

Property, Social Orders, and the Constitution

by

Clara Hudson Shaw
Class of 2008

A thesis submitted to the
faculty of Wesleyan University
in partial fulfillment of the requirements for the
Degree of Bachelor of Arts
with Departmental Honors from the College of Social Studies

Dedication

This thesis would not have been possible without the support of my professors.
I would particularly like to thank Cecilia Miller, Richard Adelstein,
and most of all, my thesis advisor, John Finn.

I would like to dedicate this final college work to my beloved sisters,
Emily, Margaret, and Anna.
As you venture out into the world, don't forget that I still have all the answers.

Table of Contents

Introduction	1
Chapter 1: British Law and Property	3
Chapter 2: Property and Social Inequality in 18 th Century Britain	35
Chapter 3: English and French Enlightenment Philosophy	49
Chapter 4: A History of American Property Treatment	73
Chapter 5: Early American Philosophy	110
Chapter 6: The Constitution and Property	125
Bibliography	146

Introduction

In Europe and America, the amount of property that an individual owns is the sole determinant of his socioeconomic position. Thus, property treatment has considerable impact on social landscape. In pre-industrial England, property was withheld by the aristocratic few, creating a wide gap between rich and poor. This trend was substantially more pronounced in France. In comparison, colonial America enjoyed near-universal property ownership, and as a result, relatively few class distinctions.

According to John Locke, property is the ultimate celebration of natural individual freedom. However, Jean-Jacques Rousseau believed property to be an unnatural institution which caused the perpetual enslavement of mankind. American philosophers and politicians internalized both of these arguments. Property was the sacred right of every person; it was also the instigator of condemnable social inequality. Land rights were inviolable, yet communal interests had to override them. The great internal struggles of the American Revolutionary period perpetually restated these two contradicting perspectives. The Constitution itself suggests communality while mandating individualism.

The American Constitution is the product of a certain lineage, as well as a specific time and place. British jurisprudence, European history, and Enlightenment philosophy informed it, while the experiences of early America delineated it. The origins of Constitutional principles can only be ascertained by examining the historical threads from which they were woven.

This thesis explores the underlying intent of property treatment in the Constitution. Chapter 1 details the development of British property law. Chapter 2 describes wealth distribution and social ordering in Britain prior to the American Revolution. Chapter 3 summarizes the reformulations of property in British and French Enlightenment works. Chapter 4 relates the treatment of property during the American colonial, revolutionary, and Confederation periods. Chapter 5 examines the development of civic republicanism in America. These findings are considered in Chapter 6, which explores property treatment in the Constitution itself.

Chapter 1

British Law and Property

American legal systems before, during, and after the Revolution were based on the English legal system. To explain American property treatment, therefore, requires significant understanding of the development and characteristics of British common law. This chapter will delineate the development of British legal theory, clarify some of its fundamental principles, and describe its relevant property policies and practices.

The Development of British Common Law

British common law evolved out of Germanic and feudal legal orders. These orders were regional, unsystematic, and based in custom. Exposure to Roman and Canon law facilitated the creation of a legal system which developed in the late feudal period and slowly became the common law system evident in the writings of William Blackstone and other 18th century British legal theorists. This section will briefly summarize the influences on and development of British common law.

Germanic Legal Orders

Before the Norman invasion of 1066, Scotland and England were divided into ever-shifting spheres of power. Within these tribal regions, localities were virtually autonomous in their legal and social customs. Therefore, a useful description of Germanic law requires generalities based on trends evident across numerous and admittedly varied local practices.

Little is known of Germanic legal practices. Participants were largely illiterate, and few documents remain. Legal matters within a locality were brought to public

assemblies of household elders, called “moots,” who would occasionally defer to royal and ecclesiastical authorities on some matters.¹ Legal standards evolved gradually, if at all, because they were considered the products of divine will.² Determinants of justice often involved the ordeal or the blood feud, both of which developed to allow local communities to deal effectively with crime.

Royal authorities sometimes issued compilations of laws designed to direct local proceedings. The earliest known is the Laws of Ethelbert, written around 600 A.D.³ However, it was not until the ninth century that kings consistently interfered in the legal maneuverings of local communities.

Norse invasions in the second half of the ninth century left only one Germanic ruler capable of fighting off the intruders; Alfred of Wessex led a successful counterattack and became the first king whose domicile extended throughout England. Alfred and his successors did achieve some centralization of English law; however, local practices undermined these efforts by providing viable alternatives to the official law.

Folklaw, the customs of communities, remained by and large the source of justice in local communities. The procedure of folklaw remained as it had been prior to Alfred’s rule – unsystematic, subjective, and localized.⁴ Even official law had yet to be systematized; it lacked consistency, scope, and professionalism. Kings issued individual edicts on a whim with no overarching purpose. Royal delegates were likely to abandon the king’s causes when away from court, tending instead to promote local customs or their own beliefs. Kings had yet to establish the authority of official law over folklaw; thus, their edicts were often treated as requests rather than orders.⁵

The Effects of Early Christianity on Legal Institutions

Early Christianity was a powerful ally for folklaw and (as it developed) official law. Christianity emphasized literacy as an important element of religious study. Its spread in England coincides with higher incidents of written law, allowing increased levels of standardization.⁶ Additionally, the threat of divine punishment presented incentive for adherence to the law.⁷

The church also gave divine recognition to kings, further increasing the authority of official law. The king who converted to Christianity ceased to be a tribal figure; he became the representative of God on earth, legitimating his authority not only over his own subjects but also over those of neighboring pagan kings.⁸ The spread of Christianity throughout England changed the nature of royal power, adding divine legitimacy to military prowess.

Roman Law and its Effect on the Development of English Law

During the Roman Empire, Roman law was widespread and powerful. However, as an outpost of little significance, England was minimally exposed to Roman law before the fall of the empire in the fifth century. When Roman troops left Britain, they took their legal system with them.⁹ Some particular laws remained, particularly those connected to property and contract. However, these were taken out of context and, in any case, soon garbled by tribal authorities.¹⁰

The rediscovery of Justinian's works centuries later generated new interest in the Roman legal system. Scholars familiarized themselves with Roman law, an impressively comprehensive system in comparison with the contemporary English structures.

Bracton's critical thirteenth-century tome on English law included around five hundred

passages from Justinian's Digest.¹¹ But while legal scholars swooned over these ancient texts, English judges and juries could do practically little with them. Roman law presupposed legal structures which had no English counterparts; there were no Roman magistrates, legal advisors, or advocates. As a result, Roman law became an unattainable ideal, which certainly advised the development of law but did not become part of its actual processes.

Canon Law and its Effects on the Development of English Law

Canon law was created and maintained by the papacy. It synthesized Roman, Germanic, and Christian elements to create a new system of law which was in theory applicable to both the church and secular authorities. Unlike Roman law, which by virtue of its extinction and resurrection was unchangeable, canon law proved remarkably versatile. As a natural challenger to secular law throughout Europe, it was constantly adapting to changing conditions, even while fighting to retain its authority against hostile kings.¹²

Canon law was critical to the development of English law because it provided an example of standardized legal practice. Canon law was a remarkably complex and strictly hierarchical system. Its practitioners were well schooled and took orders from Rome itself. Such a model would have impressed upon contemporary legal scholars the importance of discipline and systematization.¹³ Additionally, ecclesiastical challenges to secular authority forced kings to develop counter-policies, and in doing so, encouraged the development of strong secular legal practices.

Feudalism and the Further Systematization of English Law

In 1066, William the Conqueror conquered England and sparked a new era of English legal development. The introduction of the feudal system, which dominated England well into the 16th century, was critical to the development of common law.

After his arrival, William agreed that English lords who deferred to Norman rule should continue to hold their property. However, lords were required to provide some number of knights in return for their land grants.¹⁴ To meet these quotas, the lords distributed the bulk of their lands to knights in return for service. These knights divided their land among a lower stratum of men in exchange for service, and so on until a feudal hierarchy was created. By 1086, the entire country was divided among approximately 1,500 lords, each of whom had countless underlings in his employ.¹⁵ In a matter of decades, every man was assigned a position on the feudal ladder, which was passed on to his descendants for generations to come.

Feudalism was based on the assumption that all property is ultimately owned by the king. The feudal system thus gave the king unprecedented power over his subjects. The mutual interest of all men became the maintenance of their position in his hierarchy. As a result, the king gained extensive power during the feudal period. Rather than issuing the occasional edict, he became the center of the new royal state; his messengers came to be obeyed without question throughout England.*

* David Hume describes the origin of the feudal hierarchy in Germany as an outgrowth of a heavily militant and individualistic culture. From among a group of warriors, a single man would stand out as a leader, or “chieftain.” Based on the number and strength of a chieftain’s group, he would subjugate or succumb to other chieftains. Thus, the most powerful chieftain at any point would demand fealty not because he was different in kind from the other warriors, but because he was the most powerful. Ultimately, warriors would forswear “fealty” (loyalty) to their chieftains, who would in turn pledge fealty to other chieftains, and so on (Hume, vol i. p. 456). In Hume’s account, then, the Norman king gained state authority through forcible subjugation rather than a series of contractual agreements.

Predictably, official English law was also strengthened during this time. Folklaw was slowly replaced with standardized legal practices.¹⁶ Strong central authorities undermined local customs. Professional jurists, judges, and lawyers emerged. The first law schools were established; students learned to consider laws collectively to draw overarching conclusions. English law was slowly making the transition from an assortment of legal orders to a unified legal system.¹⁷

Feudalism began to decline as early as the thirteenth century, although the tenure system did not really break down until the sixteenth century. A number of land laws contributed to its demise. Most significantly, in 1290, King Edward I issued the *Quia Emptores*, which banned the creation of new tenure arrangements. From then on, land purchasers were required to take the place of the seller in the feudal hierarchy. Edward was concerned with preserving the value of old tenure agreements; however, he inadvertently prevented the system from replenishing itself, virtually ensuring its eventual death.¹⁸

Common Law: A Triumph of English Legal Development

The interplay of Germanic, Roman, and Canon Law generated feudal law and ultimately common law in England over a period of approximately fifteen centuries. The efforts of kings throughout the Germanic and feudal periods produced a centralized state capable of creating and sustaining a comprehensive legal system. However, as the feudal system gave way, the English people developed a new relationship with their king; far from being his tenants, they became his regulators. This transition is made clear in the next section, which outlines the origins of fundamental concepts of common law.

The Fundamental Principles of Common Law

This section outlines common law principles which are particularly relevant to property and social status generally and American Constitutionalism in particular.

Common law is defined by its commitments to: the superiority of law over other authorities, the legitimacy of precedent, the importance of fundamental rights, essential equality under the law, and the popular character of legal procedures.

The Superiority of Law over Other Authorities

American colonists challenged British taxation because they claimed that it violated individual rights under the common law. Their audacious argument assumed that king and Parliament were unable to overrule the law. This argument is rooted one of the most fundamental principles of the common law, namely, that it is superior to state authority.

Germanic law subordinated the king to folklaw; he existed to enforce and clarify preexisting custom.¹⁹ Rather than deifying their king, tribes considered their laws to be sacred, handed down from the gods or God that they worshipped. The state and king, therefore, were bound to preserve and respect the law.²⁰ If a king disregarded the law, then according to Germanic custom he forfeited his claims to his subjects, who were then free to rebel against him.²¹

The belief that law transcended kingship continued into the feudal age; in 1328, the Statute of Northampton declared officially that a royal command which contradicted law must be ignored by judges.²² Germanic and feudal rulers alike attached to every decree a claim that its contents were consistent with the legal convictions of the

community.²³ In the fifteenth century, John Fortescue's essay "In Praise of the Laws of England" clarified the importance of legal predominance to English law. Fortescue was a friend and close ally of Henry IV. Nonetheless, he claims that human law has divine origin and is thus the source of "perfect justice."²⁴ Therefore, any king who attempts to change laws "at pleasure" is overstepping his political boundaries.²⁵ By the sixteenth century, judges routinely vowed that they would not delay or deny legal justice on the king's order.²⁶

English law has consistently transcended kings. It is therefore a stabilizing force, remaining largely consistent despite social and political shifts. The common law can be changed; however, minor changes must occur within previously existing structures and principles, while more significant changes must evolve over generations.

The Legitimacy of Precedent

The very existence of an American Constitution presupposes that law binds not only its creators, but also their successors. Thus, American law is dependent on the British tradition of legal precedent. In the eighteenth century, Thomas Jefferson challenged the use of precedent, denying that individuals could be legally bound to the decisions of their predecessors. Despite his concerns, precedent remains one of the most critical aspects of the American legal system. Without precedent, the Constitution would be an outdated, meaningless document. This concept stems from the Germanic orders, whose reverence for old law evolved to become the systematic deference to previous statute evident in the common law.

Germanic peoples prized legal custom as divinely inspired, and thus, timeless.²⁷ When a legal tradition was discarded, it was labeled a perversion of the true law.²⁸ A

legal practice which was of a high quality was described as an “old law” regardless of its actual age.²⁹ Feudal peoples agreed with this assessment; writing in the 15th century, John Fortescue argued that the oldness of English law was a sign of its rightness. Fortescue claimed that the laws of England have existed unchanged throughout British, Roman, Saxon, Danish, and Norman rule. According to Fortescue, had a better legal structure existed, it would have been imposed by one or more of England’s previous rulers; therefore, “there is no gainsaying nor legitimate doubt but that the customs of the English are not only good but the best.”³⁰

Centralization of law during the feudal period caused the Germanic respect for custom to give way to a systematic deference to legal precedent. Legal hierarchies evolved, with the result that local judges were expected to defer to the rulings of higher courts. In the fourteenth century, the judges who sat in the highest courts began to meet in a room at Westminster called the Exchequer Chamber. Judges would share their difficult cases and come to mutual decisions.³¹ Eventually, custom without recorded legal precedent was allowable only when it could be established that the custom was immemorial, in constant use, and not in conflict with a previously determined precedent.³² Such high standards ultimately caused the virtual eradication of custom as a legitimate legal concept, making precedent the sole authority on legal tradition.

Yet precedent could be legitimately overruled when the practical terms of the case required it. Judges were not required to forego their common sense in the interest of preserving tradition. Rather, they were asked to follow tradition unless they were strongly compelled not to because the precedent was unreasonable or outdated. William Murray, the first earl of Mansfield and 18th century judge, observed that “The law of England

would be a strange science indeed, it if were decided upon precedents only.”³³ An example of overruled precedent occurred during the Tanistry Case in 1608. English judges prohibited an Irish succession custom which gave the right of inheritance to the “oldest and worthiest” clan member rather than the eldest son. Based on their perception that this tradition led to “the effusion of blood and much mischief” by consistently appointing the most ruthless man, they overturned previous court decisions.³⁴

While precedent should not disallow the expression of reason and practicality in the courtroom, common law does nonetheless accord it special privilege. This practice is based in the Germanic perception that old law is good law, as well as the feudal belief espoused by Fortescue that the practices of English law, old as they are, have proved beyond compare and ought to be maintained.

The Importance of Fundamental Rights

American reverence for fundamental rights grew out of common law emphasis on the individual. Common law holds that every man, regardless of station, has certain fundamental rights that cannot be tampered with. This stance evolved slowly out of Germanic and feudal practices which tended in contrast to assign rights based on status.

The laws of Germanic tribes treated people as members of community units rather than as individuals. If one person within a family was wronged, then that entire family was required to exact revenge and regain lost honor. Under Danish and Norman law, every man older than twelve who wanted official rights was required to join a tithing. The tithing was a group of twelve men who were obliged to vouch for each other during legal proceedings.³⁵ Thus, men were given rights only when grouped together, and it was up to these groups to ensure that these rights were respected.

The concept of individual rights first emerged under feudal law. Rights were still determined by group membership; the legal rights of a lord were significantly different than those of a serf. However, an individual's rights could not be violated by any authority, be it a community or a king.³⁶ In theory, at least, any man who violated another's rights was considered outside the legal order; thus, his own rights were forfeited.³⁷ The king was no exception. It was this belief, in fact, that sparked the composition of the Magna Carta, one of the cornerstones of common law.

In the thirteenth century, King John directly challenged the individual rights of his subjects. He made exorbitant financial demands, overtook the lands of the clergy, and seized castles without reason. If a baron was suspected of treasonous sentiments, the King forced him to surrender his children as hostages.³⁸ In 1215, King John was forced to sign a paper acknowledging the rights of his barons to hold their lands as long as they observed their tenures. John acknowledged that to take land from the barons without appropriate cause was illegitimate, and he agreed to return any lands wrongfully taken to their original tenants.³⁹ John even agreed that if he in the future failed to honor the tenures of his barons, they would be within their rights to seize his land, castles, and personal possessions. These mandates clarified the preexisting customs of the time: a man's right to his land was absolute as long as he faithfully observed his tenure.

Common law did not require a change in the substance of these rights; it simply expanded and strengthened them. By the sixteenth century, the concept of "fundamental rights" applicable to all men was ingrained in the English legal consciousness.⁴⁰ In the eighteenth century, professional jurist and legal scholar William Blackstone redefined the common law for a new generation in his "Commentaries on the Laws of England."

Blackstone claimed that individuals within society retain “absolute rights” which cannot be infringed upon except as a result of legitimate legal proceedings.⁴¹ The “first and primary” goal of the state is to “maintain and regulate” the absolute rights of individuals.⁴² Blackstone reduces these rights to three “primary articles.” First, he claims for all individuals the right of “personal security”: “a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.”⁴³ Second, all people have the right to “personal liberty,” defined as “the power of loco-motion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct” without restriction.⁴⁴ Third, all individuals have the right to property. Blackstone’s definition of a right to property is restricted to a right to maintain and utilize one’s acquired property. Within the boundaries of state law, Blackstone grants to each man “the free use, enjoyment, and disposal of all his acquisitions.”⁴⁵

As evident in Blackstone’s works, fundamental rights were of critical importance within common law structures. By the eighteenth century, these rights had transcended king and parliament to become the foremost priority within the legal system. These rights were available to all individuals who were considered full persons under the law; the limitations of that characterization will be detailed in the next section.

Equality under the Law

At the time of the American Revolution, the common law had mandated equal rights and treatment to an expansive section of the English population. This example certainly influenced American conceptions of legal equality. In Britain, as in America, equality under the law was not the reality for many; nonetheless, equal treatment was a priority for English courts.

Within the inherently unequal legal orders of Germanic tribes, an individual's legal status was based solely on his social standing. In 600 A.D., Ethelbert, ruler of Kent, produced the earliest known Anglo-Saxon legal compilation. Ethelbert's laws consisted of a schedule of tariffs; the amount of money owed to a victim or his family was based on the severity of the crime and the social standing of the victim.⁴⁶ Every household had a specified "mund," an amount of money to be paid if a member of the household was harmed. This compensatory sum varied based on social status. For example, Ethelbert assigned a mund of fifty shillings to a king, while a commoner was only considered worth six shillings.⁴⁷ Thus, a man's legal worth was directly linked to his social status, necessitating inherently unequal legal recognition.

Between the sixth and eleventh centuries, English law was gradually altered as a result of Christian values.⁴⁸ Christianity maintained that all individuals, regardless of identity, were welcome to join the church. The Bible is bereft with claims that God invites every individual to believe in Him regardless of identity.⁴⁹ The Christian doctrine of equality slowly but significantly influenced the growth and direction of English law. The conversion of the entire island to Christianity during the sixth and seventh centuries unified all men under a single, relatively egalitarian religious belief. However, rather than causing a sudden change in legal policies, Christian equality doctrine simply set a new course for legal development. From the Christianization of the island onward, there was a slow but inexorable move towards equality in British legal structures. Barely evident in an examination of any particular time period, this trend is only distinguishable when the entire arc of English legal development is considered.

Despite Christian influence, feudal orders continued to base the legal standing of individuals on their social standing. There were, generally speaking, three social classes in feudal England. The upper class nobles, large landowners titled by the king, were legally isolated from the other classes. The freeholders, a small but growing middle class during this time, were given special rights in common courts. The villeins were not given legal status of their own in royal courts.

Throughout the feudal period, it was customary for the upper class gentry and peers to be judged only by other nobles; additionally, they enjoyed the full rights identified in the Magna Carta and other legal documents. In 1688, the aristocracy made up approximately five percent of the population.⁵⁰ Section 21 of the Magna Carta mandated that lords be tried only by their social equals.⁵¹ By the 15th century, juries trying noble defendants were made up only of noble jurymen. The accused noble was almost always tried on misdemeanor charges.^{52*}

The Magna Carta was a document intended to ensure the rights of this noble class; after its instatement, there was little systematic violation of the rights assured under that document. Many of the criminal rights that are taken for granted today emerged as special considerations for noble offenders in this period. Rights against self-incrimination, assurance against re-arrest for the acquitted, and statutes of limitations were extended to the nobles as courtesies rather than official rights.⁵³

As a result of their status, freeholders legally held the same rights as nobles; they were simply tried in lower courts and thus probably received vastly different treatment.

* The House of Lords was designed as a legal body for feudal nobles. This court was presided over by the Lord High Stewart of England. In the seventeenth century, the House of Lords began hearing cases from common courts, and it evolved to become the highest English court as well as a legislative body (Harding, 257).

They numbered few during most of the feudal age, but the swelling of their ranks in the seventeenth century spelled the death knell for the feudal system. In 1688, around twelve percent of English families were freeholders.⁵⁴

In contrast to the freeholders, the villeins (or “serfs”) did not have legal standing in royal courts during the feudal period. Villeins did not hold their land freely; in all but name, they were the slaves of feudal England. In 1688, they comprised an estimated eighty-three percent of the population.⁵⁵ In the relationship between a lord and his villein, the subordinate had no legal rights. It was acknowledged that villeins did have full rights outside of this feudal tie. But villeins could not themselves take legal action in royal courts; only their lords could take action on their behalf.⁵⁶

While it is true that nobles were legally isolated, the primary division in later feudal England was between villeins and free men. Freeholders and lords were accorded equal rights; however, these rights were denied to the lower class. In the words of legal scholars Sir Frederick Pollock and Frederic William Maitland, “all men are either free men or serfs.”⁵⁷ Despite what it may seem, then, the feudal period showed marked progress towards legal equality. The idea was well established that all men of certain standing must receive equal treatment under the law.

By the eighteenth century, villein rights had expanded to equal those of free men. In the late sixteenth century, villeins were commonly granted the right to bring action against trespassers who were not their lords.⁵⁸ Around 1600, villeins were finally allowed to bring action also against their lords. In response to this news, politician Edward Coke announced that villeins now “stand upon a sure ground, now they weigh not their lords’ displeasure, they shake not at every blast of wind, they eat, drink, and sleep securely.”⁵⁹

In the eighteenth century, Blackstone's "Commentaries of the Laws of England" lauded the existence of universal equality under English law:

And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes *eo instanti* a freeman.⁶⁰

This broad statement of rights entitlement appears to welcome universal equality into the English common law. However, in reality, male landowners alone could be assured of possessing these rights at the time of the American Revolution.

Much like the villeins of earlier centuries, women, children, domestic servants, and the mentally challenged all lacked standing in eighteenth century English courts. These groups were unable to bring legal actions on their own; only their male guardians had that right.⁶¹ Additionally, these groups were considered physically or emotionally incapable of committing many crimes. At the time of the American Revolution, these groups were notably unwelcome to participate in common law institutions.

The Popular Character of Legal Procedures

The Preamble of the American Constitution assumes that that "we the People" have the capacity to create a legitimate legal structure. The common law is not founded on popular mandate; however, it does possess several legal and social channels for the incorporation of popular opinion into the machinations of law.

The argument could easily be made that the English legal practices most sensitive to the will of the people were the pre-feudal Germanic orders. There was no centralized state, rarely a powerful enforcer; legal orders were dependent on widespread consent for

their existence.⁶² Germanic legal orders were based primarily on the ordeal and the blood feud; both of these procedures required extensive community involvement.

