should be distinguished from the pure separation of powers model. See generally M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967).

83. See CICELY V. WEDGWOOD, *A COFFIN FOR KING CHARLES: THE TRIAL AND EXECUTION OF CHARLES I*, at 150-52, 159, 165 (1964).

84. *Id.* at 163, 165.

Charles's reign, there arose, under the leadership of Anthony Ashley Cooper, the Earl of Shaftesbury, an opposition political party that posed serious problems for the King and for his minister, Danby. These "First Whigs" united around professed principles, including: A constitutional and Protestant monarchy; the exclusion of the King's Catholic brother James, the Duke of York, from the line of succession to the crown; and an anti-French and anti-Catholic foreign policy. Using his party machine to spread religious hysteria, Shaftesbury sought to overthrow Danby, defeat the court or "Tory" party, force a Whig cabinet on the King, and pass the Exclusion Bill barring the Duke of York from the succession. Events unfolded rapidly in a high drama reminiscent of the years prior to the Great Rebellion: Titus Oates and the fabricated "Popish Plot," revelations of the King's secret negotiations for a French pension, the impeachment of Danby, the dissolution of Parliament, Whig triumph in the parliamentary elections, the second dissolution of Parliament, and the arrest of Shaftesbury.⁸⁵

It is important to note here, however, not the Whigs' program nor the means by which they sought to implement it, but their constitutional theory. Logically, the claims the Whig majority made in the second Exclusion Parliament led to parliamentary sovereignty. *Salus populi suprema lex*: if government existed to preserve the interests of the people, if the sole criterion of those interests was the people's will, and if the people's will were expressed by the House of Commons, then the House of Commons must be the ultimate authority in the nation, to which the other organs of the constitution must be subordinate. Yet, as an astute scholar of this subject has observed, the Whigs never drew such a deduction:

By no stretch of the imagination, however, could precedent be made to countenance such a view of the constitution, and since the Whigs could not emancipate themselves from precedent, they could never explicitly admit that this was what they desired, and it must remain a matter of doubt to what extent most of them consciously desired it.⁸⁶

Like the Parliamentarians of the preceding generation, the Whigs found themselves advocating one form of balanced constitution, what they re-

85. J.R. Jones has ably discussed the events of this period. See J.R. JONES, *THE FIRST WHIGS: THE POLITICS OF THE EXCLUSION CRISIS, 1678-1683* (1961). See also J.R. JONES, *COUNTRY AND COURT: ENGLAND, 1658-1714*, at 197-216 (1979).

86. B. Behrens, *The Whig Theory of the Constitution in the Reign of Charles II*, 7 *CAMBRIDGE HIST. J.* 42, 50 (1941).

ferred to as "mixed monarchy." The Tories, too, advocated "mixed monarchy," but of course with a mixture compounded in different proportions from that of the Whigs.⁸⁷ Both sides thus assumed fundamental law and a fixed constitution, under which powers were divided and balanced; they differed only in defining the powers of each branch, and, particularly, the prerogative powers of the King.

Even after 1688, when the constitutional form of the new "limited monarchy"—and with it, one may argue, parliamentary sovereignty—had been fully established, the prevalent constitutional orthodoxy was that of the "mixed constitution" of three estates joined in a fine balance, the "King in Parliament." This orthodoxy masked the role of legislation in unprecedented constitutional development, as was illustrated by the Bill of Rights of 1689.

Although many historians have viewed this document as an essentially conservative restoration of certain rights that James II had assaulted (such as the power of Parliament to levy taxes), at least one historian has viewed it as "essentially a radical document."⁸⁸ The title of the Bill itself was "[a]n act declaring the rights and liberties of the subject and settling the succession of the crown."⁸⁹ After enumerating various unconstitutional acts undertaken by "the late King James II" and identifying the circumstances that underlay the present constitutional settlement—James II's "having abdicated the government," William of Orange's having become "the glorious instrument for delivering this kingdom from popery and arbitrary power"⁹⁰—the Bill then enumerated the "ancient rights and liberties" of the nation. It declared illegal the "pretended" powers exercised by James II, including suspending or executing laws without consent of Parliament, creating new ecclesiastical courts, levying money without the grant of Parliament, prosecuting subjects for exercising their right to petition, and raising and keeping a standing army within the kingdom in time of peace without the consent of Parliament.⁹¹ The Bill also identified other "undoubted rights and liberties" in a series of exhortatory phrases: parliamentary elections "ought to be free"; freedom of speech during parliamentary debate "ought not to be im-

87. *Id.* at 50-51.

88. Lois G. Schworer, *The Bill of Rights: Epitome of the Revolution of 1688-89*, in *THREE BRITISH REVOLUTIONS: 1641, 1688, 1776*, at 224, 226 (J.G.A. Pocock ed., 1980).

89. Bill of Rights, I William & Mary, st. 2, c. 2 (1689), reprinted in *2 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY*, *supra* note 51, at 599.

90. *Id.* at 600.

91. *Id.* at 601.

peached"; excessive bail "ought not to be required," nor excessive fines imposed, nor cruel and unusual punishments inflicted; and "parliaments ought to be held frequently."⁹² William and Mary received the crown on the implicit condition that they recognize and preserve these rights and liberties, as "the true, ancient, and indubitable rights and liberties of the people of this kingdom."⁹³ Yet in fact these were not old rights restored, but "new laws changing the powers of the kingship." By the Bill of Rights, then, "a new monarchy was created": "the Crown that William of Orange accepted in 1689 was significantly different from the one for which Charles I fought in the 1640s and to which Charles II was restored in 1660."⁹⁴ The seventeenth-century struggle over the locus of sovereignty between King and Parliament was decisively resolved in favor of the latter, although technically "King in Parliament" and not Parliament alone was sovereign.

Although only a statute, and conceivably subject to repeal by later Parliaments, the Bill of 1689, like the Petition of Right sixty years earlier, suggested by its very terms a more fundamental limitation, not only on the powers of the monarchy but also on the powers of Parliament. The rights and liberties so declared "by authority of this present parliament . . . shall stand, remain, and be the law of this realm forever," the document declared.⁹⁵ Certain rights and privileges, like Magna Carta, would "have no 'Sovereign,'" even if Parliament were omnipotent.⁹⁶ And although Parliament may be absolute, it could not be arbitrary; as James Otis would later observe, it could not make two and two five.⁹⁷ The notion of parliamentary sovereignty thus was tempered with the notion

92. *Id.*

93. *Id.* at 602-603.

94. Schwoerer, *supra* note 88, at 228. Henry Horwitz reaches a different conclusion, arguing that the settlement of 1688-89 did not fundamentally alter the "constitution" since it "left intact the royal prerogatives to make war and command the militia, to appoint to governmental posts, and to summon, prorogue, and dissolve parliaments. Nor did [it] outlaw those devices by which Charles II and James II had sought to alter the composition of parliament and to influence its members." HENRY HORWITZ, *PARLIAMENT, POLICY AND POLITICS IN THE REIGN OF WILLIAM III* 13-14 (1977).

95. Bill of Rights, *supra* note 89, at 604.

96. CORWIN, *supra* note 46, at 54 ("... 'Sovereign Power' is no parliamentary word. In my opinion it weakens Magna Charta, and all the statutes; for they are absolute without any saving of 'Sovereign Power.' . . . Magna Charta is such a fellow, that he will have no 'Sovereign.'") (quoting Coke's speech in 2 HANSARD, *PARLIAMENTARY HISTORY* 356-57 (1628).

97. James Otis, *The Rights of the British Colonies* (1764), in *FREE GOVERNMENT IN THE MAKING: READINGS IN AMERICAN POLITICAL THOUGHT* 91, 95 (Alpheus T. Mason & Gordon E. Baker eds., 4th ed. 1985).

of sovereign power limited by self-review. Both notions, moreover, were couched in the persistent, reassuring concept of the ancient "mixed," or "balanced" constitution. Thus could complacent Englishmen of the eighteenth century rest assured that the relative political stability and economic prosperity of the period was undoubtedly associated with the blessings of their constitution.

Two important lines of constitutional analysis remained, however, for that minority of Englishmen who in the eighteenth century would dissent from this prevailing attitude. First, they could utilize the persisting concept of a higher, or fundamental law, which confined parliamentary authority. The argument Parliamentarians employed during the reign of Charles I—particularly to justify the Petition of Right of 1628—and that the Whigs used in the late 1670s to support the Exclusion Bill would be used by parliamentary reformers in the eighteenth century: that is, they would appeal to the ancient constitution—even to a mythical Saxon, or "Gothick," "original" constitution—in calling for change such as, for example, more equal representation in the House of Commons. Thus did the seventeenth-century idea of the ancient constitution develop into the "Whig" history of the eighteenth and nineteenth centuries and the so-called "Saxon myth" with which it would be associated.

The second line of analysis available to those who dissented involved far more radical thinking. They would deny, or rather disregard, the concept of the "ancient constitution" as fundamental law altogether and rather turn to an alternate higher authority, reason. Those who did so also moved the inquiry away from history, the common universe of discourse, to the new terrain of political theory, thereby resuming the development of ideas that Hobbes and Filmer earlier had suggested.

Although, as noted above, the ideas of these proponents of unlimited sovereignty won little acceptance among Englishmen in the seventeenth century, their lasting significance lay in the responses they evoked from John Locke and Algernon Sidney. Both men, like the authors they refuted, departed from a narrowly circumscribed fundamental law analysis.

John Locke's intimate association with Anthony Ashley Cooper, the first earl of Shaftesbury and the pivotal figure in the Exclusion Crisis late in the reign of Charles II, allied Locke with the "first Whigs" just as closely as the publication of his *Two Treatises on Government* in 1690

allied him with the Glorious Revolution.⁹⁸ Unlike the Whigs, however, Locke was not faced with possibly inconsistent theories about mixed monarchy because, in his arguments against the monarch's usurpation of Parliament's powers, he utilized reason, not custom, as the fundamental law that defined the constitution. Locke's famed *Second Treatise* posited the origin of political, or civil, society in the compact by which men give their consent to be governed—to give up their rights in the “state of nature”—in order to secure their lives, liberties, and estates. The monarch who exercises power he does not rightfully have is a usurper or a tyrant, and thus violates the compact. The Lockean compact is not the traditional notion of the contract between the King and his subjects, which was well established in English fundamental law thinking. It was, rather, the new notion of the original social contract, which Locke posited at the beginning of his *Treatise*—a notion, in short, that was relevant to natural law, but not to constitutional law.⁹⁹ In responding to the patriarchal arguments of Filmer on these terms, Locke thereby moved the debate altogether “out of the field in which history appears to be relevant.”¹⁰⁰

Algernon Sidney, author of *Discourses on Government* (which, like Locke's *Treatises*, was written to refute Filmer) and martyr to the cause of liberty,¹⁰¹ was often spoken of together with Locke by Americans of

98. On the importance of Locke's association with Shaftesbury, see Peter Laslett, *Introduction to JOHN LOCKE, TWO TREATISES OF GOVERNMENT 25-37* (Peter Laslett ed., student ed. 1988) (3d ed. 1698); MAURICE CRANSTON, *JOHN LOCKE: A BIOGRAPHY* 105-33 (1957).

Although the *Second Treatise* is still occasionally referred to as a justification of the Glorious Revolution, the evidence strongly suggests that it was not so written. Peter Laslett has argued persuasively that Locke wrote the bulk of the *Second Treatise* during the winter of 1679-80, before he had read Filmer's *Patriarcha*, which appeared in January 1680, and before he had written the *First Treatise*, which is a detailed reply to Filmer's work. It thus appears that Locke wrote the *Second Treatise* not as propaganda for a particular cause, but as a general refutation of absolute monarchy. Laslett, *supra*.

99. John Phillip Reid has noted this important distinction. John P. Reid, *The Irrelevance of the Declaration, in LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW* 72-73 (Hendrick Hartog ed., 1981). The constitutional-law sense of contract, observes Reid, had been utilized more than any other to limit royal power. It was “a practice of constitutionalism stretching back beyond legal memory, to the pledge of King Canute to govern by the laws of Edgar, the promise of William the Conqueror to continue Anglo-Saxon customs, the coronation charter of Henry I, and the several versions of Magna Carta.” *Id.* It persisted up to the reign of William and Mary, one may add, with the customary monarch's coronation oath and its reference to “ancient laws and constitutions.” See POCOCK, *ANCIENT CONSTITUTION*, *supra* note 61, at 239.

100. POCOCK, *ANCIENT CONSTITUTION*, *supra* note 61, at 237. See also Pocock, *supra* note 82, at 144 (Locke “did not write or think within the changing framework of commonly accepted ideas about the constitution. . .”).

101. Sidney died on the block in 1683 for his real or supposed complicity in the Rye House Plot; before his execution, he avowed that he died glorifying the “Old Cause,” that is, of liberty against

the Revolutionary generation.¹⁰² Like Locke, Sidney went outside the realm of history and custom to challenge Filmer's ideas about monarchical power, although it is debatable whether Sidney went farther than, or not quite as far as, Locke. There appeared to be no place in Sidney's argument for the idea of fundamental law as generally understood in the late seventeenth century. To Sidney, history was a process of change.

It might as well be inferred that it is unlawful for us to build, clothe, arm, defend or nourish ourselves otherwise than as our first parents did . . . as to take from us the liberty of instituting governments that were not known to them. . . . The authority of custom as well as of law . . . consists only in its rectitude. . . . We are not so much to enquire after that which is ancient as that which is best, and most conducing to the good ends to which it was directed.¹⁰³

Yet after thus unequivocally stating that what mattered was whether a government was good or evil, not whether it was old, Sidney added that if that liberty in which God created man, can receive any strength from continuance, and the rights of Englishmen can be rendered any more unquestionable by prescription, [then it is worth noting] that the nations, whose rights we inherit, have ever enjoyed the liberties we claim, and always exercised them in governing themselves . . . from the time they were first known in the world.¹⁰⁴

tyrants. Locke's fear of arrest and possible execution, for his own "scandalous" or treasonable writings, prompted him to leave England, not returning until after the Revolution in 1689. See Laslett, *supra* note 98, at 32, 66; CRANSTON, *supra* note 98, at 227-29, 246-57.

102. Thomas Jefferson, for example, invariably mentioned Sidney's *Discourses* and Locke's *Second Treatise* together. See, e.g., Letter from Thomas Jefferson to Robert Skipwith (Aug. 3 1771), reprinted in 1 THE PAPERS OF THOMAS JEFFERSON 79 (Julian P. Boyd ed., 1950); Letter from Thomas Jefferson to John Norvell (June 14, 1807), reprinted in 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 1, at 415, 416; Letter from Thomas Jefferson to Henry Lee (May 8, 1825), reprinted in 12 THE WORKS OF THOMAS JEFFERSON, *supra* note 1, at 408. In the 1825 letter to Lee, Jefferson mentioned Sidney and Locke together among the "elementary books of public right" that helped shape the "harmonizing sentiments" of American Whig Revolutionaries in 1776. Jefferson to Henry Lee, *supra* at 409. An 1825 resolution of the Board of Visitors of the University of Virginia expressed the Board's opinion that

as to the general principles of liberty and the rights of man, in nature and in society, the doctrines of Locke, in his "Essay concerning the true original extent and end of civil government," and of Sidney in his "Discourses on government," may be considered as those generally approved by our fellow citizens of this, and the United States.

Minutes of the Board of Visitors of the University of Virginia (Mar. 4, 1825), reprinted in 19 THE WRITINGS OF THOMAS JEFFERSON 460-61 (Andrew A. Lipscomb & Albert E. Bergh eds., 1905).

103. ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 82, 332 (London 1704), quoted in Behrens, *supra* note 86, at 65-66.

104. ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 380 (3d ed. London 1751), quoted in POCOCK, ANCIENT CONSTITUTION, *supra* note 61, at 238.