During an ordeal, the entire town often helped to determine an accused individual's guilt or innocence. The nature of a defendant's ordeal was determined locally, and was often based on his or her status within the community. The notorious were given harsher ordeals, while the well-liked were often spared the worst.⁶³ The ordeal was quite a subjective test. Sentences were chosen and results interpreted based on the preconceived beliefs of community members. Thus, the ordeal was a way for superstitious local communities to deal with crime effectively and practically.⁶⁴

The blood feud developed as a response to the difficulty of bringing an accused person to public trial.⁶⁵ When a murder occurred, kinsmen extending to sixth cousins of the victim were honor-bound to seek revenge.⁶⁶ Homicide had the capacity to spark longstanding feuds between families, causing numerous deaths on both sides. The blood feud was thus a powerful disincentive to murder. But the blood feud more often created an atmosphere of cooperation among families. Interfamily negotiation designed to prevent further bloodshed often concluded peaceably with honorable compensation.⁶⁷ Thus, the blood feud gave families incentive to attain private justice. The ordeal and the blood feud were community-based legal procedures; Germanic law was therefore a popularly participative endeavor.

Even as the state began to centralize, its laws remained dependent on popular approval. The king's edicts were unenforceable without community consent; many proclamations were simple requests to be enforced at the individual's discretion. Canute's legal code imposed a fine on any person who observed a thief and failed to sound the

alarm, as well as any man who refused to join a pursuit of the thief.⁶⁸ But this law was only as effective as the community members who enforced it.

Nonetheless, there is evidence that community responsibility had widespread legitimacy. The state mandated various acts of state importance, such as the upkeep of roads, drains, and bridges. State legal action against an individual who failed to do his part was a likely incentive.⁶⁹ Christianity provided further reason for individuals to toe the state line.

Thus, the feudal man was considered an active participant in the law even though he did not have direct say in its policies. Additionally, legal and religious institutions encouraged the development of a national consciousness.

Free men were given the opportunity to participate directly in legal proceedings through the English jury system. Tracing its roots back to 1166 Assize of Clerendon,⁷⁰ the jury was originally a localized institution designed to bring individuals who knew the defendant or personally witnessed the crime into the courtroom. However, it soon became a venue by which those commoners qualified to serve – namely, the middle class – espoused their convictions about social and political issues.

Juries made up of middle-class individuals were often educated, religious, and socially conscious. They used their authority to express their convictions on an array of social concerns; they were often lenient towards women,⁷¹ men who had murdered during a fight,⁷² and men who had killed a social inferior.⁷³ In some cases, jurors determined that the shame of a trial was sufficient punishment; thus, for instance, they commonly acquitted priests charged with breaking their vows of chastity.⁷⁴ Additionally, many

juries exercised “exemplary punishment,” and notorious felons were often executed as a deterrent.⁷⁵

Jury verdicts were influenced by the political beliefs of members. One famous jury acquitted the Seven Bishops, charged with challenging James II’s suspension of penal laws, which were intended to mandate conformity with the Anglican Church. These jurors were praised as heroes who had prevented tyranny.⁷⁶ Thus, the jury was an outlet for the expression of social and political beliefs in the feudal legal orders and common law system, bringing a uniquely participative element to English law.

These participative elements created the expectation that the common law be held accountable to the people of England. In the fifteenth century, John Fortescue praises English law as a mediator between king and people. According to Fortescue, the king cannot make or change law without the assent of the people; as a result, they are “ruled by laws that they themselves desire, they freely enjoy their properties and are despoiled neither by their own king nor any other.”⁷⁷

While under feudal legal orders, it is unlikely that the English subject had any direct influence in the making of law. However, Fortescue’s sentiment evolved into an argument for representative government. In the eighteenth century, William Blackstone stated that this representation is required for law itself to be legitimate: “For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament.”⁷⁸ This link between taxation and participation was the driving force behind the American Revolution.

Common law is fundamentally part of a dialogue between the state and the people of England. Popular influence is most apparent in the Germanic legal orders; however, English law ultimately became a system which, while formalized, regained much of its communal origin.

Property Treatment under the Common Law

The American Constitution mandates strict protections for private property. Laws ensuring free use of property, compensation for property loss, and respect for contracts are derived from British jurisprudence. This section will outline the development of common law concerning the acquisition, inheritance, and protection of property. English contract law will then be explored.

Property Acquisition

There is much speculation but little known about the treatment of property within Germanic orders. Movable property, or chattel, appears to have had no standardized treatment whatsoever. The vast majority of land was acquired through unrecorded transactions; the few contemporary documents found which mentioned these tracts referred to it as “folk-land.”⁷⁹

After some exposure to Roman legal practice, nobles began to record land transactions in charters, or “books.” This “book-land” tended to comprise larger areas than folk-land. Owners of book-land absorbed numerous folk-land plots in their charter; evidence suggests that the previous owners remained, perhaps with an agreed tenure.⁸⁰ Owners of book-land had considerably greater jurisdiction over their holdings than

owners of folk-land.⁸¹ Book-land remained until the twelfth century, when it merged with the feudal tenure system.⁸²

During the feudal period, the tenure system completely changed the nature of land acquisition. William the Conqueror and successive kings claimed for themselves all the land in England. As a result, it was not possible under feudal law for someone besides the king to claim a piece of land as his own.⁸³ There was no distinction drawn between the king as a public and private figure⁸⁴; his private land ownership was the basis for his political authority. In the words of scholars Sir Frederick Pollock and Frederic William Maitland, “all land in England must be held of the king of England, otherwise he would not be king of all England. To wish for an ownership of land that shall not be subject to royal rights is to wish for the state of nature.”⁸⁵

As detailed in the first section of this chapter, the king granted land tenures to his nobles, which set in motion the development of a feudal hierarchy. Within this hierarchy, common tenants had no absolute rights to their holdings. The tenants held their land on private contracts, and their tenures were conditional on services, dues, or both. If a tenant was unable to pay his lord, or was convicted of a felony, or if he died without an heir, then the lord had the right to reoccupy his land.⁸⁶

Common tenures were of two kinds; free tenures, which entailed significant land rights, and villein tenures, which involved very few rights. Holders of free tenures, or “freeholders,” were granted “seisin” over their land. Seisin entailed a right of possession which, while not ownership, gave certain legal securities to the inhabitant.⁸⁷ Seisin was not granted by simply handing over a paper; more commonly, it involved a ceremony in which the grantee was presented with a charter. The grantee would also sometimes

perform a symbolic act of ownership, such as picking an apple off of a tree.⁸⁸ Once granted seisin, inhabitants had the right to protect their land through legal action in royal courts.⁸⁹ Freeholders also maintained the right to alienate their land.⁹⁰ The terms of the freeholder's tenure rarely involved services, and eventually required only a minimal fee.

In contrast, villein tenures always involved services. The tenant was commonly required to do "week work," a full two or three days a week during most of the year, perhaps four or five days a week during the busier summer months. At harvest time, the villein was often expected to bring all of the men of his household to reap and carry the crops.⁹¹

The typical villein had little personal freedom from his lord. When his daughters were married, he was required to secure his lord's approval and pay a sum of the lord's choosing. His lord had to give permission for him to sell livestock and fell trees on his land. He was not allowed leave his land without paying for a charter of manumission.⁹² When he died, his widow was required to pay the lord five shillings for thirty days rest from work.⁹³ The villein did not have any substantive right to property.

With the end of feudalism came the diminishment of many of these land practices. The king maintained a theoretic hold on all the land in England.⁹⁴ However, all tenures were reduced to a single type, known as "socage."⁹⁵ Socage is the holding of land on an indefinite tenure; it involves a minimal and symbolic due called a "quitrent."⁹⁶ According to Blackstone, villein tenements became socages as villeins gradually bought seisin from their lords, were given it, or were granted it in court.⁹⁷

In the eighteenth century, influential English theorist John Locke dismissed the very concept of villeinage; no man, he stated, could be born into "natural subjection."⁹⁸

Clearly in support of this concept, Blackstone grants eighteenth century Englishman the fundamental right to “the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.”⁹⁹

Property Acquisition through Inheritance

The right to inherit land is critical in the maintenance of a family’s status. As such, it is a vital if distinct element of property acquisition which has not always existed in English law.

Under feudalism, the succession of nobles and free tenants was determined by the rule of primogeniture. The oldest son was mandated to inherit his father’s estate. No will or testament left by the owner could alter this process.¹⁰⁰ Assuming the existence of an appropriate heir, freehold tenements held in seisin automatically passed to him. However, if the heir was absent, nonexistent, or if two men stepped forward to claim the title, then the lord could legitimately repossess the tenement while the rightful heir was located or determined. If no heir was produced, then the lord could permanently hold the land.¹⁰¹

The inheritance rights of villein heirs were more uncertain. Because villeins lacked legal standing in royal courts, their only legal recourse was the manorial court, run by the lord of their estate. In many instances, these manorial courts would approve villein inheritances; however, a particularly greedy or malicious lord could easily override the manorial court and keep the land for himself.¹⁰² The villein was disadvantaged by the lack of a definitive process for the entailment of his property.

In the eighteenth century, scholars began to challenge primogeniture. Locke argued that a man’s right to free use of property does not end with his death; as long as his children are not in danger of starvation, he may dispose of his property as he

chooses.¹⁰³ However, inheritance under common law during the American Revolution remained predicated on the primogeniture system.

It is meaningful that British law never considered the acquisition of property a fundamental right. While common law endorses the free use of acquired land, this was applicable only to those men who already owned land. Primogeniture and entail laws actually prevented English land from changing hands, so that wealthy families held extensive plots indefinitely while few common men were practically able to acquire land. Thus, British property conceptions were most beneficial to the aristocracy.

Property Protection

Under common law, when property is unlawfully taken from an owner, that individual is allowed legal recourse to regain it, as well as monetary compensation for resultant costs. The legal assurances of property protection are extensive; they include widely available civil proceedings, as well as severe criminal punishment for transgressors.

The feudal age saw the development of a substantial body of civil law designed to exact compensation from dispossessors or attempted dispossessors. Civil laws provided extensive legal protections for property rights. These laws were introduced essentially unaltered into the common law. The first substantial civil proceeding to develop was called the “writ of detinue.” It mandated the return of objects entrusted to another for a limited time and purpose. Detinue would restore the object or its monetary value to the rightful owner; however, it did not allow the victim to ask for additional compensation.¹⁰⁴ According to Blackstone, the writ of detinue could be subverted if a defendant stated

under oath that he did not possess the item; thus, it was often a problematic legal remedy.¹⁰⁵

As a result of these limitations, the writ of detinue was replaced by trespass, also called “trover and conversion.” Originally, trespass was used to try individuals who found another’s movable property and failed to return it to them. However, it soon became a remedy for any act which resulted in loss or devalue of private property. By the end of the thirteenth century, trespass was the most common English legal proceeding.¹⁰⁶

The assize of nuisance required compensation and damages to be paid when an individual was disadvantaged by another’s actions on private land. For example, if a man built a pond which cut off water supply to his neighbor’s crop, then he was required to undo the nuisance as well as pay damages.¹⁰⁷

Transgressors were liable under civil proceedings only if the foreseeable result of their actions was a loss of devalue of another’s property. However, courts sometimes found it hard to make a distinction between a negligent act and an accidental one. For example, in *Hull v. Orynge* (1466), the defendant was charged with trespass because he had entered his neighbor’s property to collect hedge clippings that he had dropped. The court ruled that the defendant could have avoided this transgression, and thus he was required to pay a compensatory amount. The court made the ruling that a man should be liable for unintentional damage if he “by any means could have prevented it.”¹⁰⁸

These civil proceedings gave new reach to property law by allowing the courts to mandate compensation rather than punishment. They also enabled the court to develop a list of transgressions which, while not criminal, nonetheless resulted in another’s loss and were therefore punishable by civil proceedings.¹⁰⁹ Thus, the right to property was

strengthened by civil laws. The right of reparation became ingrained in the English legal consciousness. In the eighteenth century, Locke listed reparation as the natural and inalienable right of any man who has suffered damage. According to Locke, while the state may choose not to prosecute a case where damage had been done, the victim nonetheless retains full rights to seek monetary compensation.¹¹⁰

Requirement of compensation was not limited to private individuals. By the seventeenth century, the state consistently recognized that land taken from private individuals for public use required compensation.¹¹¹ According to Blackstone, because the state is primarily concerned with fundamental rights, it must protect these rights even from itself.¹¹² Thus, private property can only be taken by the state when absolutely necessary, and full compensation must then be provided to the owner.

Criminal proceedings could also be brought against a wrongful dispossessor. Most common was the charge of larceny. According to Blackstone, Ancient Saxon laws punished theft above the value of twelvepence with death. Seven centuries later, at the time of Blackstone's writing, stealing above the value of twelvepence remained a capital offense.¹¹³ Juries would often bring a decision under the value of twelvepence to prevent execution, it is true, and the clergy could also successfully appeal to the state for the life of a first time offender.¹¹⁴ However, larcenies committed in a house were likely to result in execution regardless of a clergyman's pleas.¹¹⁵ Thus, theft of property was taken quite seriously under the common law, although Blackstone hints that he believed its punishments to be excessive.

Contracts and the Common Law

Contracts were virtually unknown in Germanic England before the introduction of Roman and Canon law.¹¹⁶ However, verbal promises and statements under oath were likely used to cement agreements within Germanic tribes. This was most common after the introduction of Christianity, which provided a religious motivation for the honoring of such agreements.¹¹⁷

Roman law had achieved perhaps the most complex contract law in European legal history. Contracts formed the basis of most Roman legal interactions. A variety of contracts were legally binding; they were categorized, however, into verbal contracts, written contracts, contracts based in the delivery of an object, and innominate contracts. Contracts based in the delivery of an object and innominate contracts were both based on the assumption that no individual gives something for nothing. Therefore, if one individual delivers their part of a contract, even if there is no other evidence that the contract existed, the other individual is required to do their part to honor the contract.¹¹⁸

Canon law kept the bulk of Roman contract law; however, it gave further credence to promises, even those not made under oath. Canonists considered a promise equal to an oath before God, and thus it was given powerful legal status.¹¹⁹ Additionally, the canonists made strict laws against “shameful” profit making. While a contract could result in a profit, any unsavory business practices were condemned. The criterion for shameful profit making, admittedly vague in the abstract, varied widely depending on the time period.¹²⁰

Influenced by Roman and Canon law, English law greatly respected and strictly enforced contracts, which became the primary means of conveying land. The first English

land contracts were charters provided by kings to churchmen in the seventh century. Eventually, kings began granting these charters to nobles.¹²¹ The feudal system was based in the existence of contracts concerning mutually held land.

Slade's Case, decided in 1602, clarified the legitimacy of unwritten contract. John Slade alleged that Humphrey Morley had promised to pay him sixteen pounds in return for a quantity of wheat; despite numerous requests, however, he had failed to do so. John Slade suffered consequent damages to the amount of forty pounds. The court of the Exchequer Chamber determined that when a verbal promise was made to deliver goods, and they were nonetheless undelivered, the transgressor was liable not only for the value of the goods but also for the losses incurred.¹²²

Slade's Case became the basis for a new exercise of civil litigation. In instances where it was verbally confirmed that services or objects would be provided, then there was a contractual obligation to provide them. In social circumstances where payment was automatically expected, it was contractually required even if not specifically discussed by the parties. This was clarified in *Warbrook v. Griffin* (1610), when an innkeeper was ordered paid for services rendered to a guest even though no price had been previously specified.¹²³ These cases follow the examples of Roman and Canon law, which stipulated the legitimacy of verbal or even implied contractual agreements.

Contracts provide the basis of property transference in the common law. Based largely on the principles of Roman and Canon contract law, English contract law evolved into a complex and critical area.

Conclusion: The Influence of Common Law on American Property Law

British property law is based nearly two millennia of property law development in ancient Roman law, the early church's Canon law, the tribal orders of Germanic peoples, and finally the developments of feudal law. In turn, common law was the basis for early American legal development. Approximately 2,500 copies of William Blackstone's "Commentaries of the Laws of England" were sold in eighteenth century America before 1776,¹²⁴ placing this work on every founder's desk as the Constitution was composed.

As a result of American deference to British legal principles, the basic convictions of the common law became fundamental concepts under American law; these concepts included the superiority of law over other authorities, the legitimacy of precedent, the importance of fundamental rights, essential equality under the law, and the popular character of legal procedures. Additionally, the common law's property policies are particularly meaningful in any examination of America's early property treatment. The American Constitution emphasizes a strict right to property and enforcement of contract; the importance of property protection to the American founders was a direct result of British legal traditions.

¹ Berman, Harold. Law and Revolution: The Formation of the Western Legal Tradition, 1983. p. 52.

² Berman, p. 62.

³ Berman, p. 54.

⁴ Berman, p. 50.

⁵ Berman, p. 68.

⁶ Berman, p. 65.

⁷ Berman, p. 66.

⁸ Berman, p. 66.

⁹ Berman, p. 53.

¹⁰ Berman, p. 67.

¹¹ Berman, p. 123.

¹² Berman, p. 205.

¹³ Harding, Alan. A Social History of English Law, 1966, p. 236.

¹⁴ Harding, p. 31.

¹⁵ Harding, p. 31.

¹⁶ Pollock and Maitland, The History of English Law, 1968. vol. ii. p. 197.

-
- ¹⁷ Berman, p. 86.
- ¹⁸ Harding, p. 88.
- ¹⁹ Kern, Fritz. Kingship and Law in the Middle Ages. Trans. S.B. Chrimes, 1948, p. 153.
- ²⁰ Kern, p. 151.
- ²¹ Kern, p. 87.
- ²² Harding, p. 242.
- ²³ Kern, p. 73.
- ²⁴ Fortescue, John. "On the Merits and the Laws of England." 1471. Trans. S.B. Chrimes, p. 510-512.
- ²⁵ Fortescue, p. 518.
- ²⁶ Harding, p. 242.
- ²⁷ Kern, p. 149.
- ²⁸ Kern, p. 150.
- ²⁹ Kern, p. 160.
- ³⁰ Fortescue, p. 524.
- ³¹ Harding, p. 222.
- ³² Harding, p. 218.
- ³³ Harding, p. 293.
- ³⁴ Harding, p. 218.
- ³⁵ Harding, p. 22.
- ³⁶ Kern, p. 192.
- ³⁷ Kern, p. 192.
- ³⁸ Siegan, Bernard H. Property Rights: From Magna Carta to the Fourteenth Amendment, 2001, 7.
- ³⁹ Magna Carta, sec. 52.
- ⁴⁰ Harding, p. 237.
- ⁴¹ Blackstone, William. Commentaries on the Laws of England. 1765-1769, vol. i. p. 119.
- ⁴² Blackstone, vol. i. p. 120.
- ⁴³ Blackstone, vol. i. p. 125.
- ⁴⁴ Blackstone, vol. i. p. 130.
- ⁴⁵ Blackstone, vol. i. p. 134.
- ⁴⁶ Berman, p. 54.
- ⁴⁷ Berman, p. 56.
- ⁴⁸ Berman, p. 65.
- ⁴⁹ See, for example, Joel 2:32, Romans 10:13, and Galatians, 4:28.
- ⁵⁰ Lawson, P.G. "The Composition and Behavior of Hertfordshire Juries, 1573-1624." Twelve Men Good and True, 1988, p. 133.
- ⁵¹ Magna Carta sec. 21.
- ⁵² King, P.J.R. "'Illiterate Plebeians, Easily Misled': Jury Composition, Experience, and Behavior in Essex, 1735-1815." Twelve Men Good and True, 1988, p. 353.
- ⁵³ Harding, p. 243.
- ⁵⁴ Lawson, p. 133.
- ⁵⁵ Lawson, p. 133.
- ⁵⁶ Harding, p. 95.
- ⁵⁷ Pollock and Maitland, vol. i. p. 412.
- ⁵⁸ Harding, p. 96.
- ⁵⁹ Harding, p. 96.
- ⁶⁰ Blackstone, i. 123.
- ⁶¹ Harding, p. 247.
- ⁶² Berman, p. 77.
- ⁶³ Harding, p. 24.
- ⁶⁴ Berman, p. 58.
- ⁶⁵ Berman, p. 54.
- ⁶⁶ Harding, p. 14.
- ⁶⁷ Harding, p. 14.
- ⁶⁸ Harding, p. 21-22.
- ⁶⁹ Harding, p. 251.

-
- ⁷⁰ Groot, Roger D. "The Early-Thirteenth-Century Criminal Jury." Twelve Men Good and True, 1988, p. 5.
- ⁷¹ McLane, Bernard William. "Juror Attitudes toward Local Disorder: The Evidence of the 1328 Trailbaston Proceedings." Twelve Men Good and True, 1988, p. 53.
- ⁷² McLane, p. 58.
- ⁷³ Powell, Edward. "Jury Trial at Gaol Delivery in the Late Middle Ages: The Midland Circuit, 1400-1429." Twelve Men Good and True, 1988, p. 114.
- ⁷⁴ Powell, p. 104.
- ⁷⁵ Lawson, p. 120.
- ⁷⁶ Beattie, J.M. "London Juries in the 1690s." Twelve Men Good and True, 1988, p. 214.
- ⁷⁷ Fortescue, p. 518.
- ⁷⁸ Blackstone, i. 135.
- ⁷⁹ Pollock and Maitland, vol. i. p. 61.
- ⁸⁰ Pollock and Maitland, vol. i. p. 63.
- ⁸¹ Harding, p. 25.
- ⁸² Pollock and Maitland, vol. i. p. 63.
- ⁸³ Harding, p. 26.
- ⁸⁴ Pollock and Maitland, vol. i. p. 230-231.
- ⁸⁵ Pollock and Maitland, vol. ii. p. 3.
- ⁸⁶ Harding, p. 38.
- ⁸⁷ Harding, p. 47.
- ⁸⁸ Harding, p. 46.
- ⁸⁹ Pollock and Maitland, vol. i. p. 357.
- ⁹⁰ Pollock and Maitland, vol. ii. p. 81.
- ⁹¹ Pollock and Maitland, vol. i. p. 368.
- ⁹² Pollock and Maitland, vol. i. 428.
- ⁹³ Pollock and Maitland, vol. i. p. 368.
- ⁹⁴ Blackstone, vol. ii. p. 59.
- ⁹⁵ Blackstone, vol. ii. p. 78.
- ⁹⁶ Blackstone, vol. ii. p. 79-81.
- ⁹⁷ Blackstone, vol. ii. p. 94-96.
- ⁹⁸ Locke, John. Second Treatise of Government, 1764, ch. VIII, p. 61.
- ⁹⁹ Blackstone, vol. i. p. 134.
- ¹⁰⁰ Pollock and Maitland, vol. i. p. 307.
- ¹⁰¹ Pollock and Maitland, vol. i. p. 310.
- ¹⁰² Pollock and Maitland, vol. i. p. 379.
- ¹⁰³ Larkin, Paschal. Property in the Eighteenth Century: With Special Reference to England and Locke, 1969, p. 77.
- ¹⁰⁴ Harding, p. 99-100.
- ¹⁰⁵ Blackstone, vol. iii. P. 151.
- ¹⁰⁶ Harding, p. 97.
- ¹⁰⁷ Harding, p. 96-97.
- ¹⁰⁸ Harding, p. 101-102.
- ¹⁰⁹ Harding, p. 98.
- ¹¹⁰ Locke, John. Second Treatise of Government, ch. II, p. 11.
- ¹¹¹ Ely, James W. Jr. The Guardian of Every Other Right: The Constitutional History of Property Rights, 1992, p. 23.
- ¹¹² Blackstone, vol. i. p. 135.
- ¹¹³ Blackstone, vol. iv. P. 238.
- ¹¹⁴ Blackstone, vol. iv. p. 239.
- ¹¹⁵ Blackstone, vol. iv. p. 240.
- ¹¹⁶ Pollock and Maitland, vol. ii. p. 184.
- ¹¹⁷ Pollock and Maitland, vol. i. p. 57-58.
- ¹¹⁸ Berman, p. 245.
- ¹¹⁹ Berman, p. 247.
- ¹²⁰ Berman, p. 248.

¹²¹ Harding, p. 25.

¹²² Harding, p. 104-105.

¹²³ Harding, p. 105.

¹²⁴ Harding, p. 303.

Chapter 2

Property and Social Inequality in 18th Century Britain

The British reverence for private property is well known, and as a result, often overstated. It is true that national discourse prior to the American Revolution was informed by a commitment to individual rights. Voltaire wrote that “liberty and property is the great national cry of the English.”¹ John Locke, joined by a myriad of other English thinkers, spoke lovingly of natural rights, including the right to acquire and retain property.

However, the realities of British social structures prevented the vast majority of people from obtaining property. Parliament, dominated by the aristocracy, ensured that land would remain in their control. In the seventeenth and eighteenth centuries, social barriers to wealth were breached by a growing middle class. These developments did not redefine or reduce privilege; instead, the aristocracy simply extended many of their rights to new entrants while continuing to exclude the poor. The rise of the middle class did not carry any significance for the unprivileged, which remained deprived of political voice, economic prospect, and social standing.

The Landed Aristocracy

Three English traditions enforced aristocratic control of land. The quitrent system allowed country gentlemen and nobles to maintain substantial holdings. Entails prevented aristocratically-owned land from being dispersed. Primogeniture barred the breakup of large estates. These traditions continued throughout the Enlightenment period; as the

chapter on American property treatment will reveal, Britain even exported these practices to her colonies.

The quitrent system developed within feudal Britain as a way for villeins to be freed from their obligations to their lords; however, it soon became a new form of subjugation. The feudal system used in medieval Britain required a strict hierarchy that encompassed everyone from the most powerful king to the lowliest villein. Land was owned by the king, who gave it in portions to lords in exchange for payment and military service. Lords divided their lands among tenants, who were required to provide works or payments to their lords in exchange for protection and the right to work the lord's land. The quitrent system developed centuries later as a way for laborers to free themselves from their lord's service. Under the quitrent system, laborers paid a perpetual fee for full land rights.

In the thirteenth century, the *Quia Emptores* statute passed by Edward I banned the creation of new tenures, essentially dooming the feudal system.² By the mid-1500s, villeinage had all but disappeared.³ However, the quitrent system was transformed into a tenurial system of land ownership. The lords evolved into nobles and "gentry." The aristocracy owned the vast majority of arable land through long-term rent arrangements with the crown. Between the king and his aristocracy, the rent sums were minimal. The king's claim to the land was symbolic, and the aristocracy considered it their own property.⁴ Farm laborers then paid long-term rents to the aristocrats.

The gentry, also called "country gentlemen," maintained personal relationships with their tenants. They knew the varying rates, portions, and terms of each arrangement. They had the power to evict a tenant who was unable to pay his rent, or to raise the rent

rate when the previous contract expired.⁵ Over the centuries, the tenure system between gentry and laborers had also become largely symbolic, and rates were often quite low. But the economic expansion of the seventeenth century made it more expensive for the country gentlemen to maintain their lifestyles, and throughout the 1600s, rents were doubled and tripled.⁶ Thus the liberation of the urban middle class caused the rural poor to realize the extent of their enslavement, although they could do little about it.

The second element of the British aristocracy was the nobility. The gentry maintained their status through wealth and land; the nobles, on the other hand, retained their specific legal rights through blood. They alone were qualified to sit in the powerful House of Lords, while the gentry were relegated to the Commons.⁷ The nobility also possessed expansive land holdings; however, they rarely remained in the country, choosing instead to populate the king's court and government. Their prestige was not linked to their land, which was an outgrowth of their unique status. Thus, land ownership was the particular preoccupation of the gentry, since land alone was responsible for their social status.

In the 13th century, Edward I passed a statute which allowed the aristocracy to establish permanent ownership over their land.⁸ Once an estate was entailed, it could not be sold, even in the event of bankruptcy. Entails were invaluable in the maintenance of a landed aristocracy; even if a noble family fell on hard times, their land could not be lost. In the 14th century, Henry IV passed a law which allowed the aristocracy to break their entails. This law caused many of the old estates to break down over time, significantly increasing the amount of commonly owned land on the country.⁹ However, Henry did not allow the state to prohibit entail; it had to be willingly given up. For those nobles and

gentry who elected to retain their holdings, entails maintained aristocratic control over the vast majority of British land.

The right of primogeniture successfully prevented the breaking up of large estates. Primogeniture was first used for monarch succession; the throne was mandated to pass to the king's firstborn son rather than his brother or younger sons.¹⁰ This practice was soon applied also to aristocratic land holdings; an estate would pass to the owner's firstborn son rather than being divided among his children. This system kept property consolidated in large family holdings, rather than breaking it up into smaller pieces. It allowed a single aristocratic family to control huge swaths of land over countless generations.¹¹

Medieval practices such as tenurial land ownership, entail, and primogeniture supplemented aristocratic dominance throughout the 16th and 17th centuries. But by the 18th century, economic change caused social and political transformation.

Industrialization and Economic Growth

England underwent an economic metamorphosis in the 16th and 17th centuries that was unparalleled in other European states. As a result, it developed a uniquely advanced economic infrastructure. This fact is often overlooked by historians who marvel at the speed of Britain's 19th-century industrial revolution; without a long history of economic and industrial superiority, Britain would not have been capable of such rapid progress. Between 1575 and 1620, it is estimated that the output of coal in Britain increased tenfold. Other products increased between five and tenfold, significantly, these products included salt, iron, steel, lead, ships, and glass. New industries were established which would become critical to the British economy; these included copper, brass, paper, soap,

sugar, dyeing alum, tobacco, and tobacco pipes. Even among traditional businesses, economic prosperity was the trend.¹²

The factors that led to this transformation were varied and critical. As a small island, Britain had a distinct advantage during the mercantile period, when water transportation became more important than ever before.¹³ A sizeable population boom greatly increased demand, stimulating trade, agriculture, and industry.¹⁴ By 1789, more than half of British trade was with regions outside of Europe; in France, its closest competitor, this figure was only one third. English imports, like those of other European states, consisted mainly of raw materials. However, while France tended to export natural products such as wine, most British exports were manufactured products.¹⁵ These economic advantages brought new economic prosperity to Britain.

Empowerment of the Middle Class

Economic flux created new opportunities for individual advancement among the lower classes. Laborers and artisans could become independent entrepreneurs, creating workshops and businesses in response to burgeoning demand.¹⁶ For the first time in recent memory, a man could scale the social ladder in one lifetime; more often, a family would transform itself in the span of a few generations.¹⁷ The size and financial power of the new middle class was unprecedented. Inevitably, this economic reconstruction led to changes in the social and political fabric of the state.

In both France and Britain, traditional aristocracies were challenged by newly prosperous businessmen.¹⁸ The aristocracies had different reactions. The British aristocratic response to the rise of a middle class was exceptionally inclusive. The

acceptance of the middle class into social and economic circles allowed the forging of an alliance between them and the aristocracy. In France, alternatively, aristocratic refusal to allow middle class businessmen into their circles created deep rifts within the state.

In France, the aristocracy stubbornly prevented any social or political standing for individuals who, in many cases, were their financial equals. They insisted upon the maintenance of their traditional tax exemptions, passing France's sizeable financial burdens on to the middle and lower classes. The middle class was not socially or politically acknowledged by the French leadership; naturally, then, they tended to side with the poor peasants and laborers against the entrenched aristocracy.

In Britain, the prosperous middle class was allowed to socialize with and even marry into the upper classes. The British aristocracy's insight and resources aided industrial enterprise, and the upper classes benefited from commercial growth.¹⁹ They respected the middle class businessmen who worked alongside them. Successful businessmen were welcomed into the fold, and they worked with the old aristocracy to sustain mutual dominance over economic and political life throughout the decades.²⁰

Remnants of Aristocratic Privilege

However, one critical distinction between the middle class and the aristocracy remained. The traditional barriers to land ownership, such as the quitrent system, entails, and primogeniture, were untouched throughout this period. The rural poor lacked the upward mobility of the townspeople. A laborer could at best aspire to become a yeoman, an overseer of other laborers who remained bound by the quitrent system. And with the

exception of those who married into the old aristocracy, few businessmen were able to obtain significant land holdings.²¹

The landed gentry, then, remained dominant in the countryside. The country gentleman or his ancestors had been granted this status by the Herald's College. Criteria for entry included significant land, tenants, and a certain lifestyle commitment.²² The life of a country gentleman was luxurious; he lived off his tenants, and spent much of his time hunting and corresponding with friends. His dependence on land for status meant that he was constantly involved in lawsuits to maintain or expand his holdings.²³ Often isolated in the countryside, he would often socialize with inferiors. However, his unique status in his community set him apart from all others.^{24*}

The Successes and Limitations of Political Empowerment

Linked first by economic interest, the British aristocracy and middle class soon collaborated to create a mutually beneficial government structure. The British state is composed of three mutually dependent organs; the monarch, the House of Commons, and the House of Lords. This arrangement began after the Norman conquest of the 11th century.²⁵ By allowing formal discussion among the aristocrats, kings could count on minimal opposition to their policies. As a result, Parliament was used to strengthen the king's rule by showing public support for his measures.²⁶

* The country gentleman archetype had exceptional influence on the aspirations of American colonists. While few of them actually came from the gentry class, they nonetheless sought after that lifestyle. In a New England town, a particular successful man was often labeled "the squire," a gentleman's title. And the southern plantation was modeled after the country gentleman's estate. Plantation owners even strived to mimic the gentry lifestyle, focusing on hunting, fishing, and other traditional aristocratic pursuits (Notenstein, 46). Even the southern plantation owner's interest in political life could have been derived from the unique political responsibilities of the country gentlemen.

However, weak kings and strong legislative oppositions slowly chipped away at the foundations of monarchic power, with the result that by the 18th century, the king had lost all but a small fraction of his authority to Parliament.²⁷ Among other powers, Parliament had ultimate control over accession to the crown, elections, declarations of war and peace, and even determination of their own jurisdiction. In other words, Parliament could with an act of Parliament expand their own powers as they saw fit.²⁸ As a result, the king was forced to work closely with Parliament to take most actions, fundamentally dividing legislative sovereignty among three state actors.

The Parliament was further empowered in the seventeenth century when it claimed a unique power to represent the people of Britain. The king's bureaucracy had traditionally heard the complaints of the common people, and under duress a corporation (union) leader might go to a Privy Councilor and ask for aid. Queen Elizabeth had been adept at representing herself as the people's voice. Childless, she was succeeded by James I, an unsympathetic but stalwart man. His son, Charles I, was a weak king from his inauguration until his execution at the hands of his own people. In March 1629 he dismissed Parliament; however, he was forced to summon it again eleven years later as a result of extreme financial distress.²⁹ From that point onward, Parliament slowly took control over critical elements of power.

Lower class leaders soon realized that their interests were better served in Parliament. Corporation leaders began sending their complaints to members of the House of Commons. The House responded by publicizing its actions; by 1626, important speeches were printed and distributed, and by 1629, full weekly news reports were available to the public. The House of Commons began to consider itself uniquely

qualified to represent the people, even those who had no say in elections. This, then, was yet another source of Parliamentary power; a member might easily claim that his role as the people's voice empowered him to stand in opposition to the king's policies.³⁰ This interplay also encouraged popular participation in government.

This trend, however, is easily overstated. Representation even among the middle and upper classes was extremely unequal. Towns were disproportionately represented, based on tradition as well as influence. Additionally, the right to vote was restricted to those with a certain portion of land or wealth. In the fifteenth century, Henry VI granted voter status only to freeholders who owned land valued at forty shillings a year. This statute remained in effect throughout the eighteenth century. In the seventeenth century, it is estimated that these restrictions allowed only 212,000 men to vote, less than a fifth of the adult male population.³¹ Intimidated by political intricacies, many of these freeholders simply sold their votes to wealthy landowners.³²

Common law means of inheritance were land-based, so merchants could not depend on traditional methods of maintaining family wealth. Every new generation of commoners largely made its own way, and even the most successful businessman could not ensure political clout to his children.³³ The House of Commons was more likely to faithfully represent those individuals who had a say in their election; as a result, while they often claimed to be a voice for the people, they were certainly biased by their own self-interest.

The Alliance between Merchants and Landowners

Centuries of political and social dominance had given the gentry full control over the House of Commons. A few businessmen, it is true, were elected to the House of Commons from important towns.³⁴ However, they were often intimidated into silence by the sophisticated pomp and rhetoric of the chamber. In 1710, a statute was passed mandating that members of Parliament possess landed incomes.³⁵ The gentry in the House of Commons provided the critical link between the nobility in the House of Lords and the middle class businessmen. They alone were capable of understanding the interests of the middle class, as well as effectively communicating these interests to the nobles and crown. Additionally, the gentry controlled the politics of their local areas.³⁶ An informal statement prohibiting certain conduct most often carried the force of law. When necessary, a country gentleman could easily bring a local matter to Parliament and get official backing for his position.³⁷ The gentry collaborated with both local and national authorities to create cohesive policy.

The gentry, then, were uniquely qualified to hold the disparate elements of the British state together. With their aid, a social and political alliance was forged between the aristocracy and the middle class. While the middle class was essentially unwelcome in Parliament, their interests were satisfactorily represented by the gentry in the House of Commons. As a result, Britain's growing middle class was given political and social recognition, dissuading them from forging an alliance with the lower classes as their French equals did.

Because of their similar economic interests, the aristocracy and middle class mostly agreed on progressive industrial policies.³⁸ The British Parliament joined with the

king in encouraging commercial growth, which was in their private interest as well as the public interest.³⁹ Financial subsidies, tax privileges, and expansive freedom were granted to industrialists. The state even financed publicly-owned manufacturing and trading pursuits.⁴⁰ These measures were the result of an allied aristocracy and middle class, both of which benefited greatly from state support of industry.

The Unprivileged in British Society

The political alliance between the middle and upper classes did little, however, to assuage extreme poverty among the lower classes. The rural and urban poor, were virtually unassisted by the state. Their only significant source of relief was the charity work of churches. As the next chapter will discuss, the plight of the poor significantly affected the scholastic ruminations of the Enlightenment period. Practical solutions were proposed; John Locke, for example, advised that all children over three years old found begging should be sent to a working school to learn a trade.⁴¹ However, no substantial state solutions were implemented. Instead, the governing classes often turned a blind eye to the sufferings of their countrymen, or blamed their poverty on laziness and immorality.

The middle class also allowed the aristocracy to maintain their traditional hold on land through a series of enclosure acts. Traditionally, a landowner's tenants worked together on unenclosed land. There would be one common field for every crop. Each laborer would be assigned a small strip of the field. Every farmer had several strips on several fields which he had to tend. Similarly, livestock would graze in common in a single pasture, and plants and wood would be collected from a common forest.

This method was inefficient, since the farmer had to travel great distances to tend to each portion of his crop. Additionally, one inattentive farmer might cause an overgrowth of weeds or improper drainage, which would affect the yields of those around him.⁴² Increased demand for foodstuffs prompted the aristocracy to rethink this method, and it was correctly determined that by giving each farmer a portion of land on which all his crops would grow, efficiency would significantly increase. The enclosure acts reorganized the commonly held land into individual portions. As a result, the tenant and his landlord were both given areas of land that had greater profit potential.

In theory, of course, the enclosure movement could have benefited the tenant as well as his landlord. However, when the gentry distributed the land, they tended to withhold a larger proportion of it for themselves than before enclosure.⁴³ This development was not unheard of in British history; in at least one thirteenth century town, it was ruled that lords were entitled to possess any common lands that were deemed in excess of his serfs' needs.⁴⁴ As a result, while the landlord enjoyed a larger farm, more grazing territory, and a greater share of the forest, the tenant farmers paid the same rent for less land. Additionally, some tenants found themselves unable to prove their land rights in court; even those that did have evidence were often unable to make claims because of the prohibitive expense of court proceedings.

The enclosure acts underscore the lot of the unpropertied and unprivileged in 18th century Britain. Scholar Leonard Krieger deemed the middle class an "underprivileged" class throughout Europe, however, he emphasized that even more commoners were "unprivileged," without hope of ever gaining the tools to succeed. While those rich in land or wealth allied and controlled the fate of the nation, countless others were denied

entry into their ranks.⁴⁵ The vast majority of laborers toiled in fields and workshops ignorant of the commercial boom that rejuvenated their overlords. In France, the alliance between these people and the middle class ultimately led to revolution. Unrepresented and disorganized, the British unprivileged were reduced to the occasional town riot or desperate appeal to an uncaring bureaucrat.

¹ Bowen, Catherine Drinker. Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787, 1966, p. 71.

² Harding, Alan. A Social History of English Law, 1966, p. 88.

³ Notestein, Wallace. The English People on the Eve of Colonization, 1954, p. 6.

⁴ Ely, James W. Jr. The Guardian of Every Other Right: The Constitutional History of Property Rights, 1992, p. 11.

⁵ Notestein, p. 48.

⁶ Notestein, p. 72.

⁷ Krieger, Leonard. Kings and Philosophers, 1689-1789, 1970, p. 97.

⁸ Hume, David. The History of England. 1778, vol. ii. p. 143.

⁹ Hume, vol. iii. p. 77.

¹⁰ Hume, vol. i. p. 407.

¹¹ Jameson, J. Franklin. The American Revolution Considered as a Social Movement, 1961, p. 37.

¹² Notestein, p. 21.

¹³ Krieger, p. 124.

¹⁴ Krieger, p. 119.

¹⁵ Krieger, p. 121.

¹⁶ Krieger, p. 128.

¹⁷ Notestein, p. 109.

¹⁸ Krieger, p. 126.

¹⁹ Krieger, p. 128.

²⁰ Krieger, p. 96.

²¹ Krieger, p. 96.

²² Notestein, p. 46.

²³ Harding, p. 246.

²⁴ Krieger, p. 105.

²⁵ Notestein, p. 3.

²⁶ Notestein, p. 5.

²⁷ Krieger, p. 97.

²⁸ Krieger, p. 97.

²⁹ Notestein, p. 179.

³⁰ Notestein, p. 196.

³¹ MacPherson, C.B. Property: Mainstream and Critical Positions, 1978, p. 114.

³² Larkin, Paschal. Property in the Eighteenth Century: With Special Reference to England and Locke, 1969, p. 113.

³³ Harding, p. 325.

³⁴ Notestein, p. 186.

³⁵ Larkin, p. 112.

³⁶ Krieger, p. 105.

³⁷ Harding, p. 292.

³⁸ Krieger, p. 104.

³⁹ Krieger, p. 110.

⁴⁰ Krieger, p. 132.

⁴¹ Larkin, p. 73.

⁴² Notestein, p. 72-73.

⁴³ Notestein, p. 73.

⁴⁴ Harding, p. 233

⁴⁵ Krieger, p. 118.

Chapter 3

English and French Enlightenment Philosophy

The American Constitution was strongly influenced by the English and French Enlightenments. The English Enlightenment was dominated by Lockean individualism, which advocated strong protections for individual property rights. Social inequality encouraged Levellers, economic moralists, and utilitarians to challenge diverse aspects of aristocratic privilege. In France, the physiocrats endorsed strict property protections; however, wealth disparities led Rousseau and other collective rights philosophers to challenge the fundamental principles of individualist doctrine.

British Enlightenment Philosophy

In England, the declining legitimacy of religious and royal authority caused John Locke and other theorists to advocate strict respect for individual freedom. Individualism afforded new rights and privileges to common men; however, it also prioritized the interests of propertied individuals over the unpropertied classes. The plight of the poor encouraged English scholars to endorse wide-reaching political reforms; the Levellers argued for expansive political participation, while Thomas Paine, Robert Wallace, and Dr. Joseph Priestly proposed measures of state interference in economic matters. Ultimately, Benthamite utilitarianism challenged the fundamental precepts of individualism in response to rampant social inequality.

Challenges to Religious and Political Authority

Christianity contributed to the development of the state by creating a universal moral code which aided royal authority in the formulation of standardized, consistent

law.¹ However, the Reformation caused the spread of numerous Christian denominations throughout the British population. In 1645, Protestant writer George Smith condemned the sight of “minister preaching against minister, and one congregation separating from another.” Smith was convinced that religious pluralism has created a morally ambiguous order: “Nor will we forsake any sinne, but what we ourselves will call sinne: everyone will have his own way to worship of God; and everyone will have his own sinne to dishonour God.”² Plurality of religious beliefs created new uncertainties about the existence of universal morality.

Meanwhile, the English monarchy was also under siege. As Chapter 2 details, monarchic authority was challenged by an increasingly confident Parliament. The conflict between Parliament and King Charles I came to a head shortly before the king lost his in 1649. The events surrounding his execution called into question all sources of absolute political authority.

Hobbes and the All-Powerful Sovereign: A Case for Proto-Individualism

Thomas Hobbes proposed a political philosophy which, while excessively authoritarian, nonetheless contained the beginnings of individualist doctrine. The seventeenth century civil war, which ended in the execution of King Charles I, questioned royal authority. Writing during the conflict, Hobbes attempts to place political, religious, and moral authority at the feet of a single state sovereign. This sovereign can be one man, or many; Hobbes believes that one man is preferable. When a majority of men unite around a sovereign, any dissenters must consent to the sovereign’s rule or be destroyed by the majority.³ The sovereign embodies the will of all men.⁴ He has virtually unchecked powers of legislation and enforcement. He is above the law, and

cannot be charged with crimes against his subjects.⁵ Even if he in some way contradicts law, he can change the law to make his actions legal.⁶ Hobbes's sovereign violates English legal traditions, which (as detailed in Chapter 1) subjugate the ruler to the law.

Reminiscent of feudal property treatment, Hobbes also claims that all property is owned by the sovereign. Individuals have a right to exclude all fellow subjects from use or possession of their property; however, they cannot exclude the sovereign, who has ultimate rights to all land.⁷ Additionally, the sovereign dictates how property is distributed and exchanged among his subjects.⁸

The sovereign's far-reaching influence makes him the sole source of temporal justice and religious morality for his subjects. Speaking during a time of great religious confusion, Hobbes claims for the sovereign the right to make both temporal and spiritual judgments. Hobbes clearly viewed religious authority as a threat to state power; as such, he bluntly protests that "*temporal* and *spiritual* government, are but two words brought into the world, to make men see double, and mistake their *lawful sovereign*."⁹ The sovereign becomes both a political and a religious leader, whose mandates can unite the country against any temporal or spiritual uncertainties.

Despite the overwhelming power of the sovereign over the individual, Hobbes's work is a prototype for individualism in British Enlightenment thought.¹⁰ The sovereign power, however far-reaching, was granted by subjects; this implies that men have individual preferences, which taken collectively have merit in the creation of the state. Hobbes does not turn to divine mandate to explain sovereign authority. Rather, it is only from a majority-supported agreement that the sovereign gains his legitimacy.

Hobbes argues passionately that all men (with the exception of the sovereign) are naturally equal.¹¹ An arbitrator between individuals must thus “*deal equally between them.*”¹² Hobbes is here rejecting the feudal hierarchy, in which individual rights vary based on social status. He is a prototype individualist, unwilling to dismiss the all-powerful sovereign, yet fundamentally committed to a society based in individual choice and equal treatment.

Locke and the Decline of Moral Universalism

Bitter rifts among Christian denominations in the sixteenth century swiftly led to the secularization of the English state in the eighteenth century. In 1689, John Locke’s “Letter Concerning Toleration” heralded a new age of state neutrality in religious matters. Locke denied any religious faith the right to force others to adhere to its teachings.¹³ He also prohibited the state from religious interference, stating that “the care of souls is not committed to the civil magistrate, any more than to other men.”¹⁴ Instead, Locke granted to every individual the right to choose his or her own denomination.¹⁵

From the concept of religious self-determination, however, comes a newly clarified acceptance of the diversity of individual preference. In Locke’s “Essay concerning Human Understanding,” he criticizes previous attempts to develop universal codes for human desires.¹⁶ Locke claims that individuals naturally possess widely different aspirations and desires. In a world of diverse preferences, strict universalism cannot exist; therefore, Locke begins here to build a case for more far-reaching individualism. Rejecting the concept of universal right, he searched for ways to assimilate or even systematize diverse preferences.

Locke and the Marriage of Individualism and Property Rights

Locke developed and strengthened individualism by linking it to property rights. Property has traditionally maintained a cherished place in British society. By the early feudal period, property acquisition was the only way to maintain or enhance one's social position. However, only the king truly owned land; his subjects possessed it within an intricate tenure system. Even Hobbes argued that a successful sovereign power must own all property and use it at will. In contrast, Locke established the protection of property as a sacred individual right; additionally, he outlined a system of property acquisition which did not require consent or contract from any authority. In doing so, Locke encouraged a new respect for the individual.