At the end of the seventeenth century, therefore, a significant underlying tension, or contradiction, existed in English constitutionalism. The concept of immemorial custom, expressed through the common law, as a higher or fundamental law binding on both King and community, was in decay; ideas of sovereignty had undermined it, in practice if not in theory. The modern English conception of the "flexible" constitution, consisting not of laws but "conventions," however, had not yet been fully articulated;¹⁰⁵ Blackstone had not yet written his *Commentaries on the Laws of England*, which would affirm parliamentary sovereignty.¹⁰⁶ In the eighteenth century, then, those situated outside the established order—whether English Dissenters, Anglo-Irishmen, or Americans—could appeal against its practice by reference to "somewhat remotely perceived principles," and thus could utilize arguments based both on history or custom and on new ideas about reason and natural law.¹⁰⁷ To such dissenting voices, the arguments of Locke and Sidney would have special importance.

III. VOICES OF DISSENT: THREE GENERATIONS OF "REAL WHIGS"

The term "Whig," as used in eighteenth-century Britain, referred to the dominant political party, if one may call it a "party." Rather than being organized as a party in the modern sense, the Whigs consisted largely of a network of personal groups contending for power among themselves, kept together by friendship and patronage rather than policies and principles. "Whig" was originally an abusive term, denoting Scottish horse drovers and connoting a country bumpkin or yokel. It had been applied to Scottish Presbyterian rebels in the mid-seventeenth century and was first applied as a party name, again abusively, to the "country party" under Shaftesbury, the Petitioners of 1679.¹⁰⁸ The Glorious Revolution of 1688 was primarily their triumph, and the Whig Junto formed a powerful group in the reigns of William III and Anne. United in opposition to the Jacobites, the Whigs secured the Hanoverian succession and, because the Tories were suspected of disloyalty, enjoyed a monopoly of power until the reign of George III.

105. On the English conception of the flexible constitution and eighteenth-century American expressions of it, see Grey, *supra* note 33, at 866-67 n.102.

106. Blackstone's affirmation of parliamentary sovereignty is discussed in Part V, *infra*.

107. Pocock, *supra* note 82, at 144.

108. STEINBERG'S DICTIONARY OF BRITISH HISTORY 403 (S.H. Steinberg & I.H. Evans eds., 2d ed. 1970).

Caroline Robbins has described three generations of "Commonwealthmen," or, as they liked to call themselves, "Real Whigs." The Commonwealthmen were a small faction of politically conscious Britons in the Augustan age, representing a small minority among the many Whigs.¹⁰⁹ The "Commonwealthmen" referred to themselves as "Real Whigs" to avow a consciousness of kinship with civil-war-period republican political writers, such as Milton, Harrington, and Sidney. As Robbins notes, such a claimed connection sharply distinguished them from their contemporaries in the mainstream of British political discourse.

In the eighteenth century the majority of the ruling oligarchy and the greater part of their fellow countrymen emphatically denied any continuity or connection between the innovators and Levellers of the Puritan Revolution (1641-1660), and the philosophers and Whiggish statesmen of the struggle (1679-1710) to exclude James Stuart and secure the Glorious Revolution. An eccentric antiquarian might hang a copy of Charles the First's execution writ in his closet and speak alarmingly of kings and superstitions, but in general all talk of '41 alarmed Englishmen as much or more than the sight of Jacobite toasts over the water. Any proposed tampering with the fabric of the church and state produced dismal recollections and dire predictions.¹¹⁰

Hence the "Real Whigs"—quite literally "eccentric antiquarians"—can be credited with no consequential achievements in England. "English development," Robbins notes, "shows scarcely a trace of [the Real Whigs'] efforts to restore or amend the mixed or Gothic government they esteemed."¹¹¹ Their importance lies in their maintenance of the revolutionary tradition in English political thought and, through their influence on Americans in the mid-eighteenth century, the linking of the history of English struggles against tyranny in one century with the American effort for independence in another.¹¹²

Although those whom Robbins has described as "Real Whigs" were many different individuals of three distinct generations, they generally held certain ideas in common. First, the Real Whigs viewed with alarm the development of Cabinet government, seeing the possibility of ministerial predominance as a threat to the balance of the constitution. They

109. ROBBINS, *supra* note 6, at 3. These persons also used the terms "Independent Whig," "True Whig," and "Honest Whig" to describe themselves, but for the sake of consistency, "Real Whig" is used here.

110. *Id.*

111. *Id.* at 3-4.

112. *Id.*

believed in a separation of powers and hoped that each part of the government would check or balance the others; accordingly, they wished to separate legislative and executive branches more completely, and they roundly condemned special interests—placemen, party cliques and cabals—in government.¹¹³ Second, throughout the century Real Whigs urged the reform of Parliament by a wider franchise and a more equitable distribution of seats. They also advocated more frequent elections—in fact, annual parliaments.¹¹⁴ Third, the Real Whigs were vigorous champions of religious liberty. In tracts, sermons, and treatises they kept alive “[t]he idea of a state in which no one was more privileged than another because of his religion nor in any way penalized for his lack of orthodoxy.”¹¹⁵ The Real Whigs were very early advocates, Robbins notes, of “a tolerance which went far beyond the theories of Locke or Milton,” including within its scope Jews, atheists, Unitarians, Mohammedans, and, by Joseph Priestley’s time, even “well-behaved Catholics.”¹¹⁶ These friends to religious liberty also more broadly championed freedom of inquiry through secularized education.¹¹⁷ Finally, the Real Whigs expanded the concept of consent in two significant respects. They argued, first, that every Englishman—wherever he was, at home or abroad—was entitled to be ruled by laws to which he himself had consented, and second, that this right of Englishmen extended to all mankind.¹¹⁸

The first generation of Real Whigs Robbins described appeared not long after the Glorious Revolution, and most of its members were dead by 1727. The Revolution of 1688, Robbins notes, “made respectable eventually a large body of republican or Commonwealth writers” of the seventeenth century, including Harrington, Nedham, Milton, Ludlow, Neville, Marvell, Locke, and Sidney.¹¹⁹ As an immediate result of the Glorious Revolution, however, most Whigs moderated, relishing the “glory” of the constitutional settlement of 1689 that put William and Mary on the throne and reaffirmed the rights of Englishmen. Most Whigs “believed that they had an almost perfect constitution defined by the Bill of Rights, the Statute of Habeas Corpus, the Toleration, and the

113. *Id.* at 8.

114. *Id.* at 9.

115. *Id.* at 11.

116. *Id.*

117. *Id.* at 12-13.

118. *Id.* at 9.

119. *Id.* at 58.

Union.”¹²⁰ They spoke of the excellence of the English system and of the folly of even minor alterations to it. They concentrated instead on empire, economic stability, prosperity, and administration.¹²¹ Yet the men who in time would describe themselves as “Real Whigs” were not as content.

Beginning with the appearance of Robert Molesworth’s *Account of Denmark* in 1693 and continuing through the publication of the last of John Trenchard’s and Thomas Gordon’s *Cato’s Letters* in 1723, the first generation of Real Whigs agitated for reform that went further than that offered by the Bill of Rights and the Toleration Act. These reformers were found in dissenters’ meetings and in certain country houses and taverns. Molesworth was a leading figure; among the Real Whigs of this period were the third Earl of Shaftesbury, a self-declared disciple of Molesworth, as well as a number of Molesworth’s friends or acquaintances, including William Molyneux, author of *The Case of Ireland*, and the Scotsman, Andrew Fletcher of Saltoun.¹²² As Robbins has summarized their reform efforts, “[t]hey worked for a federal system in the British Isles, an amendment of parliament, a diminution of ministerial prerogative, an increased toleration, and some modification of mercantilist regulations.”¹²³ But the Real Whigs of this period received no support or encouragement from Whigs in office, and the legislative successes they could claim were modest. But, Robbins notes, their “real achievement” lay in the intellectual nourishment they gave to a second generation of Commonwealthmen who not only would read the “arguments” and “essays” of the first Real Whigs but also would continue to study the seventeenth-century works that they strove to have republished.¹²⁴

The second generation Robbins described was roughly contemporaneous with the reign of George II (1727-1760) and the ministry of Robert Walpole. Dissenters from the Augustan calm, the Real Whigs of this period consisted of religious nonconformists and political opposition writers: men such as Henry Grove, the teacher and scholar who contributed to *Spectator*; James Foster, the preacher and contributor to *The Old Whig*; the hymnologist Isaac Watts; Edmund Law, a leading figure

120. *Id.* at 86-87.

121. *Id.*

122. *Id.* at 91-98. For Robbins’ summaries of Molyneux and Fletcher, see *id.* at 137-43, 180-84, respectively.

123. *Id.* at 6.

124. *Id.*

among the liberal Anglicans at Cambridge; and Thomas Pownall, author of the 1752 treatise *Principles of Polity*.¹²⁵ Associated in an “uneasy” alliance with dissident Tories such as Henry St. John, Viscount Bolingbroke (1678-1751), the Real Whig opponents of the Walpole administration became the spokesmen for what historians generally refer to as the “Country” opposition.¹²⁶

Bolingbroke and others of his “circle”—men of letters such as Jonathan Swift, Alexander Pope, and John Gay—employed what Isaac Kramnick has called “the politics of nostalgia.”¹²⁷ England in the opening decades of the eighteenth century was undergoing a “financial revolution,” brought about by the establishment of the Bank of England, the growth of the national debt, and the rise of joint-stock companies such as the East India Company and the South Sea Company. New ways to wealth and political power were made available to those who exploited the opportunities created by these new institutions, while many of the landed gentry—the older elite—were in noticeable decline. Having borne the expense of King William’s wars, the gentry found themselves in debt, their estates in decay, and “new men” filling their former places of prestige. The financial revolution was “the most meaningful social experience in the lives of Bolingbroke and others in his circle”; it informed all their writings on politics and society, and it fed “their gloom, their satire, and their indignation.”¹²⁸

Bolingbroke, the Real Whigs, and other members of the opposition party were not simply a coalition of “outs”—independent Tories, dissident Whigs, small merchants and traders—held together in loose coalition by no set of ideas or ideology; rather, they shared a particular set of ideas, a political “style.” Bolingbroke had inherited from his humanist predecessors a “high public style,” a view of statecraft in tune with the

125. See generally *id.* at 221-319.

126. *Id.* at 274. Robbins deliberately excluded Bolingbroke from her original study, noting that although Bolingbroke could “cite the canonical Whig writers in defense of his own devious ways,” *id.* at 295, he—like the other Tory, David Hume—never completely accepted the logical defense for the Glorious Revolution. *Id.* at 8. Responding to Isaac Kramnick and other critics, Robbins has defended the omission of Bolingbroke by arguing that he, unlike the eighteenth-century Commonwealthmen, had “no interest” in continuing reform of the constitution. CAROLINE ROBBINS, *THE EIGHTEENTH-CENTURY COMMONWEALTHMAN* at x-xi (1968) (forward to reprint ed.).

127. ISAAC KRAMNICK, *BOLINGBROKE AND HIS CIRCLE: THE POLITICS OF NOSTALGIA IN THE AGE OF WALPOLE* (1968).

128. *Id.* at 4, 39-69.

civic republican tradition that J.G.A. Pocock has described.¹²⁹ However much that political style might differ from the “Whig canon” Robbins described, Bolingbroke was at one with the Real Whigs in his emphasis on the jealous spirit of liberty: “liberty cannot be long secure, in any country, unless a perpetual jealousy watches over it” because, “in the nature of things, the notion of a perpetual danger to liberty is inseparable from the very notion of government.”¹³⁰ Bolingbroke and his circle also shared with the Real Whigs an abhorrence of the Walpole ministry’s “corruption” of the English constitution.

“Corruption,” as used by the Country opposition in the 1720s and 1730s, denoted a disturbance of the balance of the constitution through the Crown’s “influence” over Parliament. The “Country” vision, as Pocock has summarized, assumed that governmental power would be abused:

Society is made up of court and country; government, of court and Parliament; Parliament, of court and country members. The court is the administration. The country consists of the men of independent property; all others are servants. The business of Parliament is to preserve the independence of property, on which is founded all human liberty and all human excellence. The business of administration is to govern, and this is a legitimate activity; but to govern is to wield power, and power has a natural tendency to encroach. It is more important to supervise government than to support it, because the preservation of independence is the ultimate political good.¹³¹

The most effective structural mechanism for preventing this, the “Country” vision further assumed, was to guard against “corruption” and thereby to maintain a balance among the parts of the “ancient constitution”:

There exists an ancient constitution in England, which consists in a balance or equilibrium between the various organs of government, and within this balance the function of Parliament is to supervise the executive. But the executive possesses means of distracting Parliament from its proper function; it seduces members by the offer of places and pensions, by retaining them to follow ministers and ministers’ rivals, by persuading them to support measures—standing armies, national debts, excise schemes—whereby the activities of administration grow beyond Parliament’s control. These

129. See Pocock, *supra* note 82, at 104-47, for an introduction to the argument he more fully developed in his study, *The Machiavellian Moment*. POCOCK, *supra* note 12.

130. BOLINGBROKE, *Remarks on the History of England* (1730), reprinted in 1 THE WORKS OF LORD BOLINGBROKE 292, 295-96 (reprint ed. 1967) (London 1844).

131. Pocock, *supra* note 82, at 124-25.

means of subversion are known collectively as corruption, and if ever Parliament or those who elect them—for corruption can occur at this point too—should be wholly corrupt, then there will be an end of independence and liberty. The remedy for corruption is to expel placemen, to ensure that members of Parliament become in no way entangled in the pursuit of power or the exercise of administration, and to see to it that parliaments are frequently elected by uncorrupted voters.¹³²

Hence, for example, the standing army is an instrument of corruption, and to defend the militia against a standing army is the same as to defend Parliament against corruption.¹³³

By combining control of the House of Commons with the confidence of the King, Walpole had become one of the most powerful British prime ministers. He had put into practice a rigorously articulated system of influence, using the Crown's tremendous power of patronage to create a Treasury Party and, with its dominance, reliable support for his ministry and the basis for the political stability of England. This system was necessarily "corrupt" because, in "Country" theory, the balance of the constitution depended on the complete separation of Parliament and administration. As Pocock summarizes the argument, "[i]t was for the Crown to govern, and for Parliament to exercise a jealous surveillance of government; 'corruption' would follow if the Crown discovered any means at all of attaching members of Parliament to it in the pursuit of its business."¹³⁴ The Real Whigs, as "Country" members of Parliament, therefore saw it as their special duty to exercise that "Right of examining all publick Measures" that they had claimed for themselves.¹³⁵ Indeed, one self-styled "Real Whig," William Talbot, defined Whiggery in terms of the concern over corruption and the need for eternal vigilance to guard against it:

The principles of a Real Whig, in my sense of the term are these, that government is an original compact between the governors and the governed, instituted for the good of the whole community; that in a limited monarchy, or more properly legal commonwealth, the majesty is in the people and tho' the person on the throne is superior to any individual, he is the servant of the nation; —that the only title to the crown is the election of the people; that the laws are equally obligatory to the Prince and people; that as the constitution of England is formed of three legislative branches, the balance

132. *Id.* at 125.

133. *Id.* at 125-26.

134. *Id.* at 131-32.