Locke names protection of property as the foremost individual right that the state is bound to enforce. He also extends the definition of property to include an individual's person as well as his possessions and land.¹⁷ Thus, man's own body became a piece of his property. Any individual who claimed the right to freely use his body also claimed the freedom to acquire, use, and protect property.

Locke's characterization of property received widespread support. His contemporary, Richard Overton, deemed a man's body his "self property," and stated that man has a right to free use and enjoyment of his individual rights, just as he is entitled to free use of his property:

To every individual in nature is given an individuall property by nature, not to be invaded or usurped by any: for every one as he is himselfe, so he hath a selfe propriety, else could he not be himselfe, . . . mine and thine cannot be, except his be: No man hath power over my rights and liberties and I over no man's; I may be but an individuall, enjoy *myselfe* and my selfe propriety.¹⁸

Locke famously argues that an individual can only acquire property when he mixes his labor with it. This argument begins with a fairly simple statement: when one eats an acorn or apple, the food becomes part of his body and is therefore his. However, Locke argues that these objects become a man's property before he consumes them; in fact, they are his from the moment that he removes them from nature.¹⁹ To make an object or territory his own, an individual must perform an act of ownership:

The grass my horse has bit; the turfs my servant has cut; and the ore I have digged in any place, where I have a right to them in common with others, become my *property*, without the assignation or consent of anybody.²⁰

This concept is reminiscent of Germanic and feudal legal orders which mandated a symbolic act of ownership, such as the picking of an apple off of a tree, as part of property acquisition ceremonies (see Chapter 1). The influence that those traditions may have had on Locke's philosophy is unclear.

Locke's limitations on property acquisition further intensify the relationship between action and property. Locke argues that a man cannot own more property than he can use. If a man does acquire more possessions or land than he can use and they spoil or go untouched, then he has taken "more than his share," and the excess legitimately belongs to others. If this rule is followed, Locke claims that there is more than enough property for every individual to acquire all he needs or wants.²¹ A comparison to two men drinking from the same river is particularly apt:

No body could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst: and the case of land and water, where there is enough of both, is perfectly the same.²²

Water, a seemingly undiminishable resource in Locke's time, is compared to land to establish its overwhelming abundance if every man only takes what he can use. Again,

Locke equates property ownership to physical freedom; the land a man works is as clearly his as the water that he drinks.

This limitation likely stems from widespread concern during this period for the plight of the lower classes. Scholars and politicians commonly condemned the accumulation of property in few hands. As a result, Locke accused those who possessed more property than they used of taking property that legitimately belonged to others.²³ Francis Hutcheson, Adam Smith's friend and teacher, agreed with Locke, claiming that property ought to "encourage and reward industry"; therefore, Hutcheson argued, the accumulation of unused land could only "prevent or frustrate the diligence of mankind."²⁴ However, Locke and many of his proponents were silent as to the practical method of redistributing excess property.

The vast majority of early Enlightenment thinkers simply repeated Locke's general tenets of property ownership.²⁵ Those who questioned details of his argument or conclusions did so respectfully, and few dared to challenge the status of property as a sacred individual right.

Yet from the outset there were problematic elements to Locke's property philosophy. He himself observed that the creation of a loaf of bread takes many hands, including the oven manufacturer, the lumberjack, and the baker²⁶; who, then, truly owns the bread? In an increasingly industrial world, Locke worried that individuals in manufacturing industries would be denied the products of their labor.²⁷ These issues, however, were left to other Enlightenment thinkers, who reworked Locke's philosophies to apply property rights to a new wave of landless industrialists and workers.

Property and Political Participation

Even before Locke's time, political participation was linked to substantial property ownership (see Chapter 2). In October of 1647, the linkage of political rights with land ownership was challenged in the Putney Debates between the Levellers and state leaders. The Levellers strongly endorsed an expansive franchise which disjoined political participation and land ownership. During the time of the Putney Debates, this would have widened the franchise to include approximately 417,000 men, over a third of the male population.²⁸ During the Putney Debates, Oliver Cromwell and his son-in-law, Henry Ireton, challenged a number the Levellers to explain their proposals.

Fundamentally, the Levellers endorsed the separation of property and politics. They argued that the right to vote should be based on autonomy. Thus, Leveller Maximillian Petty explained that he excluded servants and beggars from the franchise because "they depend upon the will of other men and should be afraid to displease" them.²⁹ Cromwell and Ireton objected to the extension of the franchise, claiming that it would threaten private property because those without significant holdings would vote to destroy property rights.³⁰ The Levellers were individualists, and passionately defended their commitments to property rights. In fact, their primary argument for the inclusion of the landless was that every free man possessed his body as property, and thus, was a property owner.³¹ Because a man was poor, they stated, did not mean that he was unfree or propertyless.³² In response to Cromwell and Ireton's fears, they argued that because property rights are God-given, they cannot be challenged in legislative bodies.³³ The Putnam Debates reveal much about the underlying dissatisfaction with voting rights in the Enlightenment period. This issue received much attention from scholars and activists.

Throughout the eighteenth century, however, a man's wealth continued to dictate his political rights.

Property Rights and Economics

In the sixteenth century, many British economists were convinced that neither politics nor morality had any place in economics. In Thomas Wilson's "Discourse upon Usury," published in 1572, the merchant insists that "merchants' doings must not be overthwarted by preachers and others, that can not skill of their dealings." John Hales elaborates on this philosophy in 1581; he explains that the incentive to work hard can only come about when individuals can be sure to accrue all possible profit from their endeavors.³⁴ Economics was becoming an empirical science devoid of moral content. By the eighteenth century, it was widely understood that Britain's economic achievements were the result of expansive economic freedoms.³⁵

These attitudes were quick to supplement Lockean property treatment. Property was viewed as a means to wealth and industry which had to be protected for the national good.³⁶ Locke himself estimated that a cultivated piece of soil yielded at least ten times more than an unused one; thus, "he who appropriates land to himself by his labour, does not lessen, but increase the common stock of mankind."³⁷ The Lockean property rights were considered critical to British progress.

Economic amoralism was even supported by some Christian denominations, most notably Puritanism. Predestination, the belief that one is selected by God at birth to go to heaven, led Puritans to claim that man's material standing is a direct result of his relationship with the divine. In other words, financial success was considered a sign that one had been selected for salvation. Economic and social prosperity was critical to the

Puritan's worldview. Some Puritans even encouraged the righteous to forego prayers when they interfered with finance.³⁸ Puritans claimed that the poor suffered because they were sinful, or damned. This view was used to argue that a man's station was justifiable because it was determined by his own morality. One critic wrote in 1797 that the lust for wealth was so extreme that "poverty and riches stand in our imaginations in the places of guilt and innocence."³⁹

The Moralization of Economic Theory

In the eighteenth century, economic amorality was challenged by scholars who argued that the riches of the country should also benefit the suffering poor. Expansive economic freedom had certainly made some wealthy beyond measure. However, the plight of a growing number of poor families caused widespread alarm. Thomas Paine described untold riches, yet unspeakable poverty:

When, in countries that are called civilized, we see age going to the workhouse and youth to the gallows, something must be wrong in the system of government. It would seem, by the exterior appearances of such countries, that all was happiness; but there lies hidden from the eye of common observation, a mass of wretchedness that has scarcely any other chance, than to expire in poverty or infamy. Its entrance into life is marked with the presage of its fate; and until this is remedied, it is in vain to punish.⁴⁰

Paine does not simply decry the plight of the poor. His words belie an accusation. Why, in a nation with excessive wealth, are so many abandoned with no prospects for financial success?

In the second half of the eighteenth century, the attitude towards wealth dispersal was transformed. In 1758, Robert Wallace was one of the first Enlightenment thinkers to directly blame the wealthy for the plight of the poor. While some starved in the streets, he complained, others were permitted to "gratify all their whims and fancies." As a result,

education, labor rights, and welfare systems were completely neglected. Without public education, Wallace argued, the poor were incapable of improving their social standing.⁴¹

Dr. Joseph Priestly, Wallace's contemporary, opposed public education and had strong individualist tendencies. However, even he felt the need to suggest government policies to limit alcohol consumption and mandate financial responsibility among the lower classes. Additionally, he believed that property possessed a social value in addition to its individual one; in his words, "every society has a right to apply whatever property is found, or acquired, within itself, to any purposes which the good of society at large really requires."⁴² These sentiments were echoed by later British scholars, such as T. Spence, Dr. Paley, and W. Ogilvie, all of whom proposed different methods of altering property dispersal in the hopes of improving the plight of the poor.⁴³ In 1791, Thomas Paine proposed a steep income tax which was designed to redistribute wealth to the lower classes.⁴⁴

Later in the Enlightenment period, then, the fundamental tenets of economic theory were reworked. Poverty was finally viewed as a problem inherent in an unchecked capitalist system, leading to numerous proposals of systemic change.

Utilitarianism: A Challenge to Individualism

In 1781, Jeremy Bentham published the first comprehensive book on utilitarianism. He was influenced by Joseph Priestly and other thinkers who considered the collective to be worthy of moral consideration. Taking this argument to an extreme, Bentham actually subordinated individual rights to the collective. He denied the existence of individual rights entirely. Instead, in "The Principles of Morals and Legislation," he claims that the state should take only those actions which benefit the greatest possible

number of individuals. This “principle of utility” forms the basis for Benthamite philosophy.⁴⁵

Some modern philosophers, including C.B. MacPherson, have attempted to paint Bentham’s philosophies as individualist “perversion.”⁴⁶ However, in attempting to neatly categorize Bentham as an errant liberal rights philosopher, they fail to see his exceptional contribution to the Enlightenment conflict between privilege and equality. The Lockean world treated individual rights of property owners as sacrosanct; in doing so, it denied property to the lower classes. For decades, politicians and scholars fought to find solutions to the shortcomings of individualism while nonetheless respecting its strict framework of liberal rights. But utilitarianism was not a restatement of individualism; it was a reaction against it. Bentham completely rejected the individualist, rights-based mentality, choosing instead to use property as a source for collective rather than individual advancement.

Bentham’s work influenced a new century of British, French, and American property philosophy. His theories, considered impractical and radical in his own time, nonetheless presented an alternative to Lockean individualism.

Conclusion: The Flaws of British Individualism

British individualism, which drew heavily on property rights as a source for economic and social freedom, was challenged by social reformers and utilitarians. It nonetheless remained the dominant British Enlightenment philosophy; its tenets, as we shall see, had exceptional impact on the American founding fathers. In France, individualism was questioned as a result of wealth disparities which far surpassed those in Britain. As a result, Jean-Jacques Rousseau and other French Enlightenment thinkers

formulated new conceptions of individual and collective rights. These proposals will be outlined in the next section.

French Enlightenment Philosophy

In England, property rights reigned supreme. The French state was concerned less with property than with privilege; any property assurances were created solely to sustain the privileged orders at the expense of the lower classes. Thus, the wealth gap, certainly prevalent in England, was even more pronounced in France. French philosophy focused on the practical treatment of different groups by the state. In Rousseau's work, dedication to individualism was replaced by commitments to equality and communality.

This thesis does not attempt to detail the history or philosophy of eighteenth century France. However, the impact of French Enlightenment thought on the American Constitution is too great to be ignored. The following section provides those pieces of French philosophy deemed most critical to understanding American property treatment. It is therefore a short summary of a far more complex issue.

French Social Orders: A Brief Summary

This section outlines the basics of French social orders in the eighteenth century. It focuses on the plight of the rural worker, whose suffering significantly influenced the development of French Enlightenment thought.

Even as feudalism died out in England, many of its institutions remained in the French countryside. Even into the eighteenth century, French peasants in some regions

remained bound to the land. Most peasants were technically free yet held their land through burdensome tenure systems.

In contrast to the English eighteenth century freeholder, the French peasant's obligations were considerable. Feudal labor rents, called *corvees*, were slowly replaced with fixed payments of produce or money. These money payments, called *cens*, remained quite high.⁴⁷ But payments in produce, or *champart*, were more devastating. *Champart* was most commonly collected when the price of food increased; this occurred in the second half of the eighteenth century. The dues themselves were substantial. Additionally, the serfs were prohibited from reaping their crops until the lord had collected his share. Thus, the crops were often damaged by weather prior to collection, severely reducing their value. Additionally, a lord's peasants were collectively responsible for the payment, which meant that even if a peasant succeeded in reaping a successful crop, his neighbor's failings might nonetheless affect him.⁴⁸

The lord also collected countless indirect fees from his peasants. Upon inheritance or purchase of property, the *lods et ventes* required that a certain fraction of the purchase price be paid to the lord. Additionally, peasants acquiring land through inheritance or purchase owed an *aveu*. This required formal recognition of the lord's right to collect fees and dues; it also included a detailed statement of the conditions under which the land was held. When mistakes were found in this document, it was amended, a costly and complex procedure. Records show that the *aveu* might be amended several times in a single generation. It appears that greedy lawyers would locate errors in the *aveu* to exact money from the peasant.⁴⁹

The peasant was also required to use only his lord's production, sale, and transportation resources. The lord collected fees for the use of his mills, bake-houses, wine-presses, hunting forests, and fishing rivers. When the peasant sold his produce in the market, the lord collected *minage*, a tax on corn sold in the market, *hallage*, a tax on any product sold in the market or even in a private residence, and *etalage*, a tax on any business transaction. The lord also charged a fee for the transport of the peasant's product to the market. Additionally, the lord reserved the right to sell his own product in the market first.⁵⁰

While peasants were technically free to abandon their land, the right of *mainmorte* prevented peasants from granting their land to another without the lord's permission. Additionally, *mainmorte* allowed the lord to take a deceased peasant's land if there was no heir immediately present.⁵¹ While the conditions of land alienation varied, nearly all were sufficiently restrictive as to practically prevent the peasant from leaving his land.

The enclosure movement in France, as in England, was often harmful to the peasant. Rather than raising his oxen on communal pasture, the peasant was faced with the difficulty of growing crops and sustaining plow animals on a small plot; thus, the movement tended to further decrease his productive capacity. Those peasants who might challenge this treatment were faced with law courts completely sympathetic to their lords; the legal system was notoriously biased towards the aristocracy.⁵²

In contrast to the limitations suffered by peasants, French nobles lived a secure and luxurious life. They were virtually exempt from direct taxation.⁵³ The French aristocracy valued excessive luxury, considered a sign of social advancement. Abbe Le Blanc argued that luxury was necessary for personal refinement. Luxury decreased

drunkenness, encouraged industry, promoted art, and enhanced manners; without it, individuals were reduced “almost to the condition of savages.”⁵⁴ Privilege was virtually unchallenged in a system built to fulfill aristocratic needs. Meanwhile, the poor had no real chance of upward mobility. Abject poverty and extreme desperation led to widespread discontentment among the lower classes, and the intellectuals who observed this plight were often persuaded to rethink social philosophies.

French Challenges to Individualism: The Argument for Equality

French Enlightenment thinkers bitterly debated the place of property and privilege within state and social institutions. The Physiocrats passionately advocated individualist property rights. However, individualism was questioned by other thinkers, including Jean-Jacques Rousseau, who claimed equality as the ultimate good of the state, and identified the interests of the community as superior to the rights of the individual.

Echoing English individualism, the eighteenth century French Physiocrats considered property the fundamental value of the state. The Physiocrats traced the source of social and economic inequality to differences in ambition and work ethic. The energetic, industrious, committed worker would inevitably succeed; only those who were lazy relied on the charity of other men. Without an absolute right to protect legally acquired wealth, they claimed, individuals would be disinclined to work hard and society would degenerate into idleness.⁵⁵

Thus, Physiocrats endorsed strict observation of the right to private property. The state, they claimed, was founded to protect private property; they believed that this cause remained its sole purpose. Land was the particular basis of social order and prosperity,

and must therefore be respected at all costs.⁵⁶ The Physiocrats advocated social and economic privilege for landowners.

Charles Montesquieu questioned a system in which the rights of the few transcended the needs of the many. He was torn, however, between his respect for Lockean individualism and the plight of his countrymen. Montesquieu was a frequent visitor to England, and he was a great admirer of individualism.⁵⁷ He settled into a middle position between the Physiocrats and those theorists who intended to dismiss individualism entirely. Montesquieu believed that there existed a natural law from which all legitimate civil laws must follow. He identified property as a fundamental right ensured by natural law.⁵⁸

Montesquieu argued that divergent interests among men existed even prior to the state; it was the government's responsibility to regulate these conflicts and ensure that every individual had the resources necessary to survive.⁵⁹ In contrast to French law, which subordinated the needs of the poor to the rights of the wealthy, Montesquieu passionately endorsed equal treatment for every citizen.⁶⁰ Thus, while conforming to individualist doctrine, Montesquieu did nonetheless encourage the development of basic welfare and an equitable legal system.

French activists nonetheless criticized Montesquieu's views. Property acquisition, they argued, was not a natural endeavor as Montesquieu claimed. Property ensured the place of the privileged in society, and the laws that protected it were, in activist Simon-Nicholas Henri Linguet's words, "a conspiracy against the most numerous part of the human race."⁶¹

The Brissot de Warville argued that France needed to rethink its treatment of property; in light of new social challenges, he said, philosophers needed “to carry the torch of reason into this very obscure part of natural right.”⁶² Like many of his contemporaries, Brissot observed that while some enjoyed untold luxury, others were incapable of satisfying their own hunger. The rights of the poor, he concluded, were not being respected by the state; thus, illegal actions such as robbery were the inevitable result of governmental failings, rather than the isolated infractions of individuals.⁶³

The physiocrats were joined by many French aristocrats who claimed private property as the most fundamental individual right. However, these views were called into question by thinkers such as Brissot and Linguet, who observed that this “right to property” did not encompass the peasant’s right to freely use and dispose of property; nor did it assuage the suffering of the poor. Thus, French philosophy turned more and more to doctrines of equality and collective good, believing that traditional property rights must be challenged if society itself was to be saved. The French therefore illuminated the practical contradiction in Locke’s property philosophy: in a world bereft with social hierarchy, to support absolute property rights is to deny the possibility of real equality.

Rousseau and the State

One of the state’s most adamant critics was Jean-Jacques Rousseau, an exceptionally influential French philosopher of the eighteenth century. Rousseau claimed that the eighteenth century state was caused by the development of private property. As individuals in a state of nature become concerned for the security of their possessions, they begin to crave stability. They become vulnerable to the development of a hierarchical power system; the shrewd and powerful persuade the rest to accept

subordination.⁶⁴ As a result of this trickery, a state is produced which is entirely unconcerned with the common good. Rather, it encourages constant conflicts of interest which taint personal relations with selfishness, ambition, and treachery.⁶⁵ Rousseau bemoans the development of society, to which he attributes poverty, vice, and class conflict. Rather than living in peace, “uncommitted crimes dwell deep inside men’s hearts, and all that keeps them from being carried out is the assurance of impunity.”⁶⁶

Rousseau’s proposed solution to the tragedy of the current state is the development of a legitimate “social contract.” Man must enter into a new community based on consent and common preference.⁶⁷ The purpose of the social contract is to “find a form of association that will defend and protect the person and goods of each associate with the full common force, and by means of which each, uniting with all, nevertheless obey only himself and remain as free as before.”⁶⁸ Within the justifiable state, man enjoys security; however, he is not enslaved by a hierarchical system.⁶⁹

The actions of the state are directed by a sovereign force, which encompasses the “general will” of the entire people. Every individual has a particular will, based on his selfish private preferences.⁷⁰ However, the citizen borne of a legitimate social contract also has a part in the general will, defined as the collective preferences of the entire people.⁷¹ No citizen will refer to his particular preferences for his contribution to the general will. Rather, “the particular or individual will should be null” so that “the general or sovereign will should always be dominant and the sole rule of all others.”⁷² The statutes generating from the general will are the only legitimate law,⁷³ and whoever refuses to obey these laws can be forced into submission by society.⁷⁴

The general will cannot be carried out by the untrained and disorganized citizens who generate it; thus, Rousseau mandates the creation of government institutions.⁷⁵

While Rousseau suggests that multiple types of government can express the general will,⁷⁶ he makes it clear that a democracy is most likely to be successful.⁷⁷ To be legitimate, the government must express no preference beyond that of the general will.⁷⁸

Neither the government nor the social contract may challenge natural equality. Rousseau's ideal state considers all men equal "by convention and by right."⁷⁹ No individual, even a king, may place himself above the laws of the sovereign.⁸⁰ Also, no single individual may be singled out for privilege or ill treatment by the state.⁸¹ Rousseau's social contract is in direct response to the social and economic inequality he condemned within the French monarchic state.

Rousseau's social contract stands in strict opposition to English individualism. It requires man to sacrifice his entire being to the community. Rousseau does prevent the sovereign from imposing unnecessary burdens on subjects. But if the sovereign requires a man's property or freedom, then he must willingly give it.⁸² Without this sacrifice, Rousseau argues, the social contract is meaningless. The citizen must submit completely to the whole. This seeming disregard for individual rights stems from Rousseau's conviction that every individual is better off with the social contract than without.^{83*}

* It may easily be asked: Why does Rousseau allow man to return to society, if he was at his best and most natural in the state of nature? Why is the social contract necessary? Rousseau implies that man, once in a state, loses his capacity to exist in a state of nature. But more importantly, for all his talk of the nobility and purity of the uncivilized man, Rousseau speaks lovingly of a state in which men might enhance themselves beyond their natural tendencies. Ultimately, then, he prizes those interactions among men which nurture, assist, and educate. He simply yearns for a state in which those qualities are not joined by subjugation, corruption, and conquest.

Rousseau's Treatment of Property

Rousseau's treatment of property stems directly from his political philosophies. He names property as the singular source of injustice and perversion; at the same time, he considers it a critical element of individual advancement which should be available to all.

Unlike Locke, Rousseau claims that property does not exist in the state of nature. The uncivilized man cannot even conceive of landed property: "Beyond where his eye can see or his arm can reach, there no longer is either right of property for him."⁸⁴ The first man who enclosed a piece of land and claimed it as his own was both the father of society and the condemner of mankind.⁸⁵ Men claimed property, and then found that they needed another's aid to work it.⁸⁶ Interdependence soon became subjugation. The shrewd used property to subdue the simple and all men became interlocked in a constant struggle for dominance.⁸⁷ To have luxuries while another man begged for food was considered prosperity; ultimately, man was as invested in his neighbor's failings as he was in his own successes.⁸⁸

Rousseau rages against the social and economic inequality in France. He accuses the rich of living in such luxury that the poor have nothing: "Our dishes require gravies; that is why so many sick people lack broth. We have to have liquors on our tables; that is why the peasant drinks only water. We have to have powder for our wigs; that is why so many poor people have no bread." He blames the wealthy for the plight of the lower classes. He condemns his adversaries, regretting only that "the culpable delicacy of our language prevents me from going into details on this score which would make them blush at the cause they dare defend."⁸⁹ He also criticizes the social structure, which enables the

aristocracy to accumulate wealth while preventing the poor from having that same opportunity.⁹⁰

Rousseau denies that any natural right to property existed prior to the creation of the state. Additionally, he places all property in the hands of the sovereign.⁹¹ There is some suggestion that Rousseau believed that individuals should have some fundamental rights to property. He acknowledges the “right of the first occupant” to possess any piece of land. However, his restrictions on this right are telling. He states that a man can only possess as much land as he needs to “subsist”⁹²; this qualification is far more stringent than Locke’s claim that men can only own as much property as they can use. Rousseau also echoes Locke’s proposal that property is only legitimately possessed when it is worked by the owner.⁹³

Thus, Rousseau condemns property as the root of social evil; yet he claims it as a qualified right. Practically, then, Rousseau likely believed that property was a necessary evil within even the ideal state; however, he strongly supported the dispersal of property throughout French society.

Conclusion: The French Revolution and the Triumph of Equality

In 1789, the French people revolted against state and privileged orders. The French Revolution was caused by extreme financial desperation and widespread frustration with economic privilege.⁹⁴ The intellectuals who led the uprising endorsed social and economic equitability.⁹⁵ The resultant Declaration of Human Rights plainly mandated equal treatment: “Men are born, and always continue, free and equal in respect of their rights. Civil distinctions, therefore, can be founded only on public utility.”⁹⁶ Enlightenment French philosophy therefore culminated in the beginning stages of the

French Revolution, which sharply questioned the legitimacy of a king who protected aristocratic property rights at the expense of equal opportunity.