135. See *infra* text accompanying note 264.

between each must be preserved, to prevent the destruction of the whole; —that elections ought to be free, the elected independent; —that a Parliamentary influence by places and pensions is inconsistent with the interest of the public; and that a Minister who endeavours to govern by corruption, is guilty of the vilest attempt to subvert the constitution; —that a standing mercenary army in time of peace is contrary to the laws, dangerous to the liberties, and oppressive to the subjects of *Great Britain*; . . . that our prosperity depends on trade, which it is our interest to encourage, our duty to protect; —that our colonies are the foundation of a very beneficial commerce; that honour, justice, and policy oblige us to defend them; that our navigation is not to be interrupted, or our merchants plundered with impunity to those who insult us; —that all unappropriated subsidies and votes of confidence are dangerous precedents, and always to be opposed; unless so apparent exigencies of affairs evidently and absolutely require such extraordinary and unconstitutional measures; —that the freedom of the press is the bulwark of religious and civil liberty; that as religion is of the utmost importance to every man, no person ought to suffer civil hardships for his religious persuasion, unless the tenets of his religion lead him to endeavour at the subversion of the establishment in Church or State.¹³⁶

Walpole and the “Court” apologists, like the “Country” opposition, were firmly committed to the ideal of the mixed constitution and the balance of the three branches of the legislature, the ideal that dominated eighteenth-century English constitutionalism. They actually defended the very corruption the “Country” opposition denounced, arguing that without it, the constitution would not function properly. The Commons had acquired too much power, thereby creating a constitutional imbalance, Walpole and the “Court” apologists argued; only through the Crown’s disposal of places in the civil, military, and ecclesiastical establishment could the monarch hold his place in the constitutional balance. Thus, as Pocock observes, both sides in the eighteenth-century constitutional debate—Court as well as Country—believed that the constitution consisted in the balance maintained between its parts. They disagreed about how to preserve the balance:

[B]ut the ‘Country’ theory maintained that the balance was to be preserved by preserving the parts in independence of each other, while the ‘Court’ apologists—nearer as they usually were to constitutional reality—contended that the balance was between parts that were interdependent and

136. Letter written by William Talbot (1734), quoted in ROBBINS, *supra* note 6, at 283.

must be preserved by keeping the interdependence properly adjusted.¹³⁷

Both schools of thought, Pocock adds, were true to the notion (derived, he argues, through Harrington from Machiavelli) that a return to the first principles, or original balance, of the constitution would deal with corruption. But the Country pamphleteers, who usually could be found insisting that there was corruption and that it ought to be reformed forthwith, were "responsible for importing into eighteenth-century thought the notion that the basic principles of the constitution—held to consist of some kind of balance or separation of powers—were known, as well as ancient, and that recourse could and should be made to them whenever there was need."¹³⁸ Thus the Real Whigs of the second generation, who together with Bolingbroke and certain other Tory dissidents comprised the "Country" party of the early decades of the century, kept alive into the eighteenth century the notion of the ancient constitution that Coke and others had promulgated over a century earlier.

Within a few decades, however, a noticeable change occurred in Real Whig constitutional thought. The third and last generation of Real Whigs whom Robbins identified, those of the reign of George III, were persons of science and letters such as the eminent Dr. Joseph Priestley and the jurist and Oriental scholar, Sir William Jones; liberal Anglican churchmen such as Jonathan Shipley, Bishop of Asaph and a close friend of Dr. Benjamin Franklin; and advocates of parliamentary reform such as Major John Cartwright, Dr. John Jebb, and fellow associates of the Society for Constitutional Information.¹³⁹ These "Honest Whigs" of the 1760s and 1770s are often called early "Radicals" because their thorough-going advocacy of constitutional reform made them ideological kinsmen of the American revolutionaries as well as, within a few decades, the French revolutionaries.¹⁴⁰

Five of these leading Radical political thinkers are especially important because they publicly addressed the American question during the

137. Pocock, *supra* note 82, at 132. See also KRAMNICK, *supra* note 127, at 111-12, 122-23, 135-36; VILE, *supra* note 82, at 54, 72-74.

138. Pocock, *supra* note 82, at 132. Pocock distinguishes the eighteenth-century "neo-Harringtonians" from James Harrington himself because, while Harrington dismissed medieval politics as incoherent and saw his commonwealth of freeholders as coming into existence only after 1485, the neo-Harringtonians identified it with the ancient constitution. *Id.* at 135.

139. See generally ROBBINS, *supra* note 6, at 320-77.

140. ROBBINS, *supra* note 6, at 7, 320-21. See also ROBERT E. TOOHEY, *LIBERTY & EMPIRE: BRITISH RADICAL SOLUTIONS TO THE AMERICAN PROBLEM, 1774-1776*, at xii (1978). Toohey's study provides an excellent introduction to the thought of these "British Radicals."

two critical years between the Boston Tea Party and the Declaration of Independence.¹⁴¹

James Burgh (1714-1775) spent the last years of his life completing his most important political work, *Political Disquisitions*.¹⁴² This three-volume treatise was a classic statement of Real Whig opinion; Robbins suggests that it was "the most important political treatise which appeared in England in the first half of the reign of George III."¹⁴³ It was also tremendously influential in America; Bernard Bailyn has called it "the key book of this generation."¹⁴⁴

Burgh's neighbor and friend, Richard Price (1723-1791), was an accomplished moral philosopher, political theorist, and actuarial statistician, as well as one of the most prominent Dissenting clergymen in England. One of the first and best-known Honest Whigs regularly attending informal social gatherings at London coffeehouses in the 1760s and 1770s, he also was one of Benjamin Franklin's closest friends during Dr. Franklin's long residence in England. Price's *Observations on the Nature of Civil Liberty*,¹⁴⁵ which appeared early in 1776, won broad attention on both sides of the Atlantic.

Adamant in his opposition to the war with America, Price continued to correspond with his American friends and even, when he could, passed on valuable information about affairs in England. Although circumstances forced him to decline the invitation Congress issued in autumn 1778 to come to America as a citizen and as fiscal consultant to Congress, his ties to America remained strong. The American Academy of Arts and Sciences made Price a fellow in 1782; a few years later, he was elected to membership in the American Philosophical Society. As one historian has observed, "[f]ew Englishmen welcomed the success of the American Revolution and the birth of the Republic as did Price," who on New Year's Day 1783 wrote to Dr. Benjamin Rush in Philadelphia of his heartfelt belief that the American Revolution was "one of the most important revolutions that has ever taken place in the world," one

141. TOOHEY, *supra* note 140, at 24-25 (referring to James Burgh, Richard Price, Catharine Macaulay, Granville Sharp, and John Cartwright). Much of the discussion in the following several paragraphs draws on the biographical information summarized in Toohey's useful synthesis of the lives and contributions of these five individuals.

142. JAMES BURGH, *POLITICAL DISQUISITIONS* (1774-75).

143. ROBBINS, *supra* note 6, at 365.

144. BAILYN, *supra* note 10, at 41.

145. RICHARD PRICE, *OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA* (1776).

that would make “a new opening in human affairs” and introduce “more light and liberty and virtue than have yet been known.”¹⁴⁶ Price wrote and thought extensively about the United States for the rest of his life.

The historian Catharine Macaulay (1731-1791) was an extraordinary person, “one of the most celebrated females of her time, both in England and America.”¹⁴⁷ As a gifted propagandist for the cause of liberty, she evoked strong opinions in her contemporaries: her writings sorely annoyed conservative Englishmen like Dr. Samuel Johnson, while the Sons of Liberty toasted her in the taverns of Boston along with other pro-American worthies such as Shelburne, Burke, and Wilkes. She is best remembered for her eight-volume Whiggish *History of England from the Accession of James I to that of the Brunswick Line* (1763-83), which she wrote in response to David Hume’s very popular *History of England*, and its Tory-like treatment of the Stuart reigns.

Although he was not a Dissenter like Price and Burgh, Granville Sharp had a life and career much like that of the many social reformers who could be found among the Dissenters. Mainly remembered as “the father of the anti-slavery movement” in eighteenth-century England, he became a celebrity through his role in the *Somerset* case in 1771-72 when he challenged prevailing legal opinions, including William Blackstone’s, before William Murray, Earl of Mansfield, who was Lord Chief Justice of the Court of King’s Bench.¹⁴⁸ Defense of America was one of Sharp’s many other causes. His pamphlet, *A Declaration of the People’s Natural Right to a Share in the Legislature*,¹⁴⁹ was another important contribution to the American debate as well as a revealing exposition of the Real Whig views of consent and representation. Sharp took a leave of absence and eventually resigned from his position in the government’s Ordnance Office because of his conscientious objection to the war with America. He became one of Major Cartwright’s companions in the cause of parlia-

146. TOOHEY, *supra* note 140, at 166.

147. *Id.* at 34.

148. James Somerset was a slave, brought by his master to England from Virginia, who had deserted his master, was recaptured in England by his master’s agents, and locked in chains aboard a Jamaica-bound ship. Working with other anti-slavery activists who sought to free Somerset by obtaining a writ of habeas corpus, Sharp contended that “as soon as any slave sets his foot upon English territory, he becomes free.” Judge Mansfield’s favorable decision was popularly interpreted as outlawing slavery in England. The legal issues involved in the *Somerset* case, and particularly Sharp’s interesting correspondence with Blackstone, is discussed more fully in DAVID B. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823*, at 480-86 (1975).

149. GRANVILLE SHARP, *A DECLARATION OF THE PEOPLE’S NATURAL RIGHT TO A SHARE IN THE LEGISLATURE* (1774).

mentary reform and was a charter member in the Society for Constitutional Information.

John Cartwright (1740-1824), usually known in the history of English reformism as Major Cartwright, devoted most of his long life to the advocacy of parliamentary reform. The American crisis helped convert him to this career. His first political tract, *American Independence the Interest and Glory of Great Britain*,¹⁵⁰ consisted of a series of essays that began with a denial of Parliament's authority to legislate for the colonies. Foreseeing that a bitterness and hostility inimical to the interests of both America and Britain likely would accompany the separation of the colonies, Cartwright urged in the tenth and last essay a proposal to effect a mutually beneficial separation.¹⁵¹

Like Granville Sharp, Cartwright was forced to leave a government career because of his principled opposition to the war with America. Still in the Royal Navy at the outset of the war, Cartwright refused a personal request from his old commander, Lord Admiral Howe, to serve on the admiral's staff in the coming naval campaign off the coast of North America. He instead accepted an appointment as major in the militia of Nottinghamshire, where he held on to his father's estate. Thus Cartwright combined his farming and militia duties with his crusade for parliamentary reform. He joined with Sharp, Dr. John Jebb, and others in founding the Society for Constitutional Information in 1780.

These radicals of the later eighteenth century, Isaac Kramnick has observed, were

much more likely to base their arguments on natural rights than on historical rights; they were preoccupied less with nostalgic country concerns than with very modern socioeconomic grievances. They shared a deeply felt sense that the unreformed British constitution failed to serve the interests of the talented and hard-working middle class.¹⁵²

Kramnick points to the 1760s as "the crucial turning point." Two great historical developments—the American crisis and the Industrial Revolution—changed the context of ideological discourse, especially among the Real Whigs. The American crisis and the accompanying controversy over taxation introduced into politics "new noncountry issues," primar-

150. JOHN CARTWRIGHT, *AMERICAN INDEPENDENCE THE INTEREST AND GLORY OF GREAT BRITAIN* (1774), reprinted in *English Defenders of American Freedoms, 1774-1778*, at 133-91 (Paul H. Smith ed., 1972).

151. *Id.* at 182-88.

152. Kramnick, *Republican Revisionism*, *supra* note 20, at 635.

ily the issue of representation, which “extend[ed] ‘the debate about parliamentary reform far beyond its previous confines.’”¹⁵³ The emergence of a new middle-class radicalism during the early years of the Industrial Revolution transformed the old civic republican notions of virtue and corruption and thereby dramatically altered the paradigms that underlay political discourse. Economic productivity and hard work replaced citizenship and the public quest for the common good as the criteria of virtue; “[s]elf-centered economic productivity, not public citizenship, became the badge of the virtuous man.”¹⁵⁴ And when middle-class radicals inveighed against corrupt patronage, it was a new sense of corruption: “the corruption of jobs and places going to undeserving, untalented men of birth.”¹⁵⁵

After the 1760s, Kramnick argues, “the concerns of the earlier part of the century—the mixed constitution, annual Parliaments, the independent Commons, anti-place legislation, and the standing army controversy—were shunted aside.”¹⁵⁶ Patronage and privilege were the principles that still pitted the Court against the reformers, but the Court-Country dichotomy that had arisen during the Financial Revolution of the Walpole era became nearly transposed during the Industrial Revolution of the later decades of the century. By the 1760s and 1770s, the Country reform tradition “came to terms with the market,” while the Court remained “enmeshed in the principle of patronage, which ultimately flew in the face of market notions of careers neutrally open to talent and hard work.”¹⁵⁷ The views of the middle-class radical “outs” reversed the earlier equation of Court and commerce: the “ins,” the Court and all it stood for, “were identified not with the market and with commerce but with idle, unproductive privilege.”¹⁵⁸ In this period the privileged Court responded with a nostalgic defense of the ancient constitution.¹⁵⁹

Adapting the ideas of the previous generations of Real Whigs to the new political issues of the 1760s and 1770s, the Real Whigs of the third

153. *Id.* (quoting JOHN BREWER, *PARTY IDEOLOGY AND POPULAR POLITICS AT THE ACCESSION OF GEORGE III*, at 255 (1977)).

154. *Id.* at 661.

155. *Id.* at 662. See also Isaac Kramnick, *English Middle Class Radicalism in the Eighteenth Century*, in 3 *LITERATURE OF LIBERTY* 3 (1980).

156. Kramnick, *Republican Revisionism*, *supra* note 20, at 635.

157. *Id.* at 661.

158. *Id.*

159. *Id.*

generation ensured the lasting significance of those ideas by injecting them into a trans-Atlantic dialogue. As Robert Toohey has shown, these British radicals “were the strongest ideological connection which the leadership of the American Revolution possessed in the European world of the late eighteenth century.”¹⁶⁰ Americans and British Real Whigs were

sources of inspiration to one another. . . . They read each other’s writings and their common heritage enabled them to enjoy a mutual satisfaction. Both groups honored the constitution and the liberties of England while seeking to realize human freedom on a new and larger scale. They believed that the imperial crisis resulted from political conditions in England which were eroding liberty in both the colonies and the mother country.¹⁶¹

At the outset of the American Revolution, British Radicals who viewed the imperial questions of 1774-76 in this light and who “recognized that the American problem demanded innovative solutions which complacent Englishmen were unable to accept [represented] the most advanced thinking in England on the subject of empire.”¹⁶² At the same time, they inaugurated a parliamentary reform movement that anticipated one of the most important chapters in English constitutional development in the next century.¹⁶³

IV. THE SUBSTANCE OF WHIG CONSTITUTIONALISM

At the heart of Whig constitutionalism were two related assumptions: first, that the essential function of government was to protect the rights of individuals; and second, that the essential function of a constitution was to limit or control governmental power, which—almost paradoxically—had the inevitable tendency to threaten the individual rights that government was instituted to protect. Both assumptions permeated the writings of seventeenth- and eighteenth-century English radical Whigs. The second assumption (rooted in the classic Whig fear of abuse of political power) was explicit in virtually all Whig writings. The first assumption, however, while implicit in many seventeenth-century writings, did

160. TOOHEY, *supra* note 140, at 154-55.

161. *Id.* For additional discussion of the influence of British radical Whigs on colonial Americans, see BAILYN, *supra* note 10, at 34-54. Indeed, Bailyn has argued that the radical Whigs shaped the mind of the American Revolutionary generation “more than any other single group of writers.” *Id.* at 35.

162. TOOHEY, *supra* note 140, at 154-55.

163. *Id.*

not become explicit until the Real Whigs of the mid-eighteenth century used it in their arguments for constitutional reform.

The most important readings in shaping American Whig constitutionalism in the crucial years prior to the Revolution may be divided into three groups: "black-letter" texts of the common law, primarily the works of Sir Edward Coke, Real Whig histories, and Real Whig political tracts. As one reads these works, moving from the common law texts to the histories, then from the histories to the political tracts, one sees a progressively more comprehensive Whig constitutional theory. In other words, the Whig argument for keeping a watchful eye on governmental power broadened, as it shifted from law to history and from history to philosophy: the common lawyers defended parliamentary rights against the Stuart kings; the Whig historians defended the "rights of Englishmen" against all "encroachments" of the Crown that followed the Norman Conquest; and the Whig philosophers of government defended the "natural rights of man" against *all* abuse of governmental power, whether coming from the king or from Parliament. Each of these groups of works, therefore, merits close examination.

A. "*Black-Letter*" Texts: *The Whig Common-Law Tradition*

Colonial Americans, lawyers and nonlawyers alike, repeatedly referred to the great figures of England's legal history, especially the seventeenth-century whig common lawyers. As Bernard Bailyn has observed, "Sir Edward Coke is everywhere in the literature: 'Coke upon Littleton,' 'my Lord Coke's Reports,' 'Lord Coke's 2nd Institute'—the citations are almost as frequent as, and occasionally even less precise than, those to Locke, Montesquieu, and Voltaire."¹⁶⁴ Other common-law writers casually referred to as authorities included the earlier commentators Bracton and Fortescue as well as Coke's contemporary, Francis Bacon, and his successors, Sir Matthew Hale, Sir John Vaughan, and Sir John Holt. Considered together, these treatise writers provided colonial Americans with a respect, indeed a veneration, for the common law, one that Bailyn has argued was "manifestly influential in shaping the awareness of the Revolutionary generation," even though the common law alone would not determine the conclusions Americans would draw in times of crisis.¹⁶⁵

164. BAILYN, *supra* note 10, at 30.

165. *Id.* at 31. As to the limitations of the common law, Bailyn explains, "[t]he law was no science of what to do next," although it was "a repository of experience in human dealings embody-

To Americans in the mid-eighteenth century, the single most important legal treatise was not Blackstone's *Commentaries*, which was not published until 1765, but rather Sir Edward Coke's *A Commentary upon Littleton*,¹⁶⁶ commonly referred to as simply Coke on Littleton, which constituted the first of four parts of the *Institutes of the Laws of England*. Coke wrote this difficult work in the form of a commentary, with a formidable mass of the author's criticism and learned notes heaped around the text. In the preface, Coke forewarned the reader about "this pain-full and large volume," with the complexity of its subject matter rendered even more formidable by the difficult style that exasperated many eminent American students of the law in the pre-Revolutionary era.¹⁶⁷

Sir Thomas Littleton wrote the text Coke chose for his commentary some time in the 1470s for the instruction of his son Richard. It was a brief, black-letter treatise on the land law, describing the customs that since time out of mind had surrounded the ownership and inheritance of English real property—a matter of the first importance in colonial America as well as in England. Coke's English translation of the text began with Littleton's definition of the most important of the estates in land at common law, the fee simple:

Tenant in fee-simple is he which hath lands or tenements to hold to him and his heires for ever. And it is called in Latin, *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say, lawfull or pure; and so *feodum simplex* signifies a lawfull or pure

ing the principles of justice, equity, and rights." *Id.* The common-law writers, ideologically speaking, helped lay the groundwork for the Whig historians and philosophers of government. These latter two groups, discussed *infra*, more directly helped the Americans formulate constitutional arguments in the crisis years of 1774-76. In other words, history and philosophy together supplemented the common law, in helping the Americans eventually justify independence.

166. EDWARD COKE, *COKE ON LITTLETON* (1651).

167. Struggling in the winter of 1762 with this crabbed treatise, Thomas Jefferson exclaimed to his old college chum, John Page, "I do wish the Devil had old Cooke, for I am sure I never was so tired of an old dull scoundrel in my life." Letter from Thomas Jefferson to John Page (Dec. 25, 1762), reprinted in 1 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 102, at 5. Jefferson's exasperation was typical; contemporaries such as John Adams, whose legal mentor, Jeremiah Gridley, had directed him to read Coke, shared the sense of profound discouragement this book engendered. As Dumas Malone has observed, "[t]he technical study of the law was then a 'dreary ramble,' as John Adams said, for books that smoothed the student's path did not exist. Textbooks of the modern sort were unknown, and Blackstone's famous *Commentaries* had not yet appeared." DUMAS MALONE, *JEFFERSON THE VIRGINIAN* 69-70 (1948). Other eminent American students who complained included Daniel Webster, who said that study of the book caused him to "dispair and almost to give up law for school teaching," and Joseph Story, who claimed that his struggle as a young man to comprehend Coke-Littleton actually drove him to tears. See BOWEN, *supra* note 66, at 513.

inheritance.¹⁶⁸

Coke's commentary on the text took the form of an almost word-for-word exegesis, for he deemed Littleton's every phrase worthy of comment and exposition. "Certain it is," says Coke, "that there is never a period, nor (for the most part) a word, nor an &c but affordeth excellent matter of learning."¹⁶⁹

The substantive content of other areas of English law was the subject of the three other volumes of Coke's *Institutes*. The second volume, or "part," as Coke entitled it, was a commentary on Magna Carta and some thirty-eight other important charters and statutes of the realm. Coke considered Magna Carta as "no new declaration," but rather as a reaffirmation of "the principall grounds of the fundamentall laws of England."¹⁷⁰ The implications of Coke's interpretation were clear: the rights guaranteed by Magna Carta owed their origin to the ancient common law, not to a gracious royal concession. Thus Coke's interpretation, not surprisingly, asserted the supremacy of common law over royal prerogative.

Typical of the tone of the second *Institute* was Coke's exposition of the famous thirty-ninth clause of Magna Carta: "No free man shall be taken or imprisoned, or disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed, . . . but by lawful judgment of his peers, or by the law of the land." "Upon this chapter," says Coke, "as out of a roote, many fruitfull branches of the law of Eng-

168. COKE, *supra* note 166, at *1a.

169. *Id.* at *xxxvii. Thus, in the notes in a column adjoining Littleton's definition of fee simple, Coke noted that the word tenant is derived from the verb *teneo*, "and hath in the law five significations." *Id.* at *1a. Catherine Drinker Bowen has described the text thus:

For Sir Edward Coke, every facet of the land law was a joy to study. What, for instance, did the word "tenant" mean; from whence derived? And "fee simple"-whether absolute, conditional, or qualified? . . . The French for "fee," Coke explains, is *fief*; in Domesday Book it was *feudum*. "It is a maxime in law," Littleton had written, in Section 3. Coke seized upon the phrase. "Maxim," he wrote; "i.e., a sure foundation or ground of art, a principle, all one with a rule, a common ground, postulatum or an axiome, which it were too much curiositie to make nice distinctions betweene them." The two words "in law" set Coke off upon a zestful frolic into laws of the Crown, statute law, law canon and civil, *lex naturale* (the law of nature) and *communis Lex Angliae*, the common law of England.

BOWEN, *supra* note 66, at 511-12. "To Coke," she concludes, "it was impossible that every scholar, if he but persisted, would not share his appetite for such excursions. 'We have armed our student,' says Coke brightly, 'with the signification of ancient bookes, charters, deeds, and records, to the end he may proceed in his reading with alacrity, and set upon, and know how to worke into with delight these rough mines of hidden treasure.'" *Id.*

170. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *"Proeme" (reprint ed. 1986) (London 1797).

land have sprung.”¹⁷¹ As Catherine Drinker Bowen has observed, “[a]ll that he urged in the House of Commons was here set down with particular eloquence and authority.”¹⁷² The law of the land, to Coke, meant the due process of the *common* law: hence, for example, all monopolies were against Magna Carta “because they are against the liberty and freedom of the subject, and against the law of the land.”¹⁷³ Further, Coke declared, a man “cannot be sent against his will into Ireland, to serve the King; which being an exile is prohibited by this Act.”¹⁷⁴ It is little wonder that Coke’s contemporary, Thomas Hobbes, attacked the *Institutes* on the grounds that Sir Edward seemed “on purpose to diminish . . . the King’s authority.”¹⁷⁵ The same Whig constitutionalism that appalled that advocate of monarchical sovereignty no doubt was found immensely satisfying to American Whigs in the decades preceding the Revolution.

The third *Institute* contained an account of the criminal law. It was the most readable of the four *Institutes* and also probably the least politically controversial at the time of its original publication, 1644. Coke, drawing frequently on his own experience as Attorney General under Elizabeth and James I for anecdotal embellishment, defined each crime, gave its history, and the penalty the law prescribed. “Coke’s views on high treason had not changed since his early days as prosecutor,” notes Bowen.¹⁷⁶ “Murder and homicide, robbery and rape—all these were clear; their history and provenance did not touch on politics, though Coke criticized in strong terms the cruelty of current penalties.”¹⁷⁷

In the fourth and last *Institute*, a description of the jurisdiction of the various courts in England, it was

Coke the Parliament man all over again. . . . Courts of equity and Exchequer, the Court of Chancery, Star Chamber, Admiralty: in the *Fourth Institute*, Coke describes them all. “And our desired end is,” he says, “that all these high and honourable tribunals . . . may prosper and flourish in distribution of justice, which assuredly they shall doe, if they derive all their power and strength from the proper roots.” *Their proper roots*, to Edward Coke, lay in the common law—and in Parliament, servant and handmaid of

171. *Id.* at *46.

172. BOWEN, *supra* note 66, at 516. For a fine, well-balanced account of Coke’s career in the House of Commons, see STEPHEN D. WHITE, SIR EDWARD COKE AND “THE GRIEVANCES OF THE COMMONWEALTH,” 1621-1628 (1979).

173. BOWEN, *supra* note 66, at 517 (quoting COKE, *supra* note 170, at *47).

174. *Id.* (quoting COKE, *supra* note 170, at *47).

175. *Id.* at 514-15.

176. *Id.* at 517-18.

177. *Id.*

the common law. "These things being understood," says Coke in a phrase that has been quoted for centuries, "let us now peruse our ancient authors, for out of the old fields must come the new corne."¹⁷⁸

Throughout the *Fourth Institute*, Bowen adds, "there runs a serene assurance which to royalists must have been more disturbing than the loudest rantings of the House of Commons."¹⁷⁹ The parliament held in the third year of Charles I—the parliament of 1628, of the Petition of Right—was "*benedictum parlamentum*, the blessed parliament," to Coke.¹⁸⁰

Early American students of the law, after making their way through Coke's *Institutes*, not unsurprisingly came to the conclusion that the constitution—the "law of the law," rooted in custom since time immemorial—limited the powers of all officers of government, including the monarch.¹⁸¹ Their belief that such limitations were part of an unwritten "ancient constitution" was further strengthened by their reading of Whig history.

B. *English Rights: The Whig Approach to History*

"It has ever appeared to me," Jefferson wrote to the English Real Whig John Cartwright in 1824, "that the difference between the Whig and Tory of England is that the Whig deduces his rights from the Anglo-Saxon source, and the Tory from the Norman."¹⁸² He congratulated Cartwright for deducing the English constitution from "its rightful root, the Anglo-Saxon," and added that

although this constitution was violated and set at naught by Norman force,

178. *Id.* at 520.

179. *Id.* at 520-21.

180. *Id.* at 521.

181. Evidence that Americans drew these conclusions from Coke's treatise abounds in Revolutionary-era writings. For example, James Otis relied not only on Coke's opinion in *Dr. Bonham's Case*, but also on the "Proeme" of Coke's *Second Institutes*, in presenting his arguments in 1761 that the writs of assistance—warrants that authorized customs officials to conduct a general search of any place thought to contain smuggled goods—were against common law and therefore void. Similarly, John Adams delved into Coke's *Institutes* to demonstrate, in his *Novanglus* essays in 1775, that the common law obliged the King to "rule the divers nations and kingdoms of his empire" according to each of their "distinct laws." See H. TREVOR COLBURN, *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* 68-70, 94-95 (1965).

182. Letter from Thomas Jefferson to John Cartwright (June 5, 1824), reprinted in 16 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 102, at 42, 44. See also letter from Thomas Jefferson to George Washington Lewis (Oct. 25, 1825), reprinted in *id.* at 128 ("The Whig historians of England have always gone back to the Saxon period for the true principles of the constitution, while the Tories and Hume, their Coryphaeus, date it from the Norman Conquest. . .").

yet force cannot change right. A perpetual claim was kept up by the nation, by their perpetual demand of a restoration of their Saxon laws; which shows they were never relinquished by the will of the nation. In the pullings and haulings for these ancient rights, between the nation, and its kings of the races of Plantagenets, Tudors, and Stuarts, there was sometimes gain, and sometimes loss, until the final reconquest of their rights from the Stuarts.¹⁸³

This passage nicely illustrates the extent to which the historical vision of Jefferson and his contemporaries was shaped by the romantic view that historians have called the "Whig interpretation" of English history.¹⁸⁴ The Whig historians' approach to English history, particularly the history of English government after the Norman conquest—the so-called "Saxon Myth"—has been nicely summarized by H. Trevor Colbourn, who contrasted it with the Tory historians' view.

There had developed . . . two principal views of English history; the one, ususally the more accurate by modern scholastic standards, can be called the tory interpretation—although not in any party sense; the other is reasonably familiar as the whig interpretation, although it too existed long before a formal Whig party and continued long after the Whig politicians opportunistically lost interest in it. The historical whigs were writers seeking to support parliamentary claims upon the royal prerogatives by exalting the antiquity of parliament and by asserting that their political ambitions had solid foundation in ancient customs. They presented an idealized version of an Anglo-Saxon democracy, which they usually found overturned by Norman treachery and feudalism. The tory historians instead preferred to see the parliamentary claims as without any ancient source, and viewed Anglo-Saxon England as feudalistic, but lacking in Norman stability and order.¹⁸⁵

The Whig historians began with a model of government, introduced into the nations of northern Europe by the barbarian tribes that settled there, and saw in that model the original constitution. At the same time, however, they argued that the constitution remained unchanged on a theoretical level. To the Whig historians, the whole of English constitutional

183. Letter from Thomas Jefferson to John Cartwright (June 5, 1824), *reprinted in* 16 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 102, at 44.

184. H. Trevor Colbourn, *Thomas Jefferson's Use of the Past*, 15 WM. & MARY Q. 3d ser. 56, 59 (1958) (citing, *inter alia*, the pioneering essay by Herbert Butterfield, *The Englishman and His History* (1944)).

185. *Id.* On the influence of Whig history on colonial Americans generally, see COLBOURN, *supra* note 181, at 3-20, 185-93. On the persistence of the "Saxon myth" into the nineteenth century, see *id.* at 194-98 ("The Saxon Myth Dies Hard," summarizing the work of William Stubbs and other Whig historians of Victorian England).

history since the Norman conquest was the story of a perpetual claim, kept up by the English nation, for a restoration of Saxon laws and the ancient rights those laws guaranteed.

According to the Whig historians, "whilst all the rest of Europe groaned under the galling yoke of tyranny and oppression,"¹⁸⁶ the tribes of Germany preserved their native political liberty in a model of government "as far superior to the Greek and Roman commonwealths, as these surpassed the governments of the Medes and Persians."¹⁸⁷ Citing Tacitus' *Germania*, the Whig historians described as the key element of this "Gothick model of government" the general assemblies, in which all important matters were decided and outstanding men were chosen as leaders to determine the affairs of lesser consequence.¹⁸⁸

As the German tribes increased in number, they conquered neighboring territories for the settling of their people, some of whom, "distinguished by the name of Saxons," settled in England "about the year four hundred and fifty."¹⁸⁹ After destroying the native Britons or driving them westward into Wales, the Saxons distributed the lands amongst the various tribes who had settled as "little republics," paralleling the political organization that had prevailed in their native lands.¹⁹⁰

The land the Saxons conquered "was vested in the collective body of the people, and not in any one person,"¹⁹¹ demonstrating to the Whig historians that Saxon land tenures were not feudal, or at least that the feudalism of the Saxons was not as fully developed as that of the later Norman conquerors. Those lands reserved for the Saxon princes were called by various names: Thane-land, granted to the Thaners, or lords; Reve-land, over which the king's officers had jurisdiction; Boc-land, or book-land, held by a charter; and Folk-land, held without writing, usu-

186. GEORGE ST. AMAND, *An Historical Essay on the Legislative Power of England*, in 2 A COMPLETE COLLECTION OF THE LORDS' PROTESTS, at ii (London 1767).