¹ Larkin, Paschal. Property in the Eighteenth Century: With Special Reference to England and Locke, 1969, p. 2-3.

² Larkin, p. 21-22.

³ Hobbes, Thomas. Leviathan. 1651. Oxford University Press, 1998, ch. 18 p. 117.

⁴ Hobbes, ch. 17 p. 114.

⁵ Hobbes, ch. 18 p. 117.

⁶ Hobbes, ch. 26 p. 176.

⁷ Hobbes, ch 24 p. 165.

⁸ Hobbes, ch. 24 p. 167.

⁹ Hobbes, ch 39 p. 311.

¹⁰ MacPherson, C.B. Property: Mainstream and Critical Positions, 1978, p. 1.

¹¹ Hobbes, ch 13 p. 82.

¹² Hobbes, ch 15 p. 103.

¹³ Locke, John. A Letter Concerning Toleration. 1689. Prometheus Books, 1990, p. 13.

¹⁴ Locke, A Letter Concerning Toleration, p. 19.

¹⁵ Locke, A Letter Concerning Toleration, p. 19.

¹⁶ Larkin, p. 61.

¹⁷ Larkin, p. 58.

¹⁸ Larkin, p. 43.

¹⁹ Locke, John. Second Treatise of Government. 1764, ch. V, p. 18.

²⁰ Locke, John. Second Treatise of Government. ch. V, p. 19.

²¹ Locke, John. Second Treatise of Government. ch. V, p. 21.

²² Locke, John. Second Treatise of Government. ch. V, p. 21.

²³ Larkin, p. 64.

²⁴ Larkin, p. 96-97.

²⁵ Larkin, p. 83.

²⁶ Larkin, p. 67.

²⁷ Larkin, p. 64.

²⁸ MacPherson, p. 114.

²⁹ MacPherson, p. 123.

³⁰ MacPherson, p. 127.

³¹ MacPherson, p. 148.

³² MacPherson, p. 149.

³³ MacPherson, p. 127.

³⁴ Larkin, p. 31.

³⁵ Larkin, p. 111.

³⁶ Larkin, p. 40.

³⁷ Locke, John. Second Treatise of Government. ch. V, p. 23.

³⁸ Larkin, p. 87.

³⁹ Larkin, p. 89.

⁴⁰ Paine, Thomas. Rights of Man. 1791. Penguin Books, 1985, p. 218.

⁴¹ Larkin, p. 124-125.

⁴² Larkin, p. 126.

⁴³ Larkin, p. 128-129.

⁴⁴ Paine, p. 236-251.

⁴⁵ Bentham, Jeremy. The Principles of Morals and Legislation, 1780. Amherst, New York: Prometheus Books, 1988, ch. I p. 3.

⁴⁶ MacPherson, p. 2.

⁴⁷ Larkin, p. 205.

⁴⁸ Larkin, p. 208.

-
- ⁴⁹ Larkin, p. 209.
- ⁵⁰ Larkin, p. 211.
- ⁵¹ Larkin, p. 207-208.
- ⁵² Larkin, p. 211.
- ⁵³ Larkin, p. 209.
- ⁵⁴ Larkin, p. 188.
- ⁵⁵ Larkin, p. 200.
- ⁵⁶ Larkin, p. 198.
- ⁵⁷ Larkin, p. 176.
- ⁵⁸ Larkin, p. 193.
- ⁵⁹ Larkin, p. 194.
- ⁶⁰ Cassirer, Ernst. The Philosophy of the Enlightenment, 1951, p. 243.
- ⁶¹ Larkin, p. 194-195.
- ⁶² Larkin, p. 196.
- ⁶³ Larkin, p. 195-196.
- ⁶⁴ Rousseau, Jean-Jacques. "Discourse on the Origin and the Foundations of Inequality among Men." 1754. Cambridge University Press, 1997, p. 173.
- ⁶⁵ Rousseau, Jean-Jacques. "Preface to *Narcissus*." Circa 1750. Cambridge University Press, 1997, p. 100.
- ⁶⁶ Rousseau, Inequality, "Preface to *Narcissus*," p. 101.
- ⁶⁷ Cassirer, p. 260.
- ⁶⁸ Rousseau, Jean-Jacques. "Of the Social Contract." 1762. Cambridge University Press, 1997, p. 50.
- ⁶⁹ Rousseau, "Of the Social Contract," p. 54.
- ⁷⁰ Rousseau, "Of the Social Contract," p. 52.
- ⁷¹ Cassirer, p. 260-261.
- ⁷² Rousseau, "Of the Social Contract," p. 87.
- ⁷³ Rousseau, "Of the Social Contract," p. 67.
- ⁷⁴ Rousseau, "Of the Social Contract," p. 53.
- ⁷⁵ Rousseau, "Discourse on the Origin and the Foundations of Inequality among Men," p. 117.
- ⁷⁶ Rousseau, "Of the Social Contract," p. 83.
- ⁷⁷ Rousseau, "Discourse on the Origin and the Foundations of Inequality among Men," p. 115.
- ⁷⁸ Rousseau, "Of the Social Contract," p. 87.
- ⁷⁹ Rousseau, "Of the Social Contract," p. 56.
- ⁸⁰ Rousseau, "Discourse on the Origin and the Foundations of Inequality among Men," p. 115.
- ⁸¹ Rousseau, "Of the Social Contract," p. 63.
- ⁸² Rousseau, "Of the Social Contract," p. 61.
- ⁸³ Cassirer, p. 262-263.
- ⁸⁴ Rousseau, Jean-Jacques. "Essay on the Origin of Languages." 1743. Cambridge University Press, 1997, p. 269.
- ⁸⁵ Rousseau, "Discourse on the Origin and the Foundations of Inequality among Men," p. 161.
- ⁸⁶ Rousseau, "Discourse on the Origin and the Foundations of Inequality among Men," p. 167.
- ⁸⁷ Rousseau, "Discourse on the Origin and the Foundations of Inequality among Men," p. 169.
- ⁸⁸ Rousseau, Jean-Jacques. "Last Reply." Circa 1750. Cambridge University Press, 1997, p. 71.
- ⁸⁹ Rousseau, "Last Reply," p. 70.
- ⁹⁰ Rousseau, "Preface to *Narcissus*," p. 101.
- ⁹¹ Larkin, p. 191.
- ⁹² Rousseau, "Of the Social Contract," p. 55.
- ⁹³ Rousseau, "Of the Social Contract," p. 55.
- ⁹⁴ Larkin, p. 213.
- ⁹⁵ Furet, Francois. The French Revolution, 1770-1814, 1996, p. 87.
- ⁹⁶ The French Declaration of the Rights of Man and of the Citizen.

Chapter 4

A History of American Property Treatment

In America, property values were reformulated due to a confluence of geographical, social, and political factors that differed greatly from the British historical experience. These factors created an environment which welcomed republican philosophies. The following chapter outlines these trends during three periods in early America: the colonial era, the revolutionary period, and the Confederation.

The Colonial Era

“The hopes of having land of their own & becoming independent of Landlords is what chiefly induces people into America.”

(Cadwallader Colden, New York surveyor general, 1766)¹

The colonial era set the groundwork for the development of uniquely American property conceptions. Britain’s interest in the colonies was purely mercantile; the New World was a source of income and cheap resources. However, relative autonomy and a surplus of property encouraged the rejection of traditional English practices. These different perspectives sometimes sparked conflict between Britain and her colonists, most evident in the failed Dominion of New England experiment. Meanwhile, colonial governments struggled to thrive in the harsh New World, and they were often compelled to compromise individual property rights for the greater good. The colonial era was characterized by infrequent but telling conflict between the colonists and their mother country, as well as the semiutilitarian treatment of property by colonial governments.

British Mercantilism and its Effects on Colonial Property

The British government intended to use America solely as a source for cheap resources. The exploration of the New World coincided with unprecedented population growth and the first pangs of the industrial revolution. Britain and her neighbors were convinced that resource and land scarcity made accumulation crucial to prosperity. Thus, Britain supported national companies who established geographical monopolies.² The Crown would then attempt to import as many resources and agricultural products into the British Isles as possible, freeing up domestic workers to support industrialization.³ This was the impetus for sustaining a monopoly on American trade. The Navigation Act of 1660 mandated that all American goods be shipped through Britain.⁴ Britain viewed America as a resource; whose residents were possessions of the Crown to be used for the good of the Mother Country.

Colonists faced significant limitations on the possession and use of their land. The Crown charter gave an individual or company sole rights to huge expanses of land; Virginia and Massachusetts were both founded by businesses seeking profit.⁵ The British government also attempted to enforce the quitrent system. As discussed in Chapter 1, the quitrent system supports a tenurial ownership of land; the owner must pay an annual fee to continue to possess his land. In the colonies, these fees were demanded either by the Crown or the proprietary of the province. They ranged from as much as a penny an acre to as little as a shilling (twelve pennies) per hundred acres.⁶ However, the difficulties of enforcing British policy in America and the realities of colonial life impeded British attempts to capitalize on American territory.

The Unique Colonial Situation

The geography of America, the attitudes that the colonists brought to their new land, and expansive enfranchisement and subsequent empowerment of the general populace encouraged the subversion of British attempts to control American land ownership. The availability of land in colonial America predictably redefined the relationship between individual and property. British property conceptions were developed on a small island; America, on the other hand, possessed seemingly unlimited land and resources. America's size meant an inevitable surplus of property, deemphasizing its value as a scarce resource.

Attitudes towards land ownership were informed by the ease of land accumulation in colonial America. Colonies adopted generous terms for land possession. The headright system, adopted in colonies outside of New England, guaranteed every immigrant a significant tract of land. Even indentured servants were often given land after their terms of service. In Virginia, settlers were promised fifty acres. A new colony might be even more generous; in 1689, Carolina offered immigrants one hundred fifty acres. This system continued well into the seventeenth century.⁷ Even after the headright system died out, land was cheap and easy to come by. In fact, many settlers sidestepped the law entirely and simply took over vacant land; these "squatters" often used their occupancy to gain formal land titles.^{8*} Throughout the colonial era, it remained true that every

* Differences in the ease of transportation and the arability of land led to significant distinctions in the accumulation of land. In New England, where the rivers had rapids and waterfalls, and the soil was difficult to cultivate, colonists often had to focus much time and effort on the development of a small area of land; thus, early colonists in the north often had to forego dreams of infinite land for the reality of compact settlements. However, the southern colonies enjoyed wider, longer, and more navigable rivers, as well as fertile soil. In the south, therefore, colonists generally accumulated more land and developed greater need for labor, whether hired or enslaved (Jameson, p. 31). Ultimately, then, New England had few large estates and its aristocracy tended to consolidate in cities; on the other hand, the southern aristocracy developed on

immigrant could easily possess whatever land he could manage; in this context, the quitrent system seemed not only unfair but somewhat ridiculous.

The Colonial Response to British Policies

Colonists tended to reject British mercantilist policies. They maintained that their property deserved the same protections of eminent domain that existed in Britain. In 1648, the “Laws and Liberties of Massachusetts” declared that “no mans goods or estate shall be taken away from him...unless it be by the vertue or equity of some expresse law of the Country.” This sentiment was echoed in the policies of most colonial legislatures, who saw themselves as inheritors of British property traditions.

British tradition linked property ownership to political enfranchisement; this custom was adopted in the colonies with vastly different results. New England, which tended towards smaller estates, enacted the forty-shilling freehold standard that had stood in Britain for three hundred fifty years; most New England colonists, however, possessed a freehold that would rent for forty shillings, and the electorate was quite expansive. The southern colonies more often required ownership of a certain amount of acres, generally fifty, and this too included a large number of white male inhabitants. By generally adhering to British enfranchisement traditions, Americans nonetheless developed a tradition of expansive suffrage, which would continue throughout the nation’s history.

When Britain attempted to enforce mercantilist or even traditional quitrent policies in the colonies, they were met with widespread resistance. The quitrent system represents one of the first failures of the British government to effectively govern American colonists. Colonists insisted that the tenure system was antithetical to their new

extensive tracts of land and had a dependency on slave labor. These distinctions led to a differentiation in attitudes about property, particularly slave property, between New England and the rest of the colonies.

way of life.⁹ It was for the most part easy to avoid, since collection was inconstant and somewhat halfhearted. When serious attempts were made to collect quitrent taxes, colonists often refused to pay or rebelled against the tax collectors.¹⁰ New England was particularly opposed to the quitrent system, and it was never successful there. Virginia, Maryland, and Pennsylvania were the only colonies where the quitrent system was ever widely recognized.¹¹ The inconsistency and ineffectiveness of the quitrent tax emboldened colonists' beliefs in outright land ownership; this development had an incalculable impact on the subsequent growth of colonial resistance to British taxation.

The Dominion of New England was another failed attempt to subdue the colonies. In 1686, Sir Edmund Andros became the royal governor of the Dominion of New England. While the Dominion had an appointed council, it did not have the customary representative assembly. Andros was charged with fully subjecting the New England colonies, as well as New York, to British rule. However, when Andros attempted to collect taxes in Massachusetts, the colonists claimed that taxation was illegitimate without representation. They cited the Magna Carta and proceeding property doctrine, claiming that they deserved the rights of Englishmen. Andros collected the taxes by force¹²; however, the seeds of an important argument were sown.

Andros also attempted to reestablish the quitrent system, further enraging the colonists. He mandated that all land titles be reviewed; he also charged a fee for any new titles. Andros enforced Britain's claim that the colonists had only a tenurial right to their land. However, colonists had become accustomed to *de facto* outright land ownership. The Dominion of New England was short-lived. When news of the Glorious Revolution reached America, Boston mobs overthrew the Dominion and arrested Andros.¹³ The

relationship between Britain and its colonies was irreparably damaged; colonists became sensitive to any interference with their property rights.

Property Treatment within Colonial Governments

Despite resistance to British interference with land ownership, colonists faced hardships that enforced community and supported limitations on the possession, accumulation, and utilization of wealth. Thus, colonial governments often enacted semiutilitarian land policies.

The Value of Community in the New World

On November 11, 1620, the first British settlers in the New World emphasized cooperative efforts in the Mayflower Compact. Rather than stressing individual opportunity or property rights, the Compact stressed the importance of community. The Pilgrims agreed to:

combine ourselves together into a civill body politick; for our better ordering, & preservation...and by vertue hereof to enacte constitute, and frame shuch just & equall lawes, orginances, Acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for the generall good of the Colonie: unto which we promise all due submission and obedience.¹⁴

The Puritan colonies that spread across New England stressed community cohesion. Early settlements granted land to communities rather than individuals, mediating this transaction through townships and church congregations. Land distribution was based on community needs. In some cases, villagers worked in commonly owned fields. This practice died out relatively quickly¹⁵; however, the cohesion of Puritan communities remained an asset in colonial America.

Groups that placed primary emphasis on individual efforts often faced resistance. In the seventeenth century, Dutch settlers to the Hudson River Valley claimed large tracts of land, and then divided it up into tenant farms for other settlers to use. These “patroonships” created a land monopoly maintained a few families who refused to give land titles to other colonists. Many colonists relocated as a result; others remained but pressured New York to discontinue the practice. In 1766, the controversy caused widespread agrarian riots.¹⁶ Officials enforced the quitrent system in order to encourage owners to sell their land.¹⁷ Colonists resisted both British and domestic attempts to deprive them of land rights.

Colonial Labor and Land Policies

The colonies also emphasized the importance of labor to land rights. Following Lockean principles, colonial governments often linked legitimate ownership to settlement and improvement. Headright grants often mandated land improvement. Unsettled or unimproved land was subject to repossession or sale, particularly in New England.¹⁸ Such restrictions ensured that private land contributed to economic development.

The hardships of colonial life made further restrictions on private property necessary. Policies often reflected English practices. Colonial governments regulated economic activities that were critical to growth. For example, the colonies supported transportation systems such as ferries. Other enterprises important to the common good, such as gristmills, bread baking, and moneylending, were heavily regulated.¹⁹ Price constraints were critical in small towns where one greedy merchant could imperil the economic welfare of the entire community.

Colonial governments also granted limited monopolies to reward new ideas. Patent laws supported individuals' right to intellectual property, allowing an inventor or writer sole access to new concepts for a limited time. In 1648, Massachusetts established patent laws intended to allow monopolies for "such new inventions that are profitable for the Countrie." In 1756, South Carolina recognized Adam Penington's right to exclusively market "a new method of cleaning rice" for fourteen years, advocating "that all due encouragement be given to ingenuity and industry when it tends to the public good."²⁰

Colonial emphasis on community benefits at the expense of compensation laws is distinct. Under British law, property can only be taken from an individual by the state when he is fully compensated. In colonial America, most colonies only compensated individuals when improved land was taken for public use. Compensation became more frequent as land became scarcer.²¹ Eminent domain was even delegated to private individuals. For example, mill acts often allowed an individual to flood his neighbor's field in the construction of a dam for a gristmill. Sometimes, the individual had to compensate his neighbor; other times, he had to institute judicial proceedings to lawfully take his neighbor's land. Virginia even extended this right to businesses.²² Eminent domain was used unreliably and extended to private pursuits when these actions benefited the common good.

In 1776, Adam Smith's "Wealth of Nations" verbalized a well established belief in the importance of free market economies. Smith proposed that individuals acting in their own self-interest will collectively produce well-functioning economies.²³ This concept had already spread to America. Economic development had reached a point where the need for semiutilitarian property treatment was no longer evident. Monopolies were

considered particularly detrimental to free economic activity.²⁴ Commitment to free markets led to some disapproval of colonial government intervention in private economic enterprise. A 1763 article in the Boston Evening Post emphasized that colonial governments should “not deprive us of the liberty common to Englishmen.”²⁵ Thus, many regulatory practices were diminished or abandoned. However, America maintained a commitment to the public good that continued in the republican political theories of the Constitution age.

Therefore, colonial traditions fostered a deep commitment to absolute land ownership, tempered by collective values that allowed some expression of utilitarianism in government economic policy.

The Revolutionary Period

One day in the 1770s, a man yearning to escape his difficult wife wandered from his town in the remote forest of the Kaatskill mountains of New York. He encountered a group of men dressed in traditional Dutch clothing who were playing ten-pins. Shortly thereafter, this protagonist fell asleep, only to wake up twenty years later and return to a town that was astonishingly different. The villagers were dressed in strange clothing. They spoke of strange events. And the picture of King George III that had hung above doorway at the local inn was replaced with a portrait of a man clad in blue, with a sword in his hand and a cocked hat on his head. The caption below the new portrait read, “GENERAL Washington.”²⁶ This folk tale, common to this day in the Catskill Mountain region, was written by Washington Irving in 1819. Rip Van Winkle’s reaction upon

returning to his town after a mere twenty years highlights the astounding changes that occurred in the few years during and directly after the American Revolution.

The Revolutionary period entailed two related struggles; first, a domestic struggle which pitted the common people against a newly formed American aristocracy, and second, the international struggle that occurred when the colonies opposed British property policies and ultimately declared their independence. While the domestic struggle is often deemphasized in the history books, it remains perhaps the most substantive challenge to traditional British property treatment. Furthermore, the Revolution itself must be understood in the context of these domestic changes. The political empowerment of the common people was a result of preceding economic and social empowerment. The Revolution challenged the British Empire, but it was also the first realization of American common empowerment. While the colonists raged against British infringements on their property rights, they nonetheless stripped loyalists of their property, depriving much of the aristocracy of their landed estates and redistributing large tracts of land. Ultimately, then, the American Revolution posed a distinct challenge to traditional British property considerations even as it purportedly fought to maintain them.

Economic and Political Transformation

In the mid-eighteenth century, America was more important to Britain than ever before. Britain was engulfed in the Industrial Revolution, and also facing an ongoing struggle with France for European dominance. By 1760, Britain was importing more grain than it exported; for the first time in the eighteenth century, Britain was dependent on imports to meet the demand for food.²⁷ Meanwhile, despite British mercantilist

policies, the American economy was expanding rapidly. In the years following 1745, American commerce encompassed nearly half of English shipping. Twenty-five percent of English exports went to America; this number was even higher for Scotland. From 1747 to 1765, colonial exports to the British Isles doubled, rising from about 700,000 pounds to 1.5 million pounds. The value of colonial imports was still higher; from 900,000 pounds in 1747, it grew to more than two million by 1765.²⁸ The increasing demand for American products raised prices and opened the economy to a new generation of eager working-class merchants.

The American population was also expanding rapidly; around 125,000 people left Britain for the colonies between 1764 and 1776.²⁹ In 1700, the population of the colonies had been a mere twentieth of the combined populations of Britain and Ireland; in 1770, this figure had risen to nearly one fifth. The population continued to skyrocket throughout the Revolutionary period; the census of 1790 counted 3,699,525 white Americans. Concurrent economic and population booms led Benjamin Franklin and other optimists to predict that America, not England, would one day become the center of the British Empire.³⁰ The effects of this economic expansion reverberated throughout the American social hierarchy, even as the increasingly desperate British situation pressured them to fully subjugate their colonies.

The Economic Empowerment of the Common Man

The growing demand for American goods, both in America and in Britain, drove prices up. The average American's standard of living increased dramatically. Seeking better deals, British merchants began dealing with small farmers directly, rather than going to the larger plantations. By the 1760s, a London merchant company would

commonly deal with as many as one hundred fifty traders in a single port. Small farmers quickly formed their own relationships with buyers. For example, tobacco farmers in the Chesapeake area profited greatly when Scottish “factors,” or store keepers, spread throughout Virginia and Maryland.³¹ By doing business directly with the buyers, these farmers became economically autonomous. Thus, small farmers were economically empowered as a result of increased British demand for goods.

The need for nonagricultural labor, such as shoemaking and carpentry, drove wages up. Trench Tilghman, who had been charged with finding labor for George Washington’s home in Mount Vernon, observed that labor was scarce, and that those carpenters who were available to work demanded no less than the “high daily wages given to such tradesmen here.” He was shocked to discover that “such is the demand for carpenters and masons, that the master builders in those branches who are settled here, in order to entice the newcomers to give them a preference, will agree to release a four years’ indented servant at the expiration of one year and a half.”³² American workers, on farms and in cities, enjoyed improved standards of living.

Those who came to America still observed a ready availability of land. Thomas Hutchins, called “the first geographer of the United States,” reported that colonized America was composed of 589,000,000 acres of land and 51,000,000 acres of water. West of the colonies, 220,000 acres were considered public domain. All told, more than a third of accessible American land was unoccupied by white colonists.³³

Europeans would also discover the relative nonexistence of an “idle rich,” common to European nations.³⁴ Some did have more than others, but they lacked unalterable economic or political power monopolies. Any white man who was willing to

work could become a successful farmer, or, if he wished, a carpenter, shoemaker, or other laborer; as a result, he would be given some voice in government. Colonial enfranchisement was therefore remarkably expansive, and economic empowerment coincided with political empowerment. Thus, the availability of land eased the enfranchisement of the American working class.

The Political Empowerment of the Common Man

When Rip Van Winkle returned to his town after twenty years, he was astonished at the new sentiments in his small town:

The very character of the people seemed changed. There was a busy, bustling, disputatious tone about it, instead of the accustomed phlegm and drowsy tranquility. He looked in vain for the sage Nicholas Vedder, with his broad face, double chin, and fair long pipe, uttering clouds of tobacco-smoke instead of idle speeches; or Van Bummel, the schoolmaster dolling forth the contents of an ancient newspaper. In place of these, a lean, bilious-looking fellow, with his pockets full of handbills, was haranguing vehemently about rights of citizens – elections – members of congress – liberty – Bunker’s Hill – heroes of seventy-six – and other words, which were a perfect Babylonish jargon to the bewildered Van Winkle.³⁵

Irving’s description here highlights the development of common empowerment as the source of a drastic change in social ordering of Rip Van Winkle’s town. The source of knowledge is no longer the elite; Nicholas Vedder the patriarchal landlord and Van Bummel the schoolteacher have been replaced with the man on the street handing out handbills that all can read and understand. There is also a greater sense of action; Irving describes the general tone as “busy, bustling, disputatious,” rather than “the accustomed phlegm and drowsy tranquility.” The economic and political empowerment of America’s working classes challenged aristocratic values.