187. OBADIAH HULME, AN HISTORICAL ESSAY ON THE ENGLISH CONSTITUTION 3 (London 1771). See also ROBERT MOLESWORTH, AN ACCOUNT OF DENMARK 42-43 (London, 1694) ("The Ancient Form of Government here was the same which the Goths and Vandals established in most, if not all parts of Europe, whither they carried their Conquest, and which in England is retained to this day for the most part. . . . All Europe was beholden to these people for introducing or restoring a Constitution of Government far excelling all others that we know of in the world.").

188. ST. AMAND, *supra* note 186, at iii-iv; TACITUS, *Germania*, in WORKS, 323-25, 328 (Gordon trans., London 1731).

189. HULME, *supra* note 187, at 3.

190. ST. AMAND, *supra* note 186, at xiii.

191. *Id.* at viii.

ally by the few remaining ancient inhabitants.¹⁹² In these lands held by feudal tenures, "the feudal relations were far from running in that regular subordination" that, in later centuries, made the feudal connections "so compleat" that the sub-vassals held their lands under the crown vassals in the same manner that the latter held under the crown.¹⁹³ Because the Saxons, "a cruel and extirpating race," eliminated the native Britons, there was an abundance of land; accordingly, the lesser Saxon chiefs would not submit to feudal regulations for a mere grant of land.¹⁹⁴ Further, the Saxon princes' "being rather plunderers than princes," their attendants were more like associates than subjects; "from thence arose that degree of equality of princes and chieftains which is so contradictory to the feudal system and the rights of the superior lord."¹⁹⁵

Thus, the feudal law as understood in the ninth and tenth centuries was, according to the Whig historians, "unknown to our Saxon ancestors before the Norman invasion."¹⁹⁶ The lands not reserved for the princes were parcelled out to the chieftains within the various Saxon kingdoms; the chieftains in turn apportioned them among the individual families of each tribe. These lands were held allodially, the individual families holding the annual use, their seignories held not under the king but under the public or kingdom. Thus, not only did the Saxons not develop their feudal tenures fully, but also a great deal of the land continued to be allodial, not held by feudal tenures at all.¹⁹⁷

With so many lands held allodially in Saxon England, "it was necessary to subject in a political capacity those who were not subjected in a feudal."¹⁹⁸ Within each Saxon kingdom, the allodial lands were divided into counties, or shires, which were in turn divided into wapentakes, or hundreds, and these in turn subdivided into boroughs and rural tythings. Each of these "little republics" was self-governing, and within each all

192. JOHN DALYRMPLE, AN ESSAY TOWARDS A GENERAL HISTORY OF FEUDAL PROPERTY IN GREAT BRITAIN 10 (London 1759).

193. *Id.* at 12-13.

194. *Id.* at 15-16.

195. *Id.*

196. *Id.* at 15 ("... that infinite variety of rights, arising from the closer union, betwixt the king and his vassals, and from the subordination of that union descending through the various ranks of the nation, was as yet not known."). Ironically, the savageness of the Saxons thus may be credited for making possible the nobility of their constitution. This point was less obvious to some Whig historians than to others.

197. *Id.* at 7-9, 12.

198. *Id.* at 11.

those to whom lands were apportioned had a say in the government.¹⁹⁹ Over time, as the population grew and the seven Saxon kingdoms merged into one, “the exercise of the legislative power became impracticable in the person of every individual”; although the individuals “ever retained their native right of being governed by laws made by themselves,” that right was exercised indirectly, through their representatives.²⁰⁰ These representatives were none other than the presiding judges or magistrates, elected annually within each borough or tything. Such *wites*, or wise men as they were called, along with the king’s thanes, and the bishops and abbots as representatives of the clergy, comprised the “witenagemot,” or Saxon parliament. This parliament was literally an assembly of “wise men,” an assembly of “all the presiding judges of the nation, earls, bishops, and *wites*, or the annual magistrates of the tythings or boroughs, who represented all the proprietors of land in their respective tythings.”²⁰¹

A key characteristic of the Whig historians’ “Gothick model of government,” then, was the fact that each piece of land—or, equivalently, every proprietor of land—was represented, directly or indirectly, in the assembly.²⁰² Just as the whole collective body took the lands the Saxons conquered and distributed them to all who had a right to share in the conquest, so too was the making of laws entrusted to the whole nation, as represented in the assembly. The Saxons “had one mode of government,” whether for a town, a wapentake, a shire, or a kingdom: government by representatives, elected annually by each inhabitant of the respective district who “paid his shot and bore his lot.”²⁰³

Each level of government had its equivalent of a court of council to make laws, a court of law to enforce laws, and a chief magistrate to administer the laws. The laws limited the chief magistrate’s power, and this limitation applied equally to kings, the chief magistrates of the nation, the only difference being the circle and the duration of authority: the

199. HULME, *supra* note 187, at 12-16; ST. AMAND, *supra* note 186, at xlv-xlvii, 1.

200. ST. AMAND, *supra* note 186, at lix.

201. 1 PAUL DE RAPIN, SIEUR DE THOYRAS, THE HISTORY OF ENGLAND, at xiv-xv (Tindal trans., London 1757) [hereinafter RAPIN]; 2 RAPIN, *supra*, at 32-33 (footnote by Tindal). From this, Whig historians concluded that the House of Commons was always a part of Parliament. See, e.g., ST. AMAND, *supra* note 186, at lx. Later generations of historians would find this argument one of the more blatant examples of the Whig historians’ distortion of the record of the evolution of the English constitution. See SAYLES, *supra* note 39.

202. 2 RAPIN, *supra* note 201, at 34.

203. HULME, *supra* note 187, at 27-29.

magistrate's was annual and confined to the walls of the town, while the king's was for life and extended over the whole kingdom.²⁰⁴ Thus, the English constitution in its original form—as it was under the Saxons—was “an intimate union between the prince and the people,” connected by the witenagemot, the assembly of wise men “who represented the whole nation.”²⁰⁵

The Whig historians argued that William the Conqueror's conquest of England “contaminated the purity of the English constitution” by mixing with the old Saxon laws, “founded on the principles of liberty,” the new establishment of the Normans, founded on “the principles of slavery.”²⁰⁶ Although the English constitution continued fundamentally as a union between the crown and the people, connected by a parliament nominally representative of the whole nation, the weight of the “Norman yoke” greatly altered the character of that union in two respects. First, the imposition of Norman feudalism so changed the composition of Parliament that it no longer adequately checked the power of the King. Thus, although the executive authority in theory continued to be confined to a certain sphere of action, prescribed by the law, it in fact was quite arbitrary. Second, in addition to the change in composition of Parliament, the dilution of the elective power of the people made Parliament less and less representative of the will of the nation. In time it came to reflect not only the will of the sovereign but also the will of certain factions that had come to power. These changes supposed by the Whig historians merit closer examination.

As previously noted, the Whig historians argued that under the Saxons, feudalism had not fully developed: their rear-vassals had no clearly defined feudal holdings (Dalrymple noted that their grants of land were not hereditary, for example²⁰⁷), and even the vassals “of the crown,” properly speaking, held not of the crown but of the realm. William of Normandy, however, “came from a country where the greater power of the prince had soon rivetted the feudal duties of the crown vassals, and had given time and room for the rights of the rear vassals to ripen.”²⁰⁸ William redistributed the lands of his former Saxon opponents among his own confederates, who held of the crown by a service and who in turn

204. *Id.* at 28-30.

205. 1 RAPIN, *supra* note 201, at xiii.

206. HULME, *supra* note 187, at 8, 38.

207. DALRYMPLE, *supra* note 192, at 269.

208. *Id.* at 16-18.

enfeoffed their own immediate followers with some portions of land under reservation of a service. Over most tythings was placed a Norman chief, or baron, alongside the existing Saxon earls to undermine their power. The estates of the Norman chiefs were called baronies, and the barons recognized no superior but the King. The distinction between allodial and feudal lands was eliminated, since the former as well as the later were held by military tenures. All the fiefs of the nation, lower as well as higher, became hereditary and acquired firmness, and subsequently the feudal incidents such as escheats, wards and marriages developed, to which "the independency of the Saxons would never have submitted."²⁰⁹ Only the boroughs were left by the Normans in the same condition as in Saxon times; and at least at the beginning of William's reign, they continued to be governed by magistrates whom they chose annually.

Although "every spot of land" was still represented in Parliament, it was represented in Norman times through either a barony or a borough rather than through some tything. The rural tythings no longer were represented by *wites* chosen annually; rather, the barons represented them. "Greater" barons were personally summoned to Parliament, while "lesser" barons, after Magna Carta, were summoned generally, and represented indirectly by the knights of the shires, chosen at the county courts by the lesser barons of each shire.²¹⁰ Thus did the government fall into the hands of "a new order of men, with new authority derived from the king."²¹¹ William, in creating the new seats in Parliament, amassed a great deal of power; he "put his finger upon the great artery of the constitution, and stopped the circulation of all power arising from the Saxon principles of government."²¹²

The new government seized church property, imposed heavy taxes, and depopulated a great portion of Hampshire to make room for the Conqueror's New Forest. The arbitrary rule of one man replaced rule of law. Even the boroughs, which continued to be represented in Parliament by men of their own choosing (called burgesses instead of *wites*, probably because the magistrates were not always chosen representatives), periodically succumbed to the power of the crown: frequently the crown forced the towns to surrender their rights of self-government and

209. *Id.* at 16-19.

210. 2 RAPIN, *supra* note 201, at 33-34 (note by Tindal).

211. HULME, *supra* note 187, at 48.

212. *Id.* at 47.

then to repurchase them to pay for the wars that medieval English kings were fond of waging.²¹³ In addition, because parliamentary seats did not change with demographic patterns, over a period of centuries the boroughs became quite unevenly represented: deserted boroughs retained their seats, while new commercial towns, such as Birmingham, had hardly any representatives at all.²¹⁴ By the time of the Tudors, every spot of land was still represented, but the representation had lost the logical simplicity it once had under the Saxons.

To the Whig historians, Duke William's "conquest" of England was no less a conquest because he "accepted" the crown under color of a legitimate claim and began his reign by taking the usual oath of the Saxon kings. Although he and many of his successors "seduced" the English people by this "seeming indulgence,"²¹⁵ the King's oath-taking—like the fiction of an elective monarchy²¹⁶—showed the Whig historians that, by insisting on the restoration of the ancient mode at the beginning of every reign, the English people "kept up a title to their Saxon privileges" that even the Norman kings "acknowledged . . . to be just."²¹⁷ Some of William's successors—Henry I, most notably—confirmed the ancient Saxon privileges and renounced the unjust prerogatives of their predecessors. In addition, Magna Carta signified an end to the distinction between Norman and Saxon by demonstrating that the Norman lords, as anxious as the Saxons to be secured in their acquisitions free of the arbitrary power of the crown, had by degrees "put on the English genius, wholly addicted to liberty."²¹⁸ In spite of these partial restorations of Saxon laws, however, much arbitrary power continued to be vested in the crown.²¹⁹ The nation continued to feel the heavy weight of the "Norman yoke," long after the two races had merged, to the ex-

213. 2 RAPIN, *supra* note 201, at 33; HULME, *supra* note 187, at 58-59.

214. HULME, *supra* note 187, at 75-76.

215. 2 RAPIN, *supra* note 201, at 79.

216. Whig historians differed in their views about an elective monarchy. Rapin noted that the basically hereditary nature of the crown did not prevent Parliament in extraordinary cases from claiming a power to overrule custom and settle the succession on a more distant relative. 2 RAPIN, *supra* note 201, at 47. Henry Care went further, arguing that succession to the crown was not at all generally by hereditary right, but rather by act of Parliament, "in which the consent of the whole nation is virtually included by their representatives" and so directed "according to the presumed will of the people." HENRY CARE, *ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT'S INHERITANCE* 98 (6th ed. Providence, R.I. 1774).

217. 2 RAPIN, *supra* note 201, at 76-77; HULME, *supra* note 187, at 60.

218. 2 RAPIN, *supra* note 201, at 162-63, 464.

219. HULME, *supra* note 187, at 71.

tent to which the monarchy, theoretically circumscribed by law and kept in line by a Parliament representative of the nation, continued to exercise arbitrary powers outside the bounds of legitimate prerogative.

The Whig historians' concern for the constitutionally legitimate maintenance of the union between the crown and the people extended not only to the composition of Parliament, but also to its duration. Just as the representation of every man who "paid his shot and bore his lot" helped insure that the consent of Parliament was every man's consent (or, at least, the consent of every proprietor of land), annual elections kept that consent legitimate. The annual exercise of the elective power, to at least one Whig historian, was "the quintessence, the life and soul of [the Saxons'] constitution, and the basis of the whole fabrick of their government, from the internal police of the minutest part of the country, to the administration of the government of the whole kingdom."²²⁰ The House of Commons was representative of the people only insofar as it was "constitutionally so, that is, for one year; agreeable to the ancient law of the land, and confirmed by a statute, of Edward III, which declares, 'that parliaments should be holden every year, or oftener, if need be, for the redress of divers mischiefs and grievances that daily happen.'"²²¹ That the Saxon witenagemots were annual is not surprising, since the *wites* held their offices for only one year.

Even after the Norman establishment changed the composition of Parliament into one of knights and burgesses instead of *wites*, it appeared to the Whig historians that annual parliaments were the rule from the time of Edward III until Henry VIII lengthened his parliaments as "the most effectual means for rendering the members obedient to his will."²²² Mary Tudor restored annual Parliaments, and they continued until the Triennial Act in the reign of Charles I. From then on, the history was erratic, with new Parliaments never again being held more often than every three years. No Parliament at all met for eleven years under Charles I; the "long," or "rebel," Parliament continued itself for some twenty years; Charles II's "pensioned" Parliament continued for eighteen years; the Triennial Act was reinstated under William III, only to be repealed under George I and replaced by the Septennial Act.²²³ Moreover, a law in the reign of Anne made a landed qualification for members of the

220. *Id.* at 7.

221. *Id.* at 115.

222. 1 JAMES BURGH, POLITICAL DISQUISITIONS 88 (London 1774).

223. HULME, *supra* note 187, at 107-28.

Commons and converted Parliament into "a down-right rank aristocracy of the rich in land," composed of the "RICH MEN" rather than the "WISE MEN."²²⁴

Dilution of the elective power of the people, coupled with the inadequacy of representation, resulted in a Parliament that no longer represented the nation. A Parliament sitting not for one but for three or seven years lacked "that confidence between the commons and the people, which had been the support of the constitution for many ages."²²⁵ Pointing to such examples as the rapid and complete transition back to popery under Mary Tudor and the shifts in control of the 1647-48 Parliament between Independents and Presbyterians, the Whig historians showed that "the determination of a Parliament is not always a convincing proof of the approbation of the whole English nation."²²⁶ In the ebb and flow of the political tides under the Houses of Tudor, Stuart, and Hanover, Parliament fell under the influence of monarchs, armies, and corrupt ministers.

The Whig historians thus were not surprised that the union between crown and people—a union cemented by a parliament representative of the whole nation—fell apart in the mid-seventeenth century. They blamed both King and Parliament for the civil war:

[A] wise and prudent king of England will never quarrel with his Parliament; and a Parliament, whose sole view is the kingdom's welfare, will take care never to question the king's just prerogative; nay, they will rather chuse to see it stretched a little too far, than run the risk of breaking the union.²²⁷

Although the matter of the extent of the royal prerogative—the constant occasion of quarrels between Parliament and the Stuarts, with each side "pulling and hauling" for what it considered its ancient right—was

224. *Id.* at 126 (emphasis in original). The statute was ostensibly designed to *lessen* the influence of the Court. Hulme criticized this rationalization: "Our constitution hath not placed the independency of the house of commons upon the riches, honour or virtue of the members of that house; but she hath placed it upon an IMPOSSIBILITY of its being corrupted." *Id.* at 149 (emphasis in original).

225. *Id.* at 139.

226. 7 RAPIN, *supra* note 201, at 24-25; 10 *id.* at 483-523.

227. 8 *id.* at 216. Note that Rapin's treatment of the civil war to some degree attempted to vindicate Oliver Cromwell, whose actions, Rapin claimed, were no more arbitrary than those for which Elizabeth had been praised. "Since, therefore, as matters then stood, England was to be governed by force, was it more convenient to see the nation ruled by the greatest general and statesman the kingdom had for many years produced, than by a parliament, independent or presbyterian, or by a king intoxicated with arbitrary power?" 11 *id.* at 68.

resolved by the constitutional settlement following the “glorious” Revolution of 1688, the restoration of the ancient Saxon constitution was incomplete, to the satisfaction of the Whig historians. The influence of the Hanoverian court in the election of members of Parliament, in part occasioned by the division into Whig and Tory parties; the unequal representation of boroughs in Parliament; the lack of instructions binding members of Parliament to the wills of their constituencies; the purchasing of boroughs; the bribery and corruption at elections; and, of course, the lack of annual elections: these were the sad facts that troubled the Whig historians concerned with preserving the English constitution according to its original “mixed” character.²²⁸ They raised their banner—“where annual election ends, there slavery begins”—and called for Englishmen to defend their constitutional rights and liberties by organizing legal associations, “the only effectual remedy the people of England have now left, for the redress of their grievances.”²²⁹

C. *Natural Rights: The Whig Approach to Government*

As J.G.A. Pocock has shown, English Whiggism followed in part from the “common-law version” of history; but some of the more radical Whigs “went on . . . to reject history altogether and aver that the criterion by which any government must be judged was not its antiquity, but its rationality.”²³⁰ From their standpoint, the Saxon constitution was in itself noble because it was based on “the natural rights of mankind.”²³¹ That it was also the original English constitution was simply a happy coincidence. As one of these Whigs, Algernon Sidney, wrote, “The English nation has always bin [sic] governed by itself or its representatives.”²³² It mattered not whether the assemblies “were frequent or rare; composed of many or few persons, sitting altogether in one place, or in more; what name they had; or whether every free man did meet and vote

228. See 12 *id.* at 264-66; HULME, *supra* note 187, at 153-57.

229. HULME, *supra* note 187, at 161. Interestingly, the Whig historians’ banner cry, “Where Annual Election ends, Tyranny begins,” appeared on the frontispiece of a book published in America early in July 1776. Although the book contained the first book-form publication of the text of the Declaration of Independence, almost three-quarters of it comprised excerpts from Hulme’s *Historical Essay*. “DEMOPHILUS,” THE GENUINE PRINCIPLES OF THE ANCIENT SAXON, OR ENGLISH CONSTITUTION (1776), discussed in H. COLBOURN, *supra* note 181, at 190-91.

230. POCOCK, ANCIENT CONSTITUTION, *supra* note 61, at 232.

231. HULME, *supra* note 187, at 4.

232. ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 379 (1698).

in his person, or a few were delegated by many."²³³ All that mattered was that the Saxons "ordered all things according to their own pleasure,"²³⁴ for "that which a people does rightly establish for their own good, is of as much force the first day, as continuance can ever give to it; and therefore in matters of the greatest importance, wise and good men do not so much inquire what has bin, as what is good and ought to be."²³⁵

Pocock suggests that, because they were not bound by historical precedent, the Whig philosophers of government were not troubled by a dilemma that confronted the Whig historians: they were not forced to choose between Parliamentary sovereignty and monarchical sovereignty. Instead, the appeal to rationality led them to the concept of *popular* sovereignty. From that concept, the Whig philosophers derived notions about natural rights and the remodeling of governments— notions which in turn eventually underlay the case for American independence as asserted in the Declaration of Independence.

Those notions, though generally described by scholars as "Lockean," were not original to Locke's *Second Treatise*. Some scholars have greatly exaggerated the influence of John Locke while others have unjustifiably trivialized it.²³⁶ Locke, together with Algernon Sidney²³⁷ and many of

233. *Id.* at 382.

234. *Id.* at 383.

235. *Id.* at 380.

236. Compare CARL L. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* (reprint ed. 1960) with GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (1978). Becker's study, first published in 1922, viewed Locke as the most notable influence on the phraseology of the Declaration, as well as the most representative figure for "the philosophy of Nature and Natural Law." BECKER, *supra*, at 74. Wills, apparently hostile to Locke's treatise because of its later association with nineteenth-century liberalism, attempted to substitute for Locke the Scottish "moral-sense" philosophers, and particularly Hutcheson, as the pivotal influences on Jefferson's Declaration.

Ronald Hamowy has decisively refuted Wills' study. Hamowy marshalled the evidence in favor of a Lockean influence and showed that the Scottish philosophers had no demonstrable influence on the political thought of Jefferson—and indeed, that, if Hutcheson did have an influence, it would have in no way detracted from Locke's since Hutcheson himself was closely acquainted with Locke's political writings. Ronald Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Garry Wills' Inventing America: Jefferson's Declaration of Independence*, 36 WM. & MARY Q. 3d ser. 503 (1979). Hamowy also has responded persuasively to his own critics. *Communications*, 37 WM. & MARY Q. 3d ser. 529 (1980) (comments by Nicholas Varga and Gilman Ostrander with a reply by Hamowy).

An excellent summary of the historiographical debate over the importance of Locke, in the broader context of eighteenth-century Anglo-American thought, may be found in Kramnick, *Republican Revisionism*, *supra* note 20. Kramnick also persuasively argues on behalf of Locke's influence, particularly among the third generation of Real Whigs discussed in Part III of this Article—Burgh, Price, Priestley, Cartwright, and other members of the Society for Constitutional Information.

the Real Whigs of the eighteenth century—writers such as “Cato” (John Trenchard and Thomas Gordon), Robert Molesworth, James Burgh, and Granville Sharp, all discussed in Part III—comprised a group of radical Whig philosophers of government whose influence on Revolutionary-era Americans equalled that of the Whig historians.

The Whig philosophers of government began, logically, with an understanding of human nature. Man, “whom we dignify with the honorable title of *Rational*,” is much more frequently influenced by his passions;²³⁸ chief among these passions is self-love, for “it is impossible for any Man to act upon any other motive than his own interest.”²³⁹ In their natural state all men have an equal right to their natural freedom; reason teaches all mankind that, all being equal and independent, no one ought to harm another in his life, liberty, or possessions.²⁴⁰ Men being naturally equal, “none ever rose above the rest but by Force or Consent.”²⁴¹ Reason leads men to see that “they cannot well live asunder”—“since we cannot endure the Solitude, Barbarity, Weakness, Want, Misery, and Dangers that accompany it whilst we live alone”²⁴²—“nor [can we live] many together, without some Rule to which all must submit.”²⁴³ Accordingly, men mutually agree to restrain their natural liberty by submission to laws; “this general consent of all to resign such a part of their Liberty as seems to be for the good of all, is the voice of Nature, and the act of Men (according to Natural Reason) seeking their own Good.”²⁴⁴ The consent must be mutual since “the equality in which men are born is so perfect, that no man will suffer his natural liberty to be abridged, except others do the like. . . .”²⁴⁵

Men consent to give up their free natural state by “agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties,” that is, their lives, liberties, and estates.²⁴⁶ The end of civil

237. The dual influence of Locke and Sidney on Revolutionary Americans is briefly discussed, *supra* note 102.

238. 1 BURGH, *supra* note 222, at 1.

239. 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS 241 (London 1724) [hereinafter CATO]; 4 *id.* at 4.

240. LOCKE, *supra* note 98, at 269-71 (*Second Treatise*, Chapter II).

241. 2 CATO, *supra* note 239, at 275. See also SIDNEY, *supra* note 232, at 24.

242. SIDNEY, *supra* note 232, at 23.

243. *Id.* at 151.

244. *Id.*

245. *Id.*

246. LOCKE, *supra* note 98, at 331 (*Second Treatise*, Chapter VIII).

society is to avoid and remedy the inconveniences necessarily arising in the state of nature, in which every man is the judge in his own case. Consent, therefore, grounds civil society; and consent grounds all lawful, just, and peaceable government.²⁴⁷ The people may choose whatever form of government they wish—democracy, aristocracy, monarchy, or mixed—but regardless of the form, “[a]ll the lawful authority, legislative and executive, originates from the people”.²⁴⁸

Power in the *people* is like light in the sun, native, original, inherent, and unlimited by anything human. In governors, it may be compared to the reflected light of the moon; for it is only borrowed, delegated, and limited by the intention of the people, whose it is and to whom governors are to consider themselves responsible, while the people are answerable only to God.²⁴⁹

The coercive power of law proceeds from the authority of the legislative power, which in turn is delegated by the people.²⁵⁰

Civil liberty, as understood by the Whig philosophers of government, thus meant to be under no other legislative power but that established by consent in the commonwealth, and to be under the dominion of no law but that which the legislature shall enact according to the trust placed in it. Freedom under government is to have a standing rule to live by, common to everyone in society and made by the legislative power erected in society. Freedom under government is also not to be subject to the inconsistent, arbitrary rule of another.²⁵¹ Again, “the *consent* of the whole *people*, as far as it can be obtained, is indispensably *necessary* to every law, by which the whole *people* are to be bound.”²⁵² Otherwise, the Whig writers warned, “the whole people are enslaved to the *one*, or the *few*, who frame the laws for them.”²⁵³ The consent of the people similarly binds the authority of the magistrate who enforces the law; he “can have no other just power than what the Laws give.”²⁵⁴ The magistrate “ought not to take what no Man ought to give, nor exact what no Man ought to perform.”²⁵⁵

247. *Id.* at 324-25, 330-31 (*Second Treatise*, Chapters VII and VIII); 2 CATO, *supra* note 239, at 53-54.

248. 1 BURGH, *supra* note 222, at 3-4.

249. *Id.*

250. SIDNEY, *supra* note 232, at 457.

251. LOCKE, *supra* note 98, at 284 (*Second Treatise*, Chapter IV).

252. 1 BURGH, *supra* note 222, at 2-3 (emphasis in original).

253. *Id.* (emphasis in original).

254. SIDNEY, *supra* note 232, at 250.

255. 2 CATO, *supra* note 239, at 56.

Consent alone, however, was not the sole basis of legitimate government; it was a necessary, but not a sufficient condition. The legitimate exercise of governmental power also must accord with the ends of political society: the further security of one's life, liberty, and possessions. It is not merely the will of the majority; if it were, a society in which all peaceful men were protected would become "a conspiracy of the Many against the Minority."²⁵⁶

That government can only be pronounced consistent with the design of all government, which allows to the governed the liberty of doing what, consistently with the general good, they may desire to do, and which only forbids their doing the contrary. [*Salus populi suprema lex est:*] the sole end of man's entering into political Societies [being] mutual protection and defense . . . whatever Power does not contribute to these Purposes, is not Government but Usurpation.²⁵⁷

The Whig philosophers were aware not only of the good that may come from the rational use of government, but also of the evil that may come from its abuse. "Such is the perverse disposition of man," that government, "this most useful institution, has been generally debauched into an engine of oppression and tyranny over those, whom it was expressly and solely established to defend"—so much so that "in almost every age and country, the *government* has been the principal grievance of the people."²⁵⁸ Everyone in civil society "ought to be upon his Guard against another, that he not become the Prey of another."²⁵⁹ Where the "public passions"—"every Man's particular Warmth and Concern about publick Transactions and Events"—are well-regulated and honestly employed, there is good government; but where they are "knavishly raised and ill employed," there is that bane of all good Whigs, "Faction."²⁶⁰ Positive laws "can never entirely prevent the Arts of crafty Men to evade

256. *Id.* at 73.

257. 1 CATO, *supra* note 239, at 67. The authors of *Cato's Letters* defined *liberty* quite broadly: the Power which every Man has over his own Actions, and his Right to enjoy the Fruits of his Labour, Art, and Industry, as far as by it he hurts not the Society, or any Members of it, by taking from any Member, or by hindering him from enjoying what he himself enjoys.

Id. at 72. The authors also were quite aware of the libertarian implications. Each person, they argued, is "the sole Lord and Arbitrator of his own private Actions and Property," which the magistrate had no right to direct. "Let People alone, and they will take care of themselves, and do it best; and if they do not, a sufficient Punishment will follow their Neglect, without the Magistrate's Interposition and Penalties." *Id.* at 74-75.

258. 1 BURGH, *supra* note 222, at 1-2.

259. 2 CATO, *supra* note 239, at 241.

260. *Id.* at 235. "Faction" was defined as "the gratifying of private Passion by publick Means." *Id.*

them"; they can only lessen or qualify evil, not abolish it. New laws are daily made, and new occasions for more laws are daily arising. Law being "a sign of the Corruption in Man," many laws are "signs of the Corruption of a State."²⁶¹

To the Real Whigs it was the right and duty of every citizen to be watchful of those in power since, "considering what Sort of Creature Man is, it is scarce possible to put him under too many Restraints, when he is possessed of great Power."²⁶² "Those who are in the Possession of Power, as all Magistrates are, ought above all other Men, to be narrowly watched and checked with Restraints stronger than their Temptations to break them."²⁶³ All in society should behave, argued the Whig writers, in the spirit of what Burgh called "a true and independent Whig":

An independent whig scorns all implicit faith in the state, as well as in the church. The authority of names is nothing to him; he judges all men by their actions and behaviour, and despises a knave of his own party as much as he despises a fool of another. He contents not that any man or body of men shall do what they please. He claims a right of examining all publick measures, and if they deserve it, of censuring them. As he never saw much power possessed without some abuse, he takes upon him to watch those that have it; and to acquit, or expose them, according as they apply it to the good of their own country, or their own crooked privileges.²⁶⁴

One rash law may overturn the country at once since "the Liberty, the Property, nay the Virtue, Credit, and Religion of his Country" are in the legislator's or the magistrate's hands.²⁶⁵ "Such is the Misfortune of Mankind, and so uncertain is the Condition of human affairs, that the very Power given for Protection, carries in it a sufficient Power to destroy, and so readily does Government slide, and often start, into Oppression!"²⁶⁶

261. *Id.* at 253.

262. 1 *id.* at 262.

263. *Id.* at 88; 3 *id.* at 76.

264. 1 BURGH, *supra* note 222, at xvi-xvii.

265. 3 CATO, *supra* note 239, at 234.

266. *Id.* The example of Denmark convinced one of the Real Whig writers, Robert Molesworth, that this was no idle fear.