While the landed aristocracy had no official governing role, they nonetheless maintained a respected place in colonial political systems. New landed aristocracies quietly laid the foundations for minority rule within democratic institutions; for example, although back-country farmers made up over half of the total white population of colonial America, they had to fight for representation in far-away legislatures and were seldom given more than a disproportionate few representatives.³⁶ Colonial governments would then impose taxes and other unpopular measures without impunity.

Rebellions against minority rule were uncommon but significant in the colonial era. Bacon's Rebellion in 1676 had been the first. A century later, the Regulator Movement in the Carolinas and tenant farmer rebellions in New York and New Jersey revealed widespread discontent. More rebellions threatened to break out when legislatures dominated by creditors refused to allow the creation of paper money to help debtor farmers. The townspeople similarly rioted from time to time, although their causes were more uncertain.³⁷

Workers were quick to draw a connection between the complaints that their colonies sent to their king and the conflicts that they had with their own legislatures.³⁸ As a result, there were widespread challenges to aristocratic political dominance. Working class men even became more likely to run for legislatures themselves; for example, the Virginia House of Burgesses saw a marked increase in the number of contested elections during this era.³⁹

One of the most astounding results of common political empowerment was the virtual elimination of many British property traditions, including primogeniture, entails, and hunting laws. British tradition held that in the absence of a will, a man's property

would pass solely to his eldest son. Furthermore, families could entail their land, so that it could not be taken, sold, or even voluntarily given away. The laws of primogeniture and entail tended to maintain landed aristocracy by avoiding the breakup of their vast estates. Fifteen years after the Revolution, every single state had abolished laws of primogeniture, allowing all direct descendants (including women, in all but two cases) equal shares in the inheritance.⁴⁰ Hunting laws were also deemphasized during this same period. New constitutions in Vermont and Pennsylvania granted the right to hunt on unenclosed private land, breaking sharply with British property tradition.⁴¹

Thomas Jefferson was instrumental in abolishing Virginian primogeniture laws. In his autobiography, he argued that primogeniture tended to retain political power in the hands of the few; the elder sons who inherited their father's estates and added to them perpetuated "a Patrician order, distinguished by the splendor and luxury of their establishments." After primogeniture ended, the political capital of each heir was diminished. This created "an opening for the aristocracy of virtue and talent" to replace that of wealth and privilege.⁴² The elimination, completely or in part, of these three British land traditions highlights popular empowerment and foreshadows the decline of the landed aristocracy in Revolutionary America.

As the next section will outline, the colonial aristocracy was instrumental in inciting, informing, and channeling common sentiment against British colonial property policies. However, the aristocracy realized that their calls for equal representation in the British government were informing a call for domestic equality. The defection of large swaths of colonial aristocracy to the Loyalist side is a direct result of pre-Revolutionary trends towards common empowerment.⁴³ However, enough of the colonial aristocracy

remained committed to independence, and in their hands the Revolution approached with remarkable swiftness.

The Breakdown of Relations between Britain and America

It is common to trace the origins of the Revolutionary War to the Seven Years' War (1756-1763). While the economic and political empowerment highlighted above was critical, it is nonetheless true that the Seven Years' War sparked a series of events which made Britain even more determined to control her colonies. British regulations caused an outpouring of anti-British sentiment in America that culminated in revolution – and all, it seems, over the right to own and use property.

The Seven Years' War brought several British officials to America; they observed shocking levels of noncompliance with British policy, which was reported back to the crown. William Pitt and other Crown officials attempted to enforce existing law through a series of limited reforms⁴⁴; however, these reforms did little to curb rampant disregard for Crown policy in the colonies.

At the same time, the Seven Years' War sapped Britain's already-diminished resources and capital. By 1763, the war debt had reached 137 million pounds. The annual interest alone was five million pounds. A British peacetime budget was at this time only around eight million pounds per year. The new territories acquired by Britain were deemed to require particular oversight even after the war, since they were not yet inhabited by loyal Englishmen. The establishment of a standing army in America was expensive (about 300,000 pounds a year),⁴⁵ but it also created unease throughout the old colonies. Additionally, the aftereffects of the war created an economic slump which

adversely affected both the British and the American economies.⁴⁶ Meanwhile, Britain decided to hold the Americans accountable for some of the war costs.

Taxation without Representation

The Sugar Act of 1764 was the first new measure imposed on the colonies. It was designed to discourage smuggling and corruption in American ports. The authority of customs officials was expanded and protected, and the vice-admiralty courts were given wider jurisdiction over customs violations. Search warrants, or “writs of assistance,” were encouraged. Nearly all American merchants were required to post bonds and obtain certificates of clearance, creating a complex bureaucratic system that was difficult to navigate. The British navy was also given new powers to search American ships. Parliament added several key goods to the list of colonial products which had to be transported directly to Britain.⁴⁷

These measures were a huge blow to merchants accustomed to subverting British policies; furthermore, the bureaucratic entanglements adversely affected a considerable subset of the population which ranged from wealthy aristocrats to working-class farmers. In its first unified response to British policy, the assemblies of eight colonies sent petitions to England which claimed that the Sugar Act was hindering the American economy.⁴⁸

Parliament then passed the Stamp Act of 1765 with an overwhelming majority. The Stamp Act placed a tax on nearly every form of paper used in the colonies, including legal documents, newspapers, and almanacs. This was the first direct tax that the British government had ever imposed on the colonies,⁴⁹ and it was immediately met with resistance. The Stamp Act Congress, which met in October 1765 and was comprised of

thirty-seven delegates from nine colonies, sent formal declarations to Britain denying that Parliament had a right to tax them. The Stamp Act Congress declared that “it is inseparably essential to the freedom of a people, and the undoubted right of Englishmen, that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives.”

The Stamp Act Congress declaration also argued that “the people of these colonies are not, and from their local circumstances, cannot be represented in the House of Commons in Great Britain.”⁵⁰ The declaration claimed that Parliament could not possibly have a legitimate claim to tax the colonies under any circumstances. This last concept challenges not only direct taxation of the colonies, but the very crux of British mercantilism.

The concurrent domestic and international disputes, which in the first case pitted the American aristocracy against the working class, and in the second, unified both against the British government, were equally fierce until this critical juncture. The colonists were allied in their outrage. The merchant aristocracy published fiery rhetoric about self-government to encourage rioting.⁵¹ On August 14, 1765, a mob destroyed the office of Andrew Oliver, the stamp distributor for Massachusetts. After they attacked his home, he promised not to enforce the Stamp Act. The rioting spread to the other colonies and local groups overwhelmed Crown enforcement.⁵² Middle-class merchants took the opportunity to form an intercolonial group known as the “Sons of Liberty,” which kept consistent correspondence and coordinated efforts to sabotage British interests.⁵³

Overwhelmed by the enormity of colonial opposition, Britain tried to maintain theoretical authority over her colonies. Even as it repealed the Stamp Act, Parliament

asserted that it had the right to legislate for the colonies “in all cases whatsoever.”⁵⁴ The Townshend duties of 1767 indirectly taxed imports, in the tradition of the Sugar Act which was hated but followed. Throughout this period, these import duties raised less than a tenth of the annual cost of maintaining a standing British army in America.⁵⁵

Despite reluctant acceptance of the Sugar Act, the Townshend duties were met with renewed resistance. The difference in colonial reactions to these similar laws highlights the extent to which the relationship between Britain and the colonists had been altered in a remarkably short time. Boston led a boycott of British imports, which by 1769-1770 had reduced British sales to the northern colonies by almost two thirds.⁵⁶

In February 1768, the Massachusetts House of Representatives issued a “circular letter” to the other colonial legislatures which rejected the legitimacy of the Townshend duties based on the lack of American representation in Parliament. Secretary of state of the American Department Lord Hillsborough ordered the assembly to revoke the letter. However, the Massachusetts House of Representatives voted ninety-two to seventeen to uphold it. As a result, Governor Francis Bernard dissolved the assembly, which sparked mob violence and the meeting of various unauthorized groups.⁵⁷ The resulting melee culminated in the Boston Massacre on March 5, 1770.

Defeated, Parliament passed the Tea Act of 1770. Parliament intended the Tea Act as a symbolic gesture which would continue the duty on tea but revoke all other Townshend duties.⁵⁸ But the extent of colonial agitation was such that even this minimal measure inflamed anti-British sentiment. On December 16, 1773, colonists in Boston staged the Boston Tea Party. This act, which destroyed tea priced at approximately 10,000 pounds,⁵⁹ convinced Britain that their attempts at concessions were misguided. As

Lord North explained to the House of Commons, “We are now to establish our authority or give it up entirely.”⁶⁰ The entire colonial government of Massachusetts was restructured. Military presence was expanded. The colonists were also charged with the task of paying for the destroyed tea.⁶¹

The Coercive Acts (as they would eventually be labeled) were Britain’s final attempt to overcome American resistance. These Acts included the Boston Port Bill, which closed Boston’s harbor and was declared in Virginia’s House of Burgesses an attempt to deprive Bostonians “of their property, in wharfs erected by private persons, at their own great and proper expense, which act is, in our opinion, a most dangerous attempt to destroy the constitutional liberty and rights of North America.”⁶² The other colonies rallied in support of Boston. These developments convinced the British government that revolution was inevitable. Ignoring the Olive Branch Petition, King George III declared on August 23 that the colonies were in open rebellion; in October, he publicly accused the colonies of pursuing independence. In December 1775, Parliament approved the seizure of American ships by British warships.⁶³

The New States

The colonies rushed to establish new state constitutions; their emphases on individual property rights were informed largely by their struggles with the Crown. Colonial legislatures resented British legislative excess that Britain; therefore, they developed rigid state structures and disempowered governors.⁶⁴

However, these state constitutions often maintained upper houses modeled after the House of Lords; in this, they revealed their continued fear of the common people. All

of the states except for Pennsylvania, Georgia, and Vermont provided for senates to oversee legislation passed by the popularly elected lower houses.⁶⁵

The new state constitutions also enlarged already-expansive suffrage among white men. Most states allowed any taxpaying white male the right to vote; other colonies significantly reduced wealth requirements.⁶⁶ Thus, the revolutionary period was characterized by the realization of colonial demands for “no taxation without representation,” which was tempered by the notion that the richest and wisest citizens must oversee representative governments. This conflict is evident in American thought the revolutionary era, into the Confederation, and was even reflected in the original text of the Constitution itself.

In the chaos, the meeting of the Continental Congress, the passing of the Declaration of Resolves in 1774 and the subsequent composition of the Declaration of Independence were formal proclamations which did little but echo the sentiments already prevalent throughout the colonies.

Patriots and Loyalists

When asked his political leanings, Rip Van Winkle exclaimed to a startled town that “I am a poor quiet man, a native of the place, and a loyal subject of the king, God bless him!” The town immediately rallied against him, exclaiming vigorously, ““A tory! a tory! a spy! A refugee! hustle him! away with him!”⁶⁷

The revolution divided the colonists overnight into patriots and loyalists, which the patriots labeled “Tories.” A man’s political leanings suddenly became critical to his standing as a landowner. At the outset of the Revolution, loyalists comprised twenty percent of white Americans, or roughly half a million people.⁶⁸ They came from all

elements of society, but they were more common in some groups than others. The largest and most important group of loyalists was the colonial aristocracy itself. The aristocracy was faced with the possibility that revolution against Britain would further compromise their control over American politics. As a result, more than half of New England's aristocracy sided with the Crown. These numbers were smaller in the south, where a more propertied aristocracy dreamed of lower taxes and expanded property freedoms.⁶⁹

English common law specified that traitors to the Crown forfeited their rights to property; on this basis, huge amounts of property were taken from loyalists and redistributed among patriots. In 1777, the Continental Congress issued a recommendation to the colonies that loyalist land be seized for public benefit.⁷⁰ In every state, a "test law" was adopted, which mandated that all men forswear allegiance to King George III, and declare their loyalty to their state. The states also passed laws which allowed the confiscation or heavy taxation of loyalist estates.⁷¹ In a few states, citizens who desired their neighbor's land could possess it simply by making an accusation of loyalist tendencies.⁷² Some states, such as New York, benefited greatly from the resultant revenue, which was used to help fund the war.⁷³ The profit and simple satisfaction that common people derived from watching the aristocracy's landed estates topple had innumerable impact on later attitudes towards landed aristocracy.

Furthermore, colonial governments supported the rights of patriot militaries to destroy or possess private property for the war effort. Even after the war, Congress consistently rejected compensation requests. In one decision which denied a reimbursement claim, the Supreme Court of Philadelphia bluntly stated that "it is better to

suffer a private mischief, than a public inconvenience.”⁷⁴ Thus, the American state was founded on the uncompensated destruction or possession of private property.

Despite such wartime measures, the Revolutionary period generally shows an American commitment to property protection. The introduction of a common enemy allowed the working class to put aside its domestic economic and political grievances and unite with the willing aristocrats, forming a cohesive and powerful force which ultimately upheld the individual right to property as verbalized in their famous mantra, “no taxation without representation!”

The Confederation

Despite nationalist efforts, state loyalties prevented the creation of a strong federal government in the United States, and the Articles of Confederation was a weak endorsement of national governance. States pursued generally similar property legislation, enforcing individual property rights through such policies as westward expansion while also continuing to question absolute property rights with anti-slavery measures and ongoing possessions of loyalist property. Taking advantage of expansive enfranchisement, farmers, merchants, and manufacturers asked state governments for special considerations, which often led to property disputes. In light of the post-Revolutionary commercial depression, these demands were urgent and required immediate and strong responses, which further challenged aristocratic values and led to renewed attempts by the elite to control and strengthen the federal government.

Post-Revolution Property Treatment

The Articles of Confederation granted weak economic powers to the central government. The federal government, with the approval of nine state delegations, was allowed to declare war, finance war through a state-funded treasury, appropriate money from the states, and enter into treaties and alliances; however, coinage of money, taxation, and general economic policy was reserved for the states.⁷⁵ Thus, the Articles rendered the federal government economically powerless, something that the aristocracy would quickly attempt to change.

States and Property

State constitutions often clarified a protection of the right to obtain property, rather than an absolute right to maintain property. It is true that five states echoed the Magna Carta in providing that no person could be “deprived of his life, liberty, or property but by the law of the land.”⁷⁶ However, this right was qualified by the widespread belief that every white man should have the opportunity to own his own property. Four states even established the right to obtain property; New Hampshire’s 1784 Constitution declared that “All men have certain natural, essential, and inherent rights; among which are – the enjoying and defending life and liberty – acquiring, possessing and protecting property – and in a word, of seeking and obtaining happiness.”⁷⁷ Several states encouraged wealth dispersal. Primogeniture and entail, as discussed, were successfully challenged; many states also prohibited monopolies.⁷⁸

An Expanding Nation

Westward expansion, discontinued under British rule, was strongly encouraged by state governments. Colonial land disputes created bitter rifts between states,⁷⁹ but it was ultimately decided that any previous claims to the west would be rejected in favor of the eventual creation of new states. With this policy, the west was quickly populated by adventurers, traders, and farmers. In June of 1779, the population of Kentucky was a mere 176; by December 1785, it had grown to over 300,000.⁸⁰ The aristocracy looked on fearfully, worried that the creation of new states would further dilute their political dominance.⁸¹

The Northwest Ordinance passed by the Confederation Congress in 1787 was a powerful refutation of European mercantilist tradition. The Ordinance mandated that all settlers in the west would maintain equal economic and political rights with state inhabitants. It furthermore granted to those settlers the ability to form states whose political standing would be equal to that of the original thirteen states.⁸² This policy assured people of their rights and encouraged westward expansion. It also reflected American memory of British colonial treatment; if America expanded, it would do so in a way that conformed to its own principles. The Ordinance proposed a new sort of empire. Rather than being treated as contributors to the welfare of a central area, new American territories were entitled to equal consideration.

Limitations on the Right to Property

Two widespread state policies revealed limitations to the free use of property; anti-slavery policies began to value morality over property, while loyalist rights to property continued to be compromised.

Anti-Slavery Movements

Colonial American governments had claimed that slaves had the same status as other forms of property; in 1740, South Carolina described slaves as “chattels personal, in the hands of their owners and possessors.” However, elaborate provisions also specified a certain standard of treatment for slaves.⁸³ Thus, while slavery was widely practiced and accepted, colonial Americans nonetheless recognized some distinction between slaves and other forms of property.

The Revolutionary era sparked anti-slavery movements. In 1776, one fifth of the American population, numbering around 500,000 individuals, was enslaved. Slavery was prevalent in the south, but northern states also allowed slavery and nearly every white American directly or indirectly profited from the slave trade.⁸⁴ Thomas Jefferson, famously conflicted about slave ownership, voiced a common belief that while blacks were intellectually inferior to whites, they possessed comparable moral faculties.⁸⁵ Americans saw the hypocrisy of discussing universal freedom while denying it to other races. In a 1773 response to a man who set him a copy of an anti-slavery book, Patrick Henry expressed growing personal conflict with slave ownership.⁸⁶ White Americans felt a growing unease with the concept of slavery as they fought for their own rights. It is no coincidence that the first anti-slavery society in America was formed in Philadelphia on April 14, 1775, only five days before the Battle of Lexington. “The Society for the Relief of Free Negroes unlawfully held in Bondage” pointed out that enslavement was all the more obviously wrong in a country fighting for freedom; “loosing the bonds of wickedness and setting the oppressed free, is evidently a duty incumbent on all professors of Christianity, but more especially at a time when justice, liberty, and the laws of the

land are the general topics among most ranks and stations of men.”⁸⁷ In response to these trends, the American Association established by the Continental Congress of 1774 to coordinate colonial trade included a section in which the states agreed not to allow the purchase of slaves transported to America from overseas after December 1775. This non-importation agreement was enforced and strengthened in the new colonial constitutions.⁸⁸

Once states, these governments continued to deemphasize the slave trade. The Northwest Ordinance prohibited slave ownership in the Northwest Territory.⁸⁹ In 1784, Connecticut and Rhode Island passed legislation which eventually abolished slavery in those states. In a compelling break with tradition, The Superior Court of Massachusetts affirmed the status of slaves as men when it declared that slavery had been abolished as a simple result of the new Massachusetts constitution which declared that “all men are born free and equal.”⁹⁰

However, even some northern states were wary of depriving their constituencies of already-acquired slaves. For example, Pennsylvania’s emancipation statute in 1780 applied only to slaves born after the law went into effect. Children born prior to the law could be enslaved until age twenty-eight as compensation for the cost of their upbringing.⁹¹ This hesitance resulted from the conflict between the slaveowners’ claims to property and the slave’s right to freedom. Even though Pennsylvania was home to one of the most pronounced anti-slavery movements, it was careful to consider property rights when freeing its slaves.

The southern states had a greater dependency on slave labor. Full emancipation did not occur there. However, measures were enacted to encourage the freeing of slaves. In 1782, for example, a Virginia act allowed slaveowners to free their slaves if their

welfare would not then become a public expense. This seemingly weak, voluntary law led to the freeing of more than ten thousand slaves in just eight years; this figure is twice as large as the number of slaves freed in Massachusetts, and it matches the number of freed slaves in Rhode Island and Connecticut combined.⁹² Ultimately, then, slavery represented a gray area in Confederation property principles, yet states were influenced by a number of practical and theoretical factors to encourage or mandate emancipation.

Treatment of Loyalist Property

Post-war treatment of loyalist property highlighted the growing conflict between the aristocracy and the common people. The Treaty of Paris, the peace agreement that concluded the Revolutionary War, provided a qualified mandate for the return of loyalist property. While the Confederation Congress dutifully made recommendations, the states largely ignored them. Congress responded by reminding the states that they were not empowered to enact policies “interpreting, explaining, or construing a national treaty,” which by the power of the federal government must become part of the “law of the land and not only independent of the will and power of such legislatures but also binding and obligatory on them.” The Confederation Congress sent letters to the states urging them to respect the terms of the Treaty.⁹³

As discussed, many of the colonists who had sided with Britain during the war were from the landed aristocracy. When they returned to their old homes, they reached out to their patriot aristocrat friends, by then often important officials in state governments. The patriot aristocracy therefore largely supported returning property to loyalists. John Adams, John Jay, and Patrick Henry became advocates for loyalist property rights. James Madison sponsored a Virginia bill that halted further confiscation

of British property.⁹⁴ However, these interests contradicted popular sentiment against loyalists, who were universally hated among the common patriots.⁹⁵

Every state treated postwar loyalist property claims differently. In some states, including New Hampshire and Connecticut, loyalists were welcomed back and their property returned with relative ease.⁹⁶ In other states, such as Massachusetts, patriot-dominated legislatures adopted harsh measures against loyalists.⁹⁷ The majority of states had long and bitter debates before permanent policies were adopted.*

The Economy of the Common People: Farmers, Merchants, and Manufacturers

The working class of the new United States was comprised mostly of farmers, merchants, and manufacturers, all of whom petitioned their new state governments for special considerations. These considerations often concluded with important qualifications on individual property rights.

Farmers

More than ninety percent of the new nation lived and worked on farms.⁹⁸ The American farmer enjoyed cheap land. He produced surplus crops, the export of which

* In *Rutgers v. Waddington*, Hamilton brazenly challenged the legality of the New York Trespass Act against the Treaty of Paris. Before the war, widow Elizabeth Rutgers had owned a brewery. During the war, Joshua Waddington, a loyalist, used the brewery under the authority of the British army. Rutgers brought suit under the Trespass Act, which allowed people to recover damages from those who had used their property during the British occupation. Rutgers' case was made by numerous prominent lawyers, including the state attorney general. In his defense of Waddington, Hamilton declared the Trespass Act in direct violation of the Treaty of Paris, and claimed that the Treaty was superior to state law. Mayor James Duane, who presided over the case, determined that Rutgers was entitled to only a portion of the damages she claimed. The New York assembly was so enraged that it censured Duane and even considered removing him from office (Jensen, p. 272). Ultimately, in 1788, the legislature approved an act that abolished all laws inconsistent with the peace treaty; only then, after great struggle, were the loyalist aristocrats reinstated.

Challenges to state law in such loyalist cases as *Rutgers v. Waddington* represent the first attempts by American lawyers to question the constitutionality of legislation. As a result, a tradition of judicial review was developed by the courts. The practice of judicial review broke sharply with the British commitment to *ultra vires*, the complete legal supremacy of legislative bodies.

accumulated the much-needed capital that contributed to the building of American infrastructure.⁹⁹ While farmers were self-sufficient, they often suffered from shortages of capital, making taxpaying particularly burdensome.¹⁰⁰ Farmers would often trade their goods for other goods rather than money. Since debts and taxes require money, farmers often lacked the capital to meet these demands.¹⁰¹ As a result, the American farmer petitioned his state government to minimize taxes. Furthermore, as had been done before the Revolution, farmers campaigned for the issuance of paper money as a solution to their financial hardships. Methods of taxation and the introduction of paper money proved distinct challenges to traditional notions of property rights.

Merchants

While the war was a temporary hindrance of trade, American merchants prospered after the war. Merchant interests coincided well with a general American commitment to free trade. Prevalent among American lawmakers was the belief that if free trade replaced mercantilism as the predominant European policy, then the resultant commercial interactions would provoke universal economic expansion, common empowerment, and even political peace.¹⁰² In 1776, Thomas Paine verbalized this sentiment when he said, ““Our plan is commerce...and that, well attended too, will secure us the peace and friendship of all of Europe; because it is the interest of all Europe to have America a free port.”^{103*}

* In 1776, the Continental Congress developed a “model treaty” which dismissed traditional military alliances and instead fostered free trade agreements among nations. Trade channels were to be kept open even during military conflict, to all except military goods. John Adams later recalled that the model treaty would have “put an end forever to all maritime war, and render all military navies useless.” However, when the United States asked first France and then the rest of Europe to enter into the model treaty, they were met with widespread reluctance. While France agreed to enter into a free trade agreement with America, the treaty ultimately included a military alliance. Only two peripheral European states, Prussia and Sweden,

Manufacturers

The manufacturing industry grew substantially during the Confederation. Manufacturing was discouraged by British regulation throughout the colonial era; Parliament had maintained that it lessened colonial dependence on Britain and was thus contrary to mercantilist policy.¹⁰⁴ The first Continental Congress encouraged manufacture and the colonies offered prizes for ingenuity. The war itself did much to encourage American manufacturers by increasing demand for iron and other military-related products.¹⁰⁵

There was also an emphasis on domestic production of clothing and other essentials during the war, partly due to the boycotts on British imports, but also because of the general interruption of trade. Shortages encouraged the development of new methods of production. For example, in the colonial period, salt was imported from abroad. The war caused widespread salt scarcity. A sailor eventually developed a method to evaporate salt-water in large, shallow vats; the salt deposits could then be collected and sold. This discovery led to the construction of salt-water-pumping windmills along the shores of the Atlantic, and the development of a considerable domestic industry.¹⁰⁶

To further encourage entrepreneurship, the states revised traditional rights to eminent domain and patenting. Several state constitutions mandated that compensation be paid when private property was taken for public use¹⁰⁷; this represented a divergence from colonial policies which often did not include compensation. States who did not specify compensation almost always upheld the principle anyway in legislation. Like

agreed to the terms of the model treaty. However, American lawmakers remained committed to free trade as a source of international economic, political, and military stability (Wood, p. 107-109).

colonial times, however, private companies were granted permission to take private land from others if compensation was provided.¹⁰⁸

Intellectual property rights were also recognized throughout the new nation, largely in conformity with earlier colonial traditions. In 1783, the Continental Congress recommended to the states that they protect intellectual property; every single state responded with the passage of copyright protection legislation. South Carolina passed the first general patent law in American history, which extended legal protection to all inventions as well as literary property.¹⁰⁹ It was generally understood that patents were important exceptions to anti-monopoly laws, and they were protected in both general and individual legislative acts throughout the Confederation period.

The Commercial Revolution: The Collapse of the American Economy

The American Revolution was closely followed by a commercial revolution whose excesses would haunt Americans throughout the Confederation period. After a period of thrift, Americans were eager to enter into trade; international traders were equally prepared to satisfy this hunger.¹¹⁰ However, in the melee, American buyers bought more than they could afford as foreign goods glutted the American market. Meanwhile, inflation was rampant on both the federal and the state levels. By 1781, nearly \$400 in paper money had been produced by the federal government alone, and \$167 of congressional paper was worth only \$1 in specie. This depreciation caused a disastrous economic situation for many new Americans.¹¹¹

The American nation began with a large portion of its new citizenry in debt, as well as a general depression which was felt by all. States responded with renewed encouragement for domestic manufactures.¹¹² However, their own financial situations

eventually compelled them to impose heavy taxes. This era, therefore, posed a challenge to fiery revolutionary demands for private property protection.

Taxation was predictably unpopular in early America, and this was not helped by significant flaws in state taxation systems. The main source of tax revenue was derived from poll and general property taxes, taxes on liquor, excise taxes, and import duties.¹¹³ However, new state governments often enacted unfair tax policies. For example, some colonies taxed all land by acre, regardless of differences in its value. The unfairness of taxing equally rich and poor land caused widespread protest. Controversy also sprung up in the north from the prevalence of poll taxes, supported by the wealthy aristocracy but opposed by poorer citizens.¹¹⁴ As debt accumulated in the hands of speculators, Americans became increasingly bitter about tax policy; as a result, there was widespread discontentment which was channeled into the Paper Money Movement.

Workers hindered by taxes also suffered from widespread indebtedness. While creditors insisted that these debts be paid at their face value in specie-based currency, debtors begged their state governments for relief and supported the creation of paper money and the payment of debts at current market value. Many states attempted to produce paper money or find other ways of alleviating debt. For example, South Carolina's Pine Barren Act of 1785 allowed debtors to pay their debts with worthless or distant property. Other states postponed debts, permitted the payment of debts in installments, and made depreciated paper currency legal tender.¹¹⁵ However, creditors maintained that such measures were unfair. In the words of James Madison, paper money "affects Rights of property as much as taking away equal value in land."¹¹⁶

Despite widespread aristocratic opposition, seven state governments were forced by 1786 to adopt paper money. This conflict served to further highlight to the aristocracy the extent to which its privileged position was challenged by representative government.

The Rise of Federalism

The nationalistic aristocracy gained new political strength with the failure of the state governments to effectively satisfy the economic needs of their constituents. In state after state, nationalists were voted into office. In Virginia, Thomas Jefferson was replaced by Thomas Nelson, who had opposed independence itself.¹¹⁷

The nationalists had from the beginning of the Confederation attempted to subvert its commitment to local government. As soon as the Articles were ratified, a committee of three nationalists, James M. Varnum, James Duane, and James Madison, proposed an amendment which would allow Congress to use the army and navy to seize vessels and prohibit the trade of an uncooperative state. However, recalling the recent British excesses, the report was given to another committee and suppressed.¹¹⁸ An attempt to create a national bank capable of subordinating the states to federal authority was also unsuccessful.¹¹⁹

Afraid for their political futures in state governance, the aristocracy used their newfound political power capital to bolster renewed attempts to empower the federal government. Nationalists declared that state governments were incapable of achieving full economic recovery, and called for more federal economic power.¹²⁰

The Constitutional Convention was therefore called at a time when general economic distress was prevalent across all American groups. The nationalistic

aristocracy, which failed in its attempts to establish a dominant federal government under the prohibitory Articles of Confederation, had finally accumulated the needed political support for drastic change. The Constitution, therefore, was borne of an era of great political uncertainty and conflict.

¹ Ely, James W. Jr. The Guardian of Every Other Right: The Constitutional History of Property Rights, 1992, p. 12.

² Bayly, C.A. The Birth of the Modern World, 1780-1914, 2004, p. 137.

³ Kenneth Pomeranz, The Great Divergence: Europe, China, and the Making of the Modern World Economy, 2000, p. 264.

⁴ Ely, p. 19.

⁵ Ely, p. 10.

⁶ Jameson, J. Franklin. The American Revolution Considered as a Social Movement, 1961, p. 33.

⁷ Ely, p. 11.

⁸ Ely, p. 12.

⁹ Locke, John. Second Treatise of Government. 1764, ch. V, p. 19.

¹⁰ Ely, p. 13.

¹¹ Ely, p. 13.

¹² Ely, p. 14.

¹³ Ely, p. 14-15.

¹⁴ “The Mayflower Compact.”

¹⁵ Ely, p. 11-12.

¹⁶ Ely, p. 12.

¹⁷ Ely, p. 18.

¹⁸ Ely, p. 18.

¹⁹ Ely, p. 20.

²⁰ Ely, p. 19.

²¹ Ely, p. 24.

²² Ely, p. 25.

²³ Smith, Adam. The Wealth of Nations. 1776. 1934.

²⁴ Ely, p. 22.

²⁵ Ely, p. 23.

²⁶ Irving, Washington. Rip Van Winkle. 1819. R.H. Russell, 1897, p. 11-35.

²⁷ Wood, Gordon S. The American Revolution: A History, 2002, p. 13.

²⁸ Wood, p. 13.

²⁹ Wood, p. 6-7.

³⁰ Wood, p. 6.

³¹ Wood, p. 15.

³² Jensen, Merrill. The New Nation: A History of the United States During the Confederation 1781-1789, 1950, p. 123.

³³ Jensen, p. 111.

³⁴ Bowen, Catherine Drinker. Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787, 1966, p. 72.

³⁵ Irving, p. 35-36.

³⁶ Jensen, p. 20.

³⁷ Jensen, p. 21.

³⁸ Jensen, p. 21.

³⁹ Wood, p. 15.

⁴⁰ Jameson, p. 37.

⁴¹ Ely, p. 33.

-
- ⁴² Thomas Jefferson, *Autobiography*, 1821, *Founder's Constitution*, 525.
- ⁴³ Jensen, p. 23
- ⁴⁴ Wood, p. 17.
- ⁴⁵ Wood, p. 17-18.
- ⁴⁶ Wood, p. 27.
- ⁴⁷ Wood, p. 23-24.
- ⁴⁸ Wood, p. 28.
- ⁴⁹ Wood, p. 24.
- ⁵⁰ Wood, p. 29.
- ⁵¹ Jensen, p. 22.
- ⁵² Wood, p. 29.
- ⁵³ Wood, p. 30.
- ⁵⁴ Wood, p. 30.
- ⁵⁵ Wood, p. 31.
- ⁵⁶ Wood, p. 33.
- ⁵⁷ Wood, p. 33-34.
- ⁵⁸ Wood, p. 36.
- ⁵⁹ Wood, p. 37.
- ⁶⁰ Wood, p. 38.
- ⁶¹ Wood, p. 38.
- ⁶² Ely, p. 27.
- ⁶³ Wood, p. 55.
- ⁶⁴ Wood, p. 67.
- ⁶⁵ Wood, p. 70.
- ⁶⁶ Jameson, p. 40.
- ⁶⁷ Irving, p. 37.
- ⁶⁸ Jameson, p. 16.
- ⁶⁹ Jameson, p. 16-17.
- ⁷⁰ Ely, p. 34.
- ⁷¹ Jensen, p. 265.
- ⁷² Bowen, p. 220.
- ⁷³ Ely, p. 35.
- ⁷⁴ Ely, p. 34.
- ⁷⁵ "Articles of Confederation."
- ⁷⁶ Ely, p. 31.
- ⁷⁷ Ely, p. 30.
- ⁷⁸ Ely, p. 30.
- ⁷⁹ Wood, p. 73.
- ⁸⁰ Jensen, p. 114.
- ⁸¹ Jensen, p. 11.
- ⁸² Wood, p. 74.
- ⁸³ Ely, p. 15.
- ⁸⁴ Wood, p. 57.
- ⁸⁵ Wood, p. 102.
- ⁸⁶ Jameson, p. 23.
- ⁸⁷ Jameson, p. 23.
- ⁸⁸ Jameson, p. 24-25.
- ⁸⁹ Ely, p. 34.
- ⁹⁰ Jameson, p. 25.
- ⁹¹ Ely, p. 34.
- ⁹² Jameson, p. 26.
- ⁹³ Jensen, p. 281.
- ⁹⁴ Ely, p. 36.
- ⁹⁵ Jensen, p. 267.
- ⁹⁶ Jensen, p. 268.

-
- ⁹⁷ Jensen, p. 269-270.
⁹⁸ Jensen, p. 177.
⁹⁹ Jensen, p. 234.
¹⁰⁰ Jensen, p. 177.
¹⁰¹ Jensen, p. 240.
¹⁰² Wood, p. 106-107.
¹⁰³ Wood, p. 107.
¹⁰⁴ Jameson, p. 53.
¹⁰⁵ Jensen, p. 219.
¹⁰⁶ Jameson, p. 59.
¹⁰⁷ Ely, p. 31.
¹⁰⁸ Ely, p. 31.
¹⁰⁹ Ely, p. 33.
¹¹⁰ Jensen, p. 186.
¹¹¹ Wood, p. 116.
¹¹² Jensen, p. 286-287.
¹¹³ Jensen, p. 305.
¹¹⁴ Jensen, p. 206.
¹¹⁵ Ely, p. 37.
¹¹⁶ Ely, p. 37.
¹¹⁷ Jensen, p. 52.
¹¹⁸ Jensen, p. 59.
¹¹⁹ Jensen, p. 56-62.
¹²⁰ Jensen, p. 243-244.

Chapter 5

Early American Philosophy

Early American philosophy was dominated by the development of civic republicanism, a philosophic doctrine which mandated that the public good be the ultimate end of all government action. Republicanism is, in the words of Thomas Paine, not “any *particular form* of government.”¹ Its principles do not necessitate democracy (which, in fact, the founders largely condemned), and while critical of oligarchy and monarchy, republicanism does not dismiss them.

In a broad sense, the founders were all republicans because they claimed the ultimate intent of developing a government based on the public good. However, the founders disagreed about the best way to achieve this goal. Thomas Jefferson and the Anti-Federalists took republican doctrine at its word, declaring that all individuals had the right and capacity to create the ideal society. This belief encouraged Jefferson to question the fundamental premises of English thought, arguing for economic redistribution, universal enfranchisement, and limited, localized government power. In contrast, the Federalists argued that individuals were often incapable of understanding the public interest; thus, the desires of the community had to be heavily filtered through a strong national government. But these perspectives varied in degree rather than in kind.*

Therefore, the Federalists and the Anti-Federalists agreed with James Madison that republicanism was the only political philosophy “reconcilable with the genius of the people of America.”² This chapter explores the growth of early American philosophical

* The terms “Federalist” and “Anti-Federalist” did not develop until the very end of this time period. Prior to the publication of the Constitution, these terms would have had little meaning in American discourse. However, they are representative of two strands of American philosophic thought dating back to the seventeenth century, and are thus used for the sake of simplicity. As this chapter is a philosophic account, the historic inaccuracy should be overlooked.

thought. Specifically, it discusses the development of republicanism in the seventeenth and eighteenth centuries.

The Echoes of British Individualism

The starting premise of American philosophy was British individualism. Colonists cherished the Magna Carta as a piece of their heritage; they traced its ideals to the existence of Lockean natural rights. By combining the old and the new of English philosophy, Americans built a strong case for the existence of individual rights, paramount among them the right to property protection.

Colonists insisted that they retained the full rights of British citizens. However, they did not accept the social framework that traditionally accompanied these rights. They rejected tenurial land ownership and even taxation; eventually, they abolished hereditary privileges. They also challenged Crown and Parliament orders when in contradiction with their own beliefs about the nature of British law. This often mystified British officials, who believed that the interpretation and execution of British law rested in Parliament's hands. In 1729, the Massachusetts assembly claimed that the Magna Carta overrode Crown instructions. The governor marveled at the assembly's audacious assumption that their interpretation of British law subverts Parliament's own: "it has a strange appearance that you should undertake to understand Magna Carta better than themselves when you know they are and will be your judges."³

Unlike many members of Parliament, the colonists viewed the Magna Carta through the lens of the British Enlightenment itself. As discussed in Chapter 3, English individualism identified natural rights which no government could challenge. These

rights, which included the free use of property, were challenged in England by the privileged orders. But while colonists cherished their Englishness, they also lauded their status as free men; therefore, they claimed for themselves the rights that were only gradually becoming reality in their mother country.

Americans agreed with Locke that individuals within the state retain expansive rights, including, in the words of Chief Samuel Justice Chew, “the security and protection of the lives, liberties, and properties of the people who form or constitute the community.”⁴ Protection of these rights, according to the 1721 Massachusetts House of Representatives, is the “great end of government.”⁵

However, Americans tended to demand a more expansive list of rights than simple life and property. In 1641, “The Body of Liberties of the Massachusetts Collonie in New England” claimed for colonists a wide variety of rights, including the right to a fair proceeding before loss of person or property, to refuse public service, to hold property provided the Court does not have need of it, to be compensated if property is taken, to regain property unlawfully taken, to make a will and have it honored, to attend and be heard at public gatherings, to hunt and fish in any area provided it is not owned by another, and to alienate property at will.⁶ In March 1677 West New Jersey added the right of an accused to deny jury standing to up to thirty-five of his otherwise qualified neighbors.⁷

Thus, American philosophy was predicated on an intense respect for the individual and his fundamental rights. While these concepts were derived from concurrent English philosophy and legal development, they nonetheless caused tension

between Britain and America. The evolution of republicanism further alienated these colonies from their mother country.

Equality and Property Ownership

Civic republicanism was predicated on the belief that all men are worthy of equal legal and social treatment. In the words of James Wilson, “the natural rights and duties of man belong equally to all.”⁸ However, Republicans disagreed passionately about the preferred degree of state involvement in assuring equality among men. Federalists believed that inherited inequalities ought to be accepted and even celebrated. John Adams agreed that government officials must be chosen equitably, from the entire pool of qualified men.⁹ However, he accepted status as simply another element of a man’s qualifications. Those who are well-born, wealthy, and talented form the core of Adams’s “natural aristocracy,” which is “the brightest ornament and glory of the nation.”¹⁰ Adams does not deny entry into this aristocracy for the talented man of low birth; however, he expresses no distaste in the concept that the well-born have greater privilege.

James Madison drew a political distinction between the landed interests and the propertyless. While the property owners should never have a political monopoly, Madison argued that they were worthy of greater respect and must maintain a substantive voice in government regardless of their proportional numbers. Madison believed that the approval of the property owners ought to be required for the passage of any legislation, even if it received a majority of popular support.¹¹

In contrast, while the Anti-Federalists also spoke approvingly of a “natural aristocracy,” wealth and status had nothing to do with its creation. Legitimate inequality

was based solely on personal capacity. David Ramsey claimed that talent alone should determine a man's station, so "that even the reins of the state may be held by the son of the poorest man, if possessed of abilities equal to the important station."¹² Thomas Jefferson argued that a republican aristocracy would consist only of those who were worthy of it; that is, those who had superior intellect, wisdom, and morality.¹³

In support of this cause, Jefferson suggested several ways to create equal opportunity among all Americans; his sentiments culminated in the words of the Declaration of Independence itself. One of his solutions challenged a fundamental principle of English legal theory: the precedent. English common law placed great value on tradition. The older a law, the more it was prized; additionally, age-old customs were given respected legal status. British law held that the rulings of a court are binding to that court and all inferior ones. In other words, once a case was decided, future cases must honor that decision. Reversal of a precedent was rare, and treated with intense skepticism; reversal was tolerated only when a precedent was clearly problematic or outdated.

In contrast, Jefferson argued that "the earth belongs always to the living generation."¹⁴ A nation could not be bound by the decisions of its predecessors. Jefferson extended this philosophy to inheritance law. The dead, he argued, had no rights to land. On this basis, he challenged the legitimacy of primogeniture and entail laws. Additionally, Jefferson argued that a man's debts must die with him, and not pass on to

his heir.* These efforts reveal Jefferson's commitment to every generation's clean slate; only in a world with no cross-generational privilege would a natural aristocracy develop.

Jefferson tentatively argued for more radical tactics to ensure equality of opportunity. In 1785, Jefferson wrote a letter to James Madison. He expressed serious concerns about property distribution in France. He observed that the land was concentrated in the hands of a few wealthy men. Much of it was used only for hunting and leisure. Landholders employed servants, tradesmen, manufacturers, and agricultural labors. However, the largest segment of the French population could not find work. As a result, many Frenchmen and their families suffered in abject poverty. Jefferson asked one fundamental question: why, for the sake of one man's right to own acres of uncultivated land, must dozens more starve for lack of means? Jefferson suggested a number of ways to prevent American society from such a fate. This included tax exemptions for the poor, a disproportionate tax burden on the wealthy, and assurance that those who did not own land had another source of income.¹⁵ Noah Webster, clearly in agreement with Jefferson's premise, added to this list the redistribution of intestate estates (that is, estates whose owners died without wills).¹⁶ Anti-Federalists were in agreement that extreme or perpetual wealth disparities among American families directly contradicted republican principles.

However, the Federalists adamantly opposed any wealth redistribution. In the spring of 1775, William Moore Smith stood before the Continental Congress and related an ancient story. A Spartan ruler named Lycurgus eliminated wealth in an attempt to avoid the evils of luxury. However, in doing so he eliminated his people's freedom, and

* Jefferson even attempted to quantify these practices. He used Buffon's table of mortality to estimate that the average lifespan of an adult generation was nineteen years; thus, he recommended that all laws and debts be in effect only for nineteen years, to be revisited by the new generation (Brown, 12-13).

thus, their reason to advance themselves. Moore described a seemingly impossible situation: if wealth is eliminated, then lethargy and apathy spread; however, if wealth remains, then luxury perverts the social conscience. He recommended the regulation of property usage, but insisted that property rights themselves must remain inviolable.¹⁷

Republican treatment of inequality was practically flawed. A fundamental contradiction existed between the philosophy that all men deserved equal treatment and the assessment that men were born with different social and economic standing. The Anti-Federalists attempted to resolve it by challenging those social codes which allowed the inheritance of title and wealth. They also campaigned for a more equitable distribution of property. But they were doomed to fail in a society predicated on the immutability of property rights. Nonetheless, Anti-Federalist writings suggested new expectations of the state; this included a responsibility to aid the poor. These works fundamentally challenged British traditions of absolute property right, arguing that the greater good supersedes individual interest.

The Declaration of Independence: A Verbalization of Anti-Federalist Ideals

Jefferson's derivation from the standard Lockean listing of "life, liberty and property" in the Declaration of Independence has been widely discussed; ultimately, the replacement of "property" with "the pursuit of happiness" is a nod to his own republican principles. Pursuant to his support for equal opportunity, he dismissed the right to property in favor of a more ambivalent phrase.

Jefferson was wary of tying individual rights so particularly to property ownership, knowing that this argument might well be used to defend landed estates rather

than provide all individuals with equal access to property rights. To Jefferson, the opportunity to own property was paramount. It was in deference to this belief that he fought in the Virginia assembly to abolish primogeniture and discourage speculative land companies; this also explains his support even in the revolutionary period of granting fifty acres to men who had not yet possessed land. Jefferson wanted protection for private property, but he also wanted property to be accessible to all, along with the opportunity to use this property for whatever end. Thus, to emphasize the right to property too severely would have endangered his belief in relatively equitable distribution.

Jefferson nonetheless accused King George of several property-based offenses. He blamed the king for preventing American improvement by refusing to naturalize foreigners, encourage immigration, and allow western migration. He furthermore rejected mercantilism by denouncing exclusive trade policies. He echoed revolutionary rhetoric, claiming that the king had erred in “imposing Taxes on us without our Consent.”¹⁸ In his later years, Jefferson described his effort as simply an “expression of the American mind,” intended to verbalize preexisting sentiment.¹⁹ Indeed, the Virginia Declaration had already listed “pursuing and obtaining happiness” to the list of fundamental individual rights.²⁰ In this Declaration addressed to the international community, Jefferson emphasized the concept that any people had absolute claims to representative government, as well as a right to economic freedom and property protection.

The General Will

Echoing the philosophy of Jean-Jacques Rousseau, republicans claimed the existence of a general will which unified the beliefs of state members into a single voice.

This argument assumed that man was a social creature, and that social interaction was natural rather than forced. As a result, republicans demanded that state members sacrifice their individual preferences to the interests of the community.

Republicans believed that man was fundamentally a social creature. The Reverend John Wise documented three natural law principles: “self-love and self-preservation,” “social disposition,” and “affection to mankind in general.”²¹ Jefferson agreed with these sentiments, stating that “the Creator would indeed have been a bungling artist, had he intended man for a social animal, without planting in him social dispositions.”²² Because man was fundamentally social, he was prone to enter into society; once in a society, he was capable of making personal sacrifices for the greater good.*

Republicans considered man’s social capacities to be the source of the general will, which binds individuals together into a coherent society. The republican state operated on the assumption that there existed a knowable communal good; in the words of Samuel Adams, the state was “a moral person, having an interest and will of its own.”²³ Each individual was expected to relinquish personal interests and subordinate his particular will to the general one. Benjamin Rush actually described man within a republic as “public property.” His property, his talents, and even his life must be available should the state require them.²⁴ Benjamin Franklin stated that a man’s absolute right to property did not extend beyond those possessions “absolutely necessary for his

* Following the systematization of the natural sciences, scholars wondered if social interactions had a similarly mechanical pattern. John Witherspoon, president of Princeton University, predicted that social science would ultimately consider “moral philosophy as Newton and his successors have done natural philosophy.” Massachusetts Preacher Jonathan Mayhew wondered if the relationships of men within society were any different from the gravitational forces which moved planets and suns in orbit (Wood, *Revolution*, 104).

Subsistence.” Thus, he claimed for the state the right to limit property ownership to only that amount which the individual needs to survive; additionally, he allowed state restrictions on the use, sale, and inheritance of property.²⁵

Franklin, Jefferson, and other republicans believed that the general will would protect individual rights in nearly every case. The republican state was allowed to take a man’s property or person only when in specific need; otherwise, respect for individual rights remained paramount. This was not different in kind from the Crown’s traditional prerogative powers, which allowed the English monarch to infringe on the rights of his subjects during times of crisis.