Denmark had, until the mid-seventeenth century, a "Gothick" model of government, which continued as pure as it was under the original establishment, with very little variation, except—the fatal flaw—that the power of the nobles had increased too much. In 1660, at a meeting of the Estates in Parliament, the Commons, stirred up by the Nobles' assertion of unreasonable prerogatives and egged on by the clergy, offered the King "their Votes and Assistance to be absolute Monarch of the Realm, and also that the Crown should descend by Inheritance to his Family, which hitherto had gone by Election." The Danish Commons erroneously supposed that, at the worst, "they should

As the people are the fountain of power, and their good the object of government, so are the people “the last resource when governors betray their trust.”²⁶⁷ “He that institutes, may also abrogate”: the people choose the form of government, and therefore only they can be “fit Judges of the performance of the Ends of the Institution.”²⁶⁸ The people are “often patient under oppression”; only “a long train of abuses” would cause them to rebel.²⁶⁹ Accordingly, the general revolt of the people, when it occurs, cannot be called a rebellion; it is merely their “resisting oppression, and vindicating their own Liberty.”²⁷⁰ As the Whigs saw it, it would be “a most wicked and absurd position” to say that the whole people can never be in a situation “to defend and preserve themselves, when there is no other Power in Being to protect and defend them; and much more so, that they must not oppose a tyrant.”²⁷¹

The Whig writers thus anticipated a natural right of revolution, which, of course, Americans would exercise in 1776. Indeed, by the eve of the American Revolution, the Whig writers also had anticipated the later American experience with constitutional conventions and popular ratification of written constitutions. As James Burgh argued in 1774,

[H]appy is that people, who having originally so principled their constitution, that they themselves can without violence to it, lay hold of its power, wield it as they please, and turn it, when necessary, against those to whom it was entrusted, and who have exerted it to the prejudice of its original proprietors.²⁷²

Burgh was building on ideas Algernon Sidney first advanced some eighty years earlier. Sidney had argued that good governments “admit of Changes in the Superstructures, whilst the Foundations remain un-

only change many Masters for one.” The King accepted their offer, forced the Nobles to comply, and was immediately inaugurated as an absolute, hereditary monarch. Within a four-day period, the Kingdom of Denmark had changed from a sort of Aristocracy “to as absolute a Monarchy as any is at present in the World.” The Commons subsequently learned “that the little Finger of an Absolute Prince can be heavier than the Loyns of many Nobles; the only comfort they have left them being to see their former Oppressors in almost as miserable Condition as themselves.” Most ironic was that, at the crucial moment, the King had begun to waver; had some nobles had the courage to oppose what was happening, Denmark might have been spared its oppression. MOLESWORTH, *supra* note 187, at 44, 46-47, 52-54, 69-73.

267. 1 BURGH, *supra* note 222, at 3-4.

268. SIDNEY, *supra* note 232, at 15.

269. Gordon, *Discourses on Tacitus* (Discourse IX), in 2 WORKS, *supra* note 188, at 94; LOCKE, *supra* note 98, at 415 (*Second Treatise*, Chapter XIX).

270. SIDNEY, *supra* note 232, at 413-14.

271. 2 CATO, *supra* note 239, at 17.

272. 1 BURGH, *supra* note 222, at 4.

changeable."²⁷³ Burgh followed Sidney's suggestion, and anticipated American constitutionalism, when he proposed that, "[i]n planning a government by representation, the people ought to provide against their own *annihilation*. They ought to establish a regular and constitutional method of acting by and from *themselves*, without, or even in opposition to, their *representatives*, if necessary."²⁷⁴

To the Whig philosophers of government, the absence of such a method was the greatest weakness in the English constitution. Extraordinary tyrannies in English history required extraordinary acts, often involving bloodshed. The "glorious" Revolution of 1688-89—all the more glorious because it was bloodless—was possible only because James II abdicated the government;²⁷⁵ and it is not clear what, if anything, could be done against *legislative* tyranny in England. As James Burgh observed, "[o]ur ancestors were provident; but not provident enough. They set up parliaments, as a curb on *kings* and *ministers*; but they neglected to reserve to themselves a regular and constitutional method of exerting their power in curbing *parliaments*, when necessary."²⁷⁶ Americans would declare their independence in 1776 exactly for want of such a constitutional remedy.

V. THE IRRELEVANCE OF BLACKSTONE

Against the background of the preceding discussion of radical Whig ideology, it is now possible to see why Jefferson regarded Blackstone as a "tory" in his letter to Madison quoted at the beginning of this Article. A full understanding of Jefferson's meaning, in turn, reveals the significant

273. SIDNEY, *supra* note 232, at 134. Sidney explained the need for "change in the Superstructures" of government, or constitutional change, as follows. The wisdom of man, he argued, is "imperfect, and unable to foresee the Effects that may proceed from an infinite variety of Accidents, which according to Emergencies, necessarily require new Constitutions, to prevent or cure the mischiefs arising from them, or to advance a good that at the first was not thought on." Accordingly, "all human Constitutions are subject to corruption, and must perish, unless they are timely renewed, and reduced to their first principles." *Id.* at 117, 136. In suggesting a method for constitutional change, Sidney departed significantly from Locke, who did not go so far as to suggest that the people might exercise their sovereign power, constitutionally and short of a revolution.

274. 1 BURGH, *supra* note 222, at 6 (emphasis in original).

275. Rapin went to great lengths—specifying six justifications—to prove that the manner in which James II left England amounted to "an entire desertion" of his kingdom and a "putting of his subjects into the state in which nature dictates to men, to provide for their own safety." 12 RAPIN, *supra* note 201, at 161. The authors of *Cato's Letters* observed that the rights men give up when they leave the state of nature to form political societies return when society dissolves by a demise of authority and when the constitution does not provide for succession. 2 CATO, *supra* note 239, at 17.

276. 1 BURGH, *supra* note 222, at 6 (emphasis in original).

changes that the influence of radical Whig ideas brought about in American constitutional thought—changes that meant that much of Blackstone's understanding of law would be irrelevant to post-Revolutionary America.

Part of Jefferson's disdain for Blackstone stemmed from his own early exposure to Coke's *Institutes*. As noted above, Blackstone's treatise, *The Commentaries on the Law of England*, which was not completed until two years after Jefferson was admitted to practice, had not formed a part of Jefferson's own law study.²⁷⁷ In later years, after use of Blackstone's treatise became the ordinary course of study for American law students, Jefferson expressed concern over "the degeneracy of legal science," as he wrote in an 1812 letter to Judge John Tyler.

The exclusion from the courts of the malign influence of all authorities after the *Georgium sidus* became ascendant, would uncanonize Blackstone, whose book, although the most elegant and best digested of our law catalogue, has been perverted more than all others, to the degeneracy of legal science. A student finds there a smattering of everything, and his indolence easily persuades him that if he understands that book, he is master of the whole body of law. The distinction between these, and those who have drawn their stores from the deep and rich mines of Coke, Littleton, seems well understood even by the unlettered common people, who apply the appellation of Blackstone lawyers to these ephemeral insects of the law.²⁷⁸

277. Nevertheless, Jefferson was familiar with the *Commentaries* at the time of the Revolution. Citations from the work appear in the legal commonplace book that Jefferson began as a student; and both the numerous annotations in his set of the 1770 edition, now in the Library of Congress, and the references to Blackstone in the marginal notes that Jefferson wrote in many of his books, some of which are preserved today, attest to Jefferson's careful study of Blackstone. Article 832 of Jefferson's legal commonplace book cites Blackstone, within Jefferson's abstract of James Wilson's *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, as exemplary of the reasoning of "those who allege that the parliament of Great Britain have power to make laws binding on the American colonies." THOMAS JEFFERSON, COMMONPLACE BOOK 316-17 (Gilbert Chinard ed., 1926).

278. Letter from Thomas Jefferson to Judge John Tyler (June 17, 1812), reprinted in 13 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 102, at 166-67.

In advising prospective students of the law, Jefferson emphasized the importance of obtaining a knowledge of the state of law at four important stages of its development by using Bracton, Coke, Bacon, and Blackstone, supplemented by the reports intervening between these writers. The laws of England, "in their progress from the earliest to the present times," Jefferson noted, "may be likened to the road of a traveller, divided into distinct stages or resting places, at each of which a review is taken of the road passed over so far." Jefferson regarded Bracton's "most able work, complete in its matter and luminous in its method," and Bacon's "sound digest" as highly as Coke's learned and authoritative "jumble." Jefferson considered Blackstone's *Commentaries*, though "the most lucid in arrangement" and "classical in style," lacking, in that it was "only an elementary book" that, unlike the other three great treatises, did not present "all the subjects of the law in all their details" and

But Jefferson's views on the undesirability of the *Commentaries* as a law text stemmed from more than simply an "old school" bias; his dislike of Blackstone's "elegance" was more than merely a dissatisfaction with Blackstone's style *per se*.

The full context of the letter to Tyler shows that Jefferson regarded "Blackstone lawyers," those "ephemeral insects of the law," as politically dangerous, as well as bad lawyers. In the letter to Tyler, Jefferson was arguing that the English common law applied in the United States only to the extent that Americans affirmatively adopted it. The British emigrants to America did not bring with them the common-law rights of Englishmen, he argued; rather, they brought with them "the *rights of men*, of expatriated men." When they adopted the common law, they did so out of convenience—it was "that system, with which we were familiar"—and adapted it to their particular circumstances.²⁷⁹ Since the state of the English law at the date of their emigration constituted the system adapted here, he wrote Tyler, "we may doubt, therefore, the propriety of quoting in our courts English authorities subsequent to that adoption; still more, the admission of authorities posterior to the Declaration of Independence." Indeed, argued Jefferson, the English common law as developed since the accession of George III had no application to America, for that King's reign "*ab initio* was the very tissue of wrongs which rendered the Declaration at last necessary." The relation back to the beginning of George III's reign would have an additional advantage for Jefferson: "getting us rid of all of Mansfield's innovations" of the common law.²⁸⁰

therefore required supplementation. Letter from Thomas Jefferson to Dr. Thomas Cooper (Jan. 16, 1814), reprinted in 16 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 102, at 54-59.

Later in life, Jefferson received a copy of Cooper's edition of Coke's Littleton, which, as he described it, "arranged Coke's matter in the method of Blackstone, adding the notes of Lords Hale and Nottingham and Hairgraves, adding also his own which are excellent." He declared it "beyond question, the first elementary book to be read—as agreeable as Blackstone, and more profound." Letter from Thomas Jefferson to Francis Epes (Apr. 9, 1822), reprinted in 3 HENRY S. RANDALL, THE LIFE OF THOMAS JEFFERSON 484 (New York 1858).

279. Jefferson to Tyler, *supra* note 278, at 165-66.

280. *Id.* For a concise summary of the reform in English law, particularly commercial law, which came about through a series of decisions rendered by the Court of King's Bench during the chief justiceship of Lord Mansfield, see McDONALD, *supra* note 59, at 114.

Julian Waterman has documented Jefferson's hostility to Lord Mansfield and the "sly poison" of Mansfield's legal innovations. Waterman suggests that Jefferson's tendency to associate Blackstone with Mansfield may have been the start of Jefferson's negative view of Blackstone. Julian S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 ILL. L. REV. 629, 642-45 (1933). For the relation between Blackstone and Mansfield, see Julian S. Waterman, *Mansfield and Blackstone's*

Jefferson's concern over the "degeneracy" of Blackstonian legal science, then, was more than an abhorrence of indolence. Jefferson found much objectionable in the substance of Blackstone's "honeyed Mansfieldism." As the 1826 letter to Madison indicates, he particularly found objectionable Blackstone's treatise's "tory hue."

Most obviously, Blackstone's "tory" sentiments may be found in his position with respect to the "plantations" in America, which Blackstone found to be subject to the authority of Parliament.²⁸¹ Curiously, Blackstone agreed with Jefferson in supposing that the common law of England, as such, had no authority in America. Blackstone was careful to note that only acts of Parliament in which the colonies were particularly named would bind them. But in analyzing the American colonies as conquered territories subject to the King's authority, and in arguing that even some acts of Parliament could bind them, Blackstone took a position particularly objectionable to the author of the Declaration of Independence. An extract from his *Legal Commonplace Book* shows Jefferson's awareness that Blackstone's concept of sovereignty was an essential part of the argument of those who alleged that Parliament had power to make laws binding on the American colonies.²⁸² The way commentators used that concept to assert Parliamentary jurisdiction was not the only feature of Blackstone's view of sovereignty that Jefferson found objectionable; the view itself, and its relation to Blackstone's arguments about the nature of law generally and of English law in particular, was what Jefferson and others found to be the "tory hue" of Blackstone's treatise.

The *Commentaries* were "tory" in Jefferson's eyes for two additional reasons. First, and more obvious, and despite some superficial similarities to Whig histories, the *Commentaries* in general sought to glorify

Commentaries, 1 U. CHI. L. REV. 549 (1934). Waterman's analysis needs little addition, except to emphasize that Jefferson's antagonism toward Mansfield was not aroused by the substance of the innovations themselves (many, if not most, of which Jefferson readily could have admired) but rather by the way in which Mansfield innovated, independently of the will of the people, which Jefferson considered to be the source of all law in a truly republican society. Hence, Jefferson thought it desirable to rid the law of Mansfield's un-republican innovations. That, he wrote Tyler, would "uncanonize Blackstone," the protege of Mansfield, and whose *Commentaries* faithfully reflected the ideas of his sponsor.

281. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *104.

282. JEFFERSON, *supra* note 277, at 316-17 (article 832, abstracting James Wilson's *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (1774) and citing 1 BLACKSTONE, *supra* note 281, at *48-49).

what the Real Whigs considered to be a corrupt English constitution.²⁸³ Blackstone equated with the Glorious Revolution of 1688-89 the permanent re-establishment of the ancient constitution. Yet the tone of the final chapter of the *Commentaries*, if not that of the entire work, was more than a glorification of the past; it was, in fact, a glorification of the present state of English law, the "noble monument of ancient simplicity" with all the "excrescences," however "troublesome," that later generations have added.²⁸⁴ It was not the constitution of the mid-eleventh century, but the constitution of the mid-eighteenth, to which he referred as "this noble pile."²⁸⁵ As Daniel Boorstin has noted, Blackstone endeavored to make English law not only a "science," but also a mystery. Although he shared with Whig historians the primitivistic conviction that the original form of the legal system had been one of pure and rational simplicity, Blackstone also argued that "through all legal history there ran a mysterious purpose which was of its own force improving institutions," a Providence, "at once so mysterious and so powerful that

283. In the *Commonplace Book*, Jefferson abstracted Blackstone's history of the feudal system, JEFFERSON, *supra* note 277 (Book II, Chapter 4), which attributed to William the Conqueror the introduction into England of the feudal tenures in fullest rigor. He also copied directly from Blackstone the statement that

the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.

Id. at 191-93 (Entry 740); 2 BLACKSTONE, *supra* note 281, *48-52. Blackstone also characterized English history since the conquest in what appears to be characteristic Whig fashion, as "in general, a gradual restoration of that ancient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force, of the Norman." 4 *id.* at *413.

The story Blackstone told nevertheless differed in several key respects from that told in the Whig historian Rapin's *History of England*. Blackstone's description of the ancient constitution neglects to mention annual elections and representation of every piece of land in the *witenagemot*, or the ancient Saxon assembly—features Rapin and other Real Whig historians stressed, as noted in Part IV.B. In addition, Blackstone described the constituent parts of Parliament as an assembly not of the "nation," connecting the people to the King—as did Rapin and other Whig historians—but of the King and the three estates of the realm, the lords-spiritual, the lords-temporal, and the commons. 1 *id.* at *155. Finally, Blackstone passed over the Commonwealth period, which he described as a time of "confusion" and its reforms as "crude and abortive schemes for amending the laws," while Rapin devoted due attention to the period and even treated Oliver Cromwell with some sympathy. 4 *id.* at *431; 11 RAPIN, *supra* note 201, at 3-75, 119. Blackstone was much more sympathetic to Charles II and his reign, to which he attributed not only "the re-establishment of our church and monarchy, but also the complete restitution of English liberty, for the first time since it's total abolition at the Conquest." 4 BLACKSTONE, *supra* note 281, at *431.

284. 4 BLACKSTONE, *supra* note 281, at *436.

285. *Id.*

in comparison men were bound to be either bungling or insignificant."²⁸⁶ Blackstone left the would-be reformer in the position of only "a powerless spectator of a happy story," while illustrating the tangible result of that story, the "noble pile" of mid-eighteenth century England, with all its perfection and complexity, with the "sublime" symbol of "an old Gothic castle."²⁸⁷

A second and far more important reason Jefferson considered the *Commentaries* "tory" is evident in Blackstone's concept of sovereignty. Blackstone argued that different societies may variously constitute their governments, but all forms of government have in common the essential attribute of sovereignty. However constituted, "there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside."²⁸⁸ He followed classical political thought in seeing advantages and disadvantages in the three "pure" forms of government—democracy, aristocracy, and monarchy—and hence concluded that the best is a mixed government, combining the benefits of the other three yet avoiding their basic flaws. It should not be surprising that he identified the English government as such a mixed form and argued that the legislative power, and "(of course) the supreme and absolute authority of the state," is therefore vested in Parliament.²⁸⁹

The power and jurisdiction of parliament . . . is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. . . . It hath sovereign and uncontrolable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the crown; as was done in the reign of Henry VIII and William III. It can alter the established religion of the land; as was done in a variety of instances, in the reigns of king Henry VIII and his three children. It can change and create afresh

286. DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 25, 74-75 (reprint ed. 1973).

287. *Id.* at 82, 104; cf. 3 BLACKSTONE, *supra* note 281, at *268.

288. 1 BLACKSTONE, *supra* note 281, at *48-49.

289. *Id.* at *143.

even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections.²⁹⁰

Parliament, Blackstone concluded, “can, in short, do every thing that is not naturally impossible; and therefore some have scrupled to call it’s power, by a figure rather too bold, the omnipotence of parliament. True it is, that what they do, no authority on earth can undo.”²⁹¹

Nor was Blackstone willing to recognize an inherent supreme power in the people to “remove or alter the legislative,” when they find it acting contrary to the trust reposed in them, as Locke had argued in the *Second Treatise of Government*. “However just this conclusion may be in theory, we cannot adopt it, nor argue from it, under any dispensation of government at present actually existing.”²⁹² Such a “devolution of power, to the people at large,” argued Blackstone, would dissolve “the whole form of government” established by that people, reducing all individuals to a state of nature—“their original state of equality”—and repealing “all positive law whatsoever before enacted.”²⁹³ Blackstone solemnly declares that “[n]o human laws will . . . suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual.”²⁹⁴ Yet, as Forrest McDonald has noted, that is the “case” and “event” that the Continental Congress brought into being by declaring the independence of the thirteen American states.²⁹⁵

Blackstone’s concept of an omnipotent Parliament and his refusal to recognize any constitutional right of revolution led him to the inevitable conclusion that “the power of parliament is absolute and without control.”²⁹⁶ Blackstone regarded the only practical check on the power of Parliament, the separation of the executive from the legislative power, as a means of checking executive power only; he identified the independence

290. *Id.* at *156-57.

291. *Id.*

292. *Id.* at *157.

293. *Id.*

294. *Id.*

295. McDONALD, *supra* note 59, at 59.

296. 1 BLACKSTONE, *supra* note 281, at *157. Note that in enumerating rules of construction in the third section of the Introduction to the *Commentaries*, Blackstone added to his observation that “acts of parliament contrary to reason are void,” the caveat that “if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it.” *Id.* at *91.

of the legislative power with the liberty of the subject.²⁹⁷ And, again, by Blackstone's definition of civil or political liberty, there was no contradiction in this, for the sovereign, omnipotent Parliament was to decide how far to restrain individual liberty as "necessary and expedient for the general advantage of the public."²⁹⁸ Edward Corwin has argued that this is a two-fold divergence from Locke's position in the *Second Treatise*: first because Locke had suggested public utility as but one requirement of allowable restraints on liberty; and second because Locke had not made the legislature the final arbiter.²⁹⁹ Limited as was Locke's theory of revolution, he nevertheless went further than Blackstone in giving the people a constitutional (albeit only theoretical) right to judge whether the legislature had abused its trust. Corwin concludes that, despite his "complacent" language about Magna Carta and the ancient rights of Englishmen, when Blackstone sought to trace the limits of the "rights and liberties" so grandiloquently characterized, he invariably referred to no more exalted standard than the state of the law in his own day. Hence it followed from Blackstone's argument that "neither judicial disallowance of acts of Parliament nor yet the right of revolution has either legal or constitutional basis."³⁰⁰

It is not surprising, then, that after 1776 Jefferson and some of his contemporaries viewed Blackstone's concept of sovereignty not only as logically deficient but also as wholly irrelevant to the American experience. As Robert M. Cover has noted in his review of St. George Tucker's 1803 edition of the *Commentaries*, "if any ideological issue can be specified as having been at the heart of the American Revolution it was whether sovereignty is indeed indivisible, unconditional, and legislative." From the American perspective, Blackstone, "like Dante's Virgil," says Cover, "worked under the insurmountable handicap of living before the Great Event."³⁰¹

297. *Id.* at *140.

298. *Id.* at *121.

299. CORWIN, *supra* note 46, at 85-86.

300. *Id.* at 86.

301. In 1803 Tucker, a judge on the Supreme Court of Errors of Virginia and George Wythe's successor as Professor of Law at William and Mary College, published an "Americanized" (or, more properly, a "Virginianized") version of the *Commentaries*, so extensively annotated that it expanded Blackstone's original four volumes into five.

In refuting Blackstone on the issue of the locus and the divisibility of sovereignty, Tucker simply pointed to the structure of the Government of the United States, "by whose constitutions . . . the legislative power is restrained within certain limits." From this fact, and from the correlative doctrine that constitutions create legislative power, it followed "that supreme, irresistible, absolute, un-

To Jefferson, sovereignty in the sense meant by Blackstone properly resided only in "the People."³⁰² Jefferson took popular sovereignty seriously, for it was at the heart of the American Revolution: the foundation of the American republic lay in the principle the Declaration of Independence enunciated, that governments derive their just powers from "the consent of the governed." This principle, derived from the philosophy of government espoused by the Whig writers, whose ideas were so influential in America on the eve of the Revolution, was put into practical implementation in the new American state and federal constitutions of the 1780s.³⁰³

VI. CONCLUSION

This Article has traced the uniquely American attributes of American constitutionalism directly to the influence on Americans of the Revolutionary era of the ideas of the English radical Whigs of the seventeenth and eighteenth centuries. The view of government that lay at the heart of Whig constitutionalism was not, in any meaningful sense, "civic republican." Although writers on both sides of the Atlantic in the mid-eighteenth century might use terms such as "virtue" or "corruption" in a civic republican sense, the paradigm of civic republicanism—like the traditional paradigm of liberalism with which it competes in the scholarly debate—only partially tells the story, especially as one moves from the realm of political theory in general to the more narrowly circumscribed realm of constitutional theory. To comprehend early American constitutional theory meaningfully, one must comprehend fully its "whig" es-

controlled authority, of which the commentator makes mention . . . doth not reside in the legislature, nor in any other branches of the Government, nor in the whole of them united. . . ." Robert M. Cover, Book Review, 70 COLUM. L. REV. 1475, 1479 (1970) (reviewing WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES (St. George Tucker ed., reprint 1969) and quoting at 49-50 n.5).

302. Among the distinguishing attributes of Jefferson's constitutional philosophy were a thoroughgoing republicanism (which Jefferson understood to mean direct and pervasive popular control of government), a pure theory of separation of powers, and a strict adherence to the principle of federalism. These key aspects of Jefferson's thought were all shaped by his reading of the Whig common-law writers, Whig historians, and "Real Whig" political philosophers, discussed in Part IV. For a fuller discussion of Jefferson's constitutionalism and the influence of radical Whig thought on Jefferson, see DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON (forthcoming 1993).

303. See generally WILLI P. ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (1980).

sence, which in turn requires the modern reader to grapple with English radical Whig thought, on its own terms.

The tension between ideas of fundamental law and sovereignty, which had been a recurring problem in English constitutionalism during the Tudor and Stuart periods, remained a problem for Anglo-American theorists of the mid-eighteenth century. But by the mid-1770s American Whigs, following ideas articulated in British radical writings, had begun to develop a coherent constitutionalism which, because it accorded with the Americans' own experiences with law and politics, revitalized the "Real Whig" intellectual heritage that the American Whigs shared with their radical brethren across the water.³⁰⁴ To the Americans, consent eventually became the vital element: consent defined law as law. Just as James Whitelocke in 1610 had opposed King James I's imposition of taxes without the consent of Parliament, so American Whigs in the 1760s and 1770s opposed Parliament's imposition of taxes without *their* consent.

As revealed in the Declaration of Independence, the philosophy of American Whigs in 1776 combined the Whig approaches to history and government. American Whigs, in their understanding of English history, were impressed with "that excellent Equilibrium of power, or mixt government, *limited by law*, which [their Saxon] ancestors have always most zealously asserted, and transmitted to [them] as [their] best *Birthright* and *Inheritance*."³⁰⁵ But historical precedent did not limit them; they admired the Saxon mode of government for its rationality, its consonance with what they understood to be natural rights. Most of all, they esteemed the notion of consent, "the free Representation of the people in the legislature," as essential to any legitimate government.³⁰⁶ Thus, when American Whigs found themselves in a situation in which English history furnished no adequate precedent through which to seek redress of

304. The story of how the American colonial experience with law and politics helped reinforce Whig ideas is a complex one, far beyond the scope of this Article. One area of inquiry, for example, is the American experience with the common law. The colonists' selective reception of the common law, according to their own particular needs, taught them the rudiments of popular sovereignty and legal positivism in a way that Englishmen could not quite perceive. See generally WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975); Julius Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931).

305. GRANVILLE SHARP, *A DECLARATION OF THE PEOPLE'S NATURAL RIGHT TO A SHARE IN THE LEGISLATURE; WHICH IS THE FUNDAMENTAL PRINCIPLE OF THE BRITISH CONSTITUTION OF STATE* 14-15 (Da Capo Press 1971) (London 1774) (emphasis in original).

306. *Id.*

their grievances, they abandoned history and turned to philosophy, asserting their general rights as human beings in addition to their particular rights as members of the British empire.

The theory of government articulated in the Declaration, by focusing upon popular consent, modified the concept of sovereignty significantly, changing its locus from the government to the people. The notion of an ultimate supremacy of the people, as Locke suggested in his *Second Treatise* or as James Burgh outlined in his *Political Disquisitions*, was sharply limited; as Bailyn observes, it was "normally dormant and exercised only at moments of rebellion against tyrannical government," such as the Glorious Revolution.³⁰⁷ Even then, the ultimate right of the people to dissolve and reconstruct their government was never seriously suggested, at least not by Locke. If Parliament did derive sovereignty from the people, that grant was irrevocable. It was not so in American revolutionary ideology. The notion of the ultimate supremacy of the people carried over into the uniquely American notion of sovereignty *seated in* the people.³⁰⁸

When, for example, the Massachusetts General Court announced in 1776 that the Sovereign Power "resides always in the body of the People" and that it "never was, or can be delegated, to one Man or a few," it was expressing a wholly new concept of republican government.³⁰⁹ Gordon Wood describes it as the "disembodiment of government" because it separated sovereignty, the locus of ultimate political power in the society, from government.³¹⁰ The legislature represented the people for certain purposes only, and not to all intents and purposes whatever. It had powers limited to those that the people, who always remained sovereign, had conferred. The written constitution served as a documentation of this *ad hoc* conferral of powers from people to government. This notion of popular sovereignty and the view of government that it entails was indeed, as Bailyn suggests, the crucial issue of the Revolution.³¹¹ Englishmen never could conceive that the statutes of Parliament and the statutes of colonial

307. BAILYN, *supra* note 10, at 201.

308. WOOD, *supra* note 11, at 372-89. The idea of the people as a constituent power was "distinctively American," R.R. Palmer has argued. R. R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION* 215 (1959). This idea, however, as Palmer emphasizes, developed "unclearly, gradually, and sporadically" during the Revolution. *Id.* at 216.

309. *Proclamation of the General Court* (Jan. 23, 1776), reprinted in *MASSACHUSETTS, COLONY TO COMMONWEALTH: DOCUMENTS ON THE FORMATION OF ITS CONSTITUTION, 1775-1780*, at 20 (Robert J. Taylor ed., 1972).

310. WOOD, *supra* note 11, at 383-89.

311. BAILYN, *supra* note 10, at 198.

legislatures could be given equal application in the colonies, because they saw sovereignty, by definition undivisible, as vesting in Parliament. The American Revolutionaries had no problem with the idea of two legislatures for one geographical area. As they saw it, the powers of government might be divided in any manner, without destroying Hobbes' notion of the indivisibility of sovereignty, because sovereignty vested in the people rather than in the government. That crucial perception, when it became generally understood in America, would come to underlie the federal system of government embodied in the Constitution and to help pave the way for the development of judicial review in the early nineteenth century.

As the notion of sovereignty developed from a rudimentary notion of parliamentary sovereignty, sovereignty derived from the people, to the notion of popular sovereignty, sovereignty seated in the people, so too developed the related concepts of law and constitutionalism. The source of law eventually became, not merely the description of what is and has been, but rather the measure of what ought and ought not to be. The revolutionary achievement of the Americans in 1776 was to firmly establish that this was the direction in which the development of legal and political theory was headed.

C. H. McIlwain has noted that “[t]he Whigs brought on the English Revolution, but the American doctrine of 1774 [and 1776] was really a new revolt against one of the main principles of 1688,” the doctrine of the supremacy of Parliament, the doctrine of sovereignty found in Blackstone.³¹² The Americans, in breaking from the British Empire, could carry Whig doctrines several steps farther by establishing forms of government through which the people could exercise “a regular and constitutional method of acting by and from themselves,” as James Burgh and other English Real Whig writers had urged.³¹³

Moreover, like the English radical Whig writers who inspired them, the American Revolutionaries conceived of constitutions essentially as power-limiting rather than power-granting devices. Achieving republicanism, or self-government, itself was not the end of the matter for Americans of Jefferson's and Madison's generation; they also sought to improve on the English model of government by following Burgh's suggestion and establishing “regular and constitutional methods” for hold-

312. CHARLES H. McILWAIN, *THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION* 150, 157-160 (reprint ed. 1958).

313. 1 BURGH, *supra* note 222, at 6.

ing government accountable. Accordingly, the early constitutions of the new American states contained various devices for limiting the power of government in all its branches, legislative as well as executive: separation of powers, checks and balances, the enumeration of powers, the reservation of rights, and, in some states, rudimentary forms of judicial review.³¹⁴

Consent, therefore, was a necessary but not a sufficient condition of legitimate governmental power, as understood by Americans in the Revolutionary era. Equally important for measuring legitimacy was the degree to which government remained faithful to its essential ends, as measured by the effect of governmental power upon the rights of individuals. As the Declaration of Independence so explicitly and so eloquently stated, all persons possess "certain unalienable rights," and government was instituted "to secure these rights." From this it follows that all governmental power—even that sanctioned by the will of the majority of the political community—becomes illegitimate when used to subvert the essential ends for which government was established, the protection of the rights to life, liberty, and the pursuit of happiness. That profound insight, which followed from the radical Whigs' insistence on a continual regard for the "first principles" of government, was the most important lesson that the American Founders learned from their English radical Whig teachers. It is a lesson that cannot be ignored by those of us who take seriously the "original intent" of the Framers.

314. Each of these mechanisms for limiting the power of government is discussed in ADAMS, *supra* note 303, *passim*.

Recent interest in term limitations for Congress and state legislatures has revived another radical Whig idea, "rotation in office." Several of the earliest state constitutions set limits on reelection to offices, particularly governorships, senatorial seats, and council seats. Advocates of rotation, citing the authority of the radical Whigs, based their case on the corrupting influence of political power and their distrust of professional politicians. They also believed that frequent turnover in officeholding would bring more able individuals into public service as well as generally encourage more involvement in public affairs. *See generally id.* at 251-53, 308-11.