It was assumed that individual rights would be protected under a republican state. Richard Price wrote that republicanism “does not *infringe* liberty, but *establish* it. It does not *take away* the rights of mankind, but *protect* and *confirm* them.”²⁶ Individual liberties also ensured economic security; as a result, men had incentive to increase their personal wealth through labor. The actions of a person reasonably assured of property rights would expand the national wealth. Therefore, the republican state would have every reason to assure property protections to its citizens. The state was not, however, forced to protect the right to property at the expense of the right to economic opportunity.

The Democratic Ideal

Republicans turned to representative democracy as their ideal state structure. Well-documented troubles with King George III caused colonists to be wary of monarchy. Republicans argued that existing kingships tended to sacrifice the public good to the interests of the noble classes.²⁷ In 1778, the New-Jersey Gazette celebrated the

creation of a government “erected only for the People’s sake,” implying that the British Crown had fundamentally failed to achieve this end.²⁸ However, Federalists and Anti-Federalists disagreed about the ideal extent of popular participation in the state.

Disillusioned with the British system, republicans considered America to be the final source for liberty in the world. Speaking of freedom, Thomas Paine begged America, “O! receive the fugitive, and prepare in time an asylum for mankind.”²⁹ Unfettered by a king or nobility, America alone was capable of creating a truly republican nation. The founders were aware that in the eyes of the world, they were conducting a grand experiment, the results of which could fundamentally alter future political development. Alexander Hamilton reminded his colleagues that the conduct of the American people would ultimately “decide the important question,” whether men are truly capable of governing themselves.³⁰ The rejection of monarchy was an acceptance of America’s historic role as a model for progressive governments to come.

Anti-Federalists and Federalists disagreed strongly about the extent of popular political power that was sustainable and beneficial. Anti-Federalists had great confidence in the capacities of ordinary people. Anti-Federalists trusted the common man to put aside his particular interests and consider the greater good. “Public virtue,” the willingness to prioritize the common good, was considered an inherent quality of the average American.³¹ The common man, particularly the farmer, was greatly admired in Anti-Federalist literature. Resourceful, wise, and modestly educated, this man would be the backbone of American society. He was considered naturally capable of grasping republican ideals, which were ingrained into his very being.³²

Anti-Federalists thus supported extensive popular involvement in the state. In order to make this possible, Jefferson and his allies proposed that government be decentralized. Most issues could be resolved through society-based appeals to common morality. But while society “encourages intercourse,” government served only to “create distinctions”; thus, it interfered with the natural justice of the people and ought to be minimized.³³

Jefferson’s commitment to popular empowerment led him to support the virtual abolishment of property qualifications for Virginia voters. Under his supervision, the Virginia legislature’s 1776 Declaration of Rights was carefully vague on the topic of enfranchisement. It stated only that “all men having sufficient evidence of permanent common interest with, an attachment to the community, have the right of suffrage.”³⁴ Jefferson and his proponents viewed this document as an opening for far more expansive suffrage. It was easily argued that any man with modest holdings had an interest in the state. Thus, Jefferson suggested a twenty-five acre property qualification for voting. However, he also recommended that any man over the age of twenty-five who had never owned land be entitled to fifty acres.³⁵ Jefferson’s proposals potentially expanded suffrage to nearly all white men by essentially invalidating property qualifications.

Federalists, however, stood in determined opposition to the extent of popular influence in the Anti-Federalist model. Federalists largely advocated the English belief that men can only vote when they have a significant vested interest in the state (in other words, when they possess substantial property).³⁶ This theory grew out of the British belief that an individual who is financially dependent on another cannot be politically autonomous.

The Federalists certainly supported popular influence in American governance. However, participation was to be filtered through a strong federal government system capable of derailing the public will when it was not faithful to the common good. Federalists assumed that individuals were incapable of determining the common good.³⁷ One of their greatest fears was that the landless would successfully challenge property rights. John Adams predicted that if the landless had a majority vote, they would agree to violate natural law and take the lands of their superiors. Economic irresponsibility, Adams believed, would ultimately cause the downfall of the state.³⁸

Thus, the federalists argued for a representative government tempered by strong aristocratic elements.³⁹ Madison argued that a republican government can hold its powers “directly or indirectly” from the people; he required only that government members come from the “great body of society” rather than a nobility, and that they serve tenured terms.⁴⁰ Indeed, during the ratification process, Madison made the point that the Constitution itself was not approved by the people, but by their elected officials.⁴¹

Strong central government was considered critical to the well-being of the nation. Without extensive powers, the Federalists argued, the state could not sufficiently protect its citizens, or ensure their welfare.⁴² Thus, they objected strenuously to the Articles of Confederation, which allowed the central government only the power of direct taxation with state consent, as well as limited military and economic power.⁴³

Federalists condoned a strong central government capable of overruling popular opinion when it contradicted the general will. On the other hand, the Anti-Federalists retreated to local, community-based government operation, arguing for minimal control

by larger state forces. This was the fundamental difference between the two sides as the Constitutional Convention approached.

¹ Wood, Gordon S. The Creation of the American Republic 1776-1787, 1969, p. 47.

² Madison, James. "No. 39: The Conformity of the Plan to Republican Principles." The Federalist Papers. 1787. Penguin Group, 1961, p. 236.

³ Leder, Lawrence H. Liberty and Authority: Early American Political Ideology 1689-1763, 1968, p. 119.

⁴ Leder, p. 52-53.

⁵ "House of Representatives of Massachusetts to Denny de Berdt." 12 January 1768. The Founders' Constitution, 1987, vol. 1 p. 587.

⁶ "The Body of Liberties of the Massachusetts Collonie in New England." 1641. The Founders' Constitution, 1987, vol. 1 p. 428-429.

⁷ "The Concessions and Agreements of the Proprietors, Freeholders, and Inhabitants of the Province of West New Jersey." 3 March 1677. The Founders' Constitution, 1987, vol. 1 p. 430.

⁸ Wilson, James. "Of Man, as a Member of Society, Lectures on Law." 1791. The Founders' Constitution, 1987, vol. 1 p. 556.

⁹ Madison, James. "No. 57: The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation." The Federalist Papers. 1787. Penguin Group, 1961, p. 348-349.

¹⁰ Adams, John. "Defence of the Constitutions of Government of the United States." 1787. The Founders' Constitution, 1987, vol. 1 p. 542.

¹¹ Larkin, Paschal. Property in the Eighteenth Century: With Special Reference to England and Locke, 1969, p. 158.

¹² Wood, The Creation of the American Republic 1776-1787, p. 71.

¹³ Wood, Gordon S. The American Revolution: A History, 2002, p. 100.

¹⁴ Brown, Stuart Gerry. The First Republicans: Political Philosophy and Public Policy in the Party of Jefferson and Madison, 1954, p. 11.

¹⁵ Jefferson, Thomas "Thomas Jefferson to James Madison." 28 October 1785. The Founders' Constitution, 1987, vol. 1 p. 539.

¹⁶ Webster, Noah. "Miscellaneous Remarks on Divisions of Property...In the United States." February 1790. The Founders' Constitution, 1987, p. 553.

¹⁷ Wood, The Creation of the American Republic 1776-1787, p. 64-65.

¹⁸ "The Declaration of Independence."

¹⁹ Leder, p. 118.

²⁰ Brown, p. 10.

²¹ Leder, p. 41.

²² Wood, The American Revolution: A History, p. 103.

²³ Wood, The Creation of the American Republic 1776-1787, p. 58.

²⁴ Wood, The Creation of the American Republic 1776-1787, p. 61.

²⁵ Franklin, Benjamin. Benjamin Franklin to Robert Morris." 25 December 1783. The Founders' Constitution, 1987, vol. 1 p. 589.

²⁶ Wood, The Creation of the American Republic 1776-1787, p. 62.

²⁷ Wood, The Creation of the American Republic 1776-1787, p. 54.

²⁸ Wood, The Creation of the American Republic 1776-1787, p. 55.

²⁹ Wood, The American Revolution: A History, p. 62.

³⁰ Hamilton, Alexander. "No. 1: General Introduction." The Federalist Papers. 1787. Penguin Group, 1961, p. 27.

³¹ Wood, The Creation of the American Republic 1776-1787, p. 68.

³² Wood, The American Revolution: A History, p. 93.

³³ Wood, The American Revolution: A History, p. 106.

³⁴ Brown, p. 6-7.

³⁵ Bowles, Samuel and Herbert Gintis. Democracy and Capitalism: Property, Community, and the Contradictions of Modern Social Thought, 1986. p. 47-48.

³⁶ Wood, The American Revolution: A History, p. 94.

³⁷ Wood, The American Revolution: A History, p. 93.

³⁸ Adams, John. "Defence of the Constitutions of Government of the United States." 1787. The Founders' Constitution, 1987, vol. 1 p. 591.

³⁹ Madison, James. "No. 10: The Same Subject Continued." The Federalist Papers. 1787. Penguin Group, 1961, p. 76.

⁴⁰ Madison, "No. 39: The Conformity of the Plan to Republican Principles," p. 237.

⁴¹ Madison, "No. 39: The Conformity of the Plan to Republican Principles," p. 239.

⁴² Hamilton, Alexander. "No. 30: Concerning the General Powers of Taxation." The Federalist Papers. 1787. Penguin Group, 1961, p. 184.

⁴³ Hamilton, Alexander. "No 12: The Utility of the Union in Respect to Revenue." The Federalist Papers. 1787. Penguin Group, 1961, p. 87.

Chapter 6

The Constitution and Property

The Articles of Confederation were an experiment in Jeffersonian republicanism. As Chapter 5 details, Jefferson and other Anti-Federalists believed that republican values could be best expressed in smaller political orders such as states. The document announces a simple “league of friendship” among the states (Article 3). Within this alliance, “each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States” (Article 2). The states had ultimate authority regarding critical government functions such as taxation and commerce. While the national government could request state actions, its mandates were often ignored. Within the boundaries of a state, the federal government had virtually no power whatsoever. The powers given to the national government were limited and unenforceable.

The United States suffered serious economic problems during the Confederation period. Chapter 4 discusses the collapse of the postwar American economy, which had disastrous effects. The Confederation struggled under mounting war debt, which Congress was unable to alleviate because it lacked significant powers of taxation. In 1786, Daniel Shays and a group of small farmers were driven to desperation by crippling taxation and debt; Shays’ Rebellion convinced many Americans that the Articles had to be replaced or significantly altered. The ensuing political battles heavily favored the Federalists, who arrived at the Constitutional Convention of 1787 determined to create a federal government powerful enough to protect property.

The Constitution represents a clear break from Anti-Federalist beliefs that equality of opportunity and communal interest ought to transcend propertied interests. Instead, the Federalists proposed a Constitution which provided protection to merchants, creditors, and large estate owners. State actions that Federalists believed violated private property interests, such as debtor relief legislation, possession of loyalist property, and state trade policies, received particular attention.

The Constitution also provides significant barriers to what Federalists viewed as a growing democratic threat against the propertied classes. As discussed in Chapter 4, many Federalists feared that a government with an unpropertied majority would violate the property rights of the wealthy. Thus, the Senate and Electoral College were proposed as barriers to democratic excess. However, the Constitution also provided a strong voice for republican values by dismissing federal property qualifications for suffrage.

The Constitution's treatment of property is deceptively concise; few provisions speak directly to its acquisition or use. However, many of the other clauses have significant impact on property rights. This chapter will discuss the immediate origins, direct implications, and underlying intent of property treatment in the Constitution.

Property Rights Specified in the Constitution

Despite their political differences, nearly all the members of the Constitutional Convention were convinced that individual rights were violated, in one way or another, under the Articles of Confederation. During the Convention, James Madison urged the delegates to support a constitution which would provide “more effectually for the security of private rights.” He warned delegates that “republican liberty” would soon cease to

exist as a result of state infringements on these rights.¹ The Constitution clearly assigns great value to property protection, significantly undermining Jeffersonian republicanism.

Clarifications of the Right to Property

The Constitution does not specify a right to property; rather, it clarifies instances which would have seemed disputable to the delegates. In Article I Section 8, it assures that writers and inventors have sole ownership of their work for “limited times.” This provision recalls the Enlightenment concept that property is created through labor; if an individual toils to create or invent something, he ought to have some right to sole profit before others can reproduce his sales. As discussed in Chapter 4, statesmen also considered this provision critical to future economic progress, because it provides incentive for individuals and thus stimulates industrial advancement. Thus, the Constitution clearly states that a man’s creative yield is his temporary property.

Article III Section 3 discusses the punishments for treason; while Congress does have the power to determine a traitor’s punishment, it cannot include “forfeiture,” except while the traitor is alive. This passage is in direct response to British law, which prevented a traitor’s successors from inheriting the land held in his name. This passage presented yet another potential barrier to the possession of private property by the state.

The Constitution also stipulates that neither the state nor the national government can enact bills of attainder. A bill of attainder declares an individual guilty without a trial. These provisions, which occurred in Article I Sections 9 and 10, responded to the Loyalist property confiscations that occurred during the Revolutionary period. Many of the Federalists at the Convention had argued on behalf of the dispossessed Loyalists, and were adamant that no individual be treated so unjustly.²

Contracts in the Constitution

As detailed in Chapter 4, when pressured to offset the economic distress of debtors, the new states often postponed debts, permitted payment in installments, or allowed payment with paper money or worthless property. State legislatures claimed that these measures were necessary in the aftermath of economic collapse. However, Federalists believed that the states had violated the legal sanctity of the private contract. Several passages in the Constitution were written in response to this controversy. The Contracts Clause, Article I Section 10, prohibited the states from passing any “law impairing the obligation of contracts.” When considered at the Convention, several delegates objected to the Contracts Clause, stating that it intruded on state jurisdiction. However, the committee on style unilaterally included the clause despite these complaints.³ During the ratification process, Alexander Hamilton argued that its inclusion was necessary to prevent future state violations on property rights by errant states.⁴

The Contracts Clause, however, was vague enough to require clarification in a number of related passages. Thus, several specific incidences pertaining to contracts are discussed in other clauses. Article I Section 8 allowed Congress to establish uniform bankruptcy laws. The Federalists anticipated that this clause would work to the benefit of creditors by allowing the federal government to make laws protecting their interests against fraudulence and state violation.⁵ It received little attention during the Convention.

Another clause in Article I Section 10 prevented the state from issuing bills of credit or paper money for the payment of debts. This passage was more controversial. Anti-Federalists sided with farmers who claimed that paper money was necessary for economic stability. Luther Martin argued that paper money and other debtor relief

policies were necessary in times of “*great public calamities and distress.*” Martin explained that these measures prevented “the *monied man* from *totally* destroying the *poor* though even *industrious* debtor” in the event of specie scarcity or economic disaster.⁶ However, Madison denied the validity of these arguments, instead claiming that paper money had “pestilent effects” on economic interaction by creating distrust of men, businesses, political councils, and even government itself.⁷ Madison maintained that paper money lowered the value of the debt to be paid and thus violated the sanctity of private contracts.⁸

Clauses concerning contracts were included in direct response to states actions during the Confederation. The Constitution sided with wealthy Loyalists and creditors in these passages, arguing that their rights to property transcended the interests of the states and indebted citizens. These measures represent a clear rejection of Anti-Federalist claims that a republican government must prioritize the interests of the majority above the possessions of the minority.

Slavery and Property

However, the most controversial individual right protected in the Constitution was the right to human property. The infamous Three Fifths Clause in Article I Section 2 stipulated that for representation and taxation purposes, slaves must count as three fifths of a person. The explanation provided by Madison for this fraction was that every slave possessed a “mixed character,” part person and part property. As discussed in Chapter 5, while slaves were considered the total property of their owners, traditional legal measures regulating the treatment of slaves nonetheless implied some consideration of their humanity. Thus, while the law recognized that slaves were property, they nonetheless

remained partial people, and counted in the census.⁹ The right to vote was traditionally given only to men who demonstrated autonomy (see Chapter 2), and because slaves did not meet this criterion, Madison loosely equated them with other individuals who did not have the right to vote but were nonetheless counted towards the population of the state.¹⁰

Slave owners also had legal entitlement to their slaves just as to any other form of property; thus, Article IV Section 2 requires that any misplaced slave be returned to the owner. This passage was in consideration of the growing abolition movement discussed in Chapter 5; even those who lived in an anti-slavery state or had personal moral compulsions against slavery were required to return a slave to his master.

The Absence of General Property Protection in the Constitution

On June 8, 1789, Madison presented a constitutional amendment to the new Congress. The amendment was intended to be added as an introduction to the Constitution itself. It stipulated:

That government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institutions.

The text of this passage is a clear restatement of Lockean and republican principles. It prominently demands for individuals a “right of acquiring and using property,” as well as the Jeffersonian allowance for “pursuing and obtaining happiness.” Its values appealed to Federalists and Anti-Federalists alike. However, this amendment was rejected by Congress. While the prevailing argument was that the Declaration of

Independence was sufficient provision for these rights, the true motive of Congress' actions is disputed.¹¹

Congress' rejection of this amendment is even more puzzling because a general right to property is not mentioned in the Constitution. Perhaps representatives were frightened by the second paragraph, which allowed their constituencies to challenge the government. Or maybe they considered the existence of a right to property so fundamental that it hardly required mentioning in the Constitution. More immediately, it is possible that proponents of a bill of rights feared that this amendment would compromise their cause. Regardless of the reason, it is clear that the individual right to property was intentionally unmentioned in the Constitution; in the subsequent Bill of Rights, however, a general right to property is finally articulated.

Commerce and Property

Federalists had long called for more economic oversight within and among states. The commonly known "invisible hand" arguments of Adam Smith were challenged after the economic collapse. States were forced to intervene in economic matters, but their often disparate approaches lacked cohesion. In the "Federalist Papers," Madison argued that America needed a systemic approach to the national economy, which could only be provided by a strong federal government. He argued that "sudden changes and legislative interference" must be replaced with "thorough reform," in which the interests of the economy must transcend the particular interests of the people.¹²

As a result of Federalist efforts, Congress was given expansive power over the national economy. New powers of taxation allowed Congress to generate necessary revenue; additionally, Congress was empowered to regulate interstate trade.

Taxation and Property

The United States was created in the aftermath of a bitter struggle over taxation. Thus, the subject was particularly sensitive to the delegates at the Constitutional Convention. The Articles of Confederation only allowed the federal government to request funds from the states. However, Madison reported that many states “failed altogether or nearly so” to comply with federal requests; New Jersey, he related, even had the audacity to respond with a refusal. As a result, the public debt “rendered so sacred by the cause in which it had been incurred” remained unpaid, with little hope of future relief.¹³ Hamilton warned that a federal government with no power to raise funds must either violate the rights of its citizens or “sink into a fatal atrophy, and, in a short course of time, perish.”¹⁴ Both men strongly supported extensive federal powers of taxation.

The Constitution subsequently allowed the federal government “to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States” (Article I Section 8). This power was limited by the provision that taxation must be uniform among the states; in other words, no state could be singled out for disproportionate taxation. Many Anti-Federalists objected to this clause, which they feared would give the national government too much power. An article in the *Federal Farmer* recalled the excessive taxation imposed by the British government; by placing “the purse and the sword” in the hands of one body, the writer claimed that the Constitution did not provide sufficient protection against future

violation.¹⁵ However, most delegates were supportive of measures which might create an economically stable federal government.

Article I Section 9 mandates that direct taxes imposed by Congress be apportioned according to population. This clause can be explained as an assurance that tax burdens will fall equitably on all residents, preventing any one group from enduring excessive taxation that would violate their property rights. Practically, though, it also prevented the levying of taxes on land, protecting large estate owners from significant direct federal taxation.¹⁶

Powers of taxation were considered critical to the success of the federal government despite Anti-Federalist fears about centralized political power. The limitations on direct taxation did provide some assurance against government excess; the clause prevented the government from placing an undue burden on any one group. However, these protections held the most significant benefits for wealthy landowners.

Trade and Property

The Articles of Confederation also prevented the federal government from imposing order on interstate and international trade. States adopted their own self-interested trade restrictions, often at the expense of other states. The incoherence of interstate trade worsened into one of the most serious problems facing the Confederation.

Hamilton rejected the idea that “trade will regulate itself” as “one of those wild speculative paradoxes,” pointing out that nations have historically regulated trade to the advantage of their economies. Trade regulation, he argued, was no different than every other aspect of governance; if its “fixed principles” are “understood and observed, it will be promoted by the attention of government, if unknown, or violated, it will be injured.”¹⁷

Thus, the Federalists came to the Constitutional Convention determined to grant Congress the power to regulate trade. Proponents argued that this measure would cause the economic problems of the nation to “be in a great measure alleviated, if not wholly removed.”¹⁸

Thus, Article I Section 8 allows Congress to “regulate commerce with foreign nations, and among the several States.” This clause allowed for the creation of the first cohesive national market in America. Article I Section 10 banned the states from taxing imports and exports; this passage was particularly important to the Southern states, whose economies depended on staple crops which were often sold in foreign markets.¹⁹ These clauses gave the federal government control over interstate and international trade.

Property in the Bill of Rights

The Bill of Rights was ratified on December 15, 1791 after a rigorous constitutional amendment process. Anti-Federalists celebrated it as a protection against the potential excesses of the newly empowered national government. The Fifth Amendment provides critical insight into the nature of property rights in the new United States of America.

Article V of the Bill of Rights safeguards a number of procedural rights during criminal trials. Included in this litany is the mandate that no individual “be deprived of life, liberty, or property, without due process of law.” The fact that this assurance was included in a list of criminal legal protections emphasizes the Lockean perspective that an individual’s own body is yet another piece of his property; thus, a man has a similar right to his land as to his arm.

The Takings Clause is also included in Article V of the Bill of Rights. It requires that “just compensation” be paid when private property is taken for public use. The clause is modeled after the British common law, which also mandates compensation when private property is possessed by the state (see Chapter 1). It rejects infringements on this right by colonial governments (see Chapter 5).

The Constitution thus dismisses Rousseau’s claim that the state has the ultimate right to any property needed for the public good. Instead, it requires that an individual’s right to his property be treated with the utmost respect; when public possession of private property is absolutely required, the government is nonetheless obligated to provide full compensation.

An Evolving Definition of “Property”

While the Constitution reveals a substantial bias towards the rights of propertied individuals, expansive definitions of property allowed for some consideration of the common good. Chapter 3 details the Lockean extension of “property” to include one’s body, and thus one’s right to physical freedom. Republicanism took this definition still further, as Madison’s writings will illustrate.

Madison expanded property to include a number of individual actions which were protected in the Bill of Rights. A man’s property included his opinions, his religious beliefs, and his actions, or “faculties.” Madison equated these rights with the traditional right to property: “as a man is said to have a right to his property, he may be equally said to have a property in his rights.”²⁰

Madison also included the right to such “labor” as is required for “daily subsistence,” as well as a “hallowed remnant of time” sufficient to “relieve their fatigue

and soothe their cares.” Madison fundamentally equated property with fair treatment, opportunity to earn a living, and a reasonable standard of living. In creating this quite expansive definition, Madison successfully incorporated property protection into a truly republican value system.

Thus, while Constitutional commitments were practically used to ensure property protection for the propertied classes, there was potential for the coalescence of republicanism and private property protection.

Constitutional Protections against Democratic Excess

History records that the founders were disproportionately wealthy; nearly all of them were creditors, landowners, or merchants who had much to gain from the strong national economy that they advocated. Their fears of democracy are well documented. Distrust of the common man led them to establish undemocratic institutions designed to frustrate the will of the majority. The Senate and Electoral College were both safeguards designed to protect property rights from democratic excess.

Federalist Fears of Democracy

During the ratification debates, the Anti-Federalists argued that the Constitution was overwhelmingly nationalistic. For the most part, they shared Jefferson’s respect for the common people. Thus, they endorsed a government structure which respected voting majorities in all cases except when individual rights were violated.²¹ However, the Anti-Federalists were disadvantaged by the undeniable problems of the Confederation period, as well as diminishing political support.

Shays' Rebellion and state violations of property rights convinced many Federalists that democratic governance was even more anarchic and dangerous than they had feared. During the Constitutional Convention, Madison worried aloud that population growth would ultimately create an unpropertied majority, who would subsequently develop a "leveling spirit" capable of violating the fundamental rights of the propertied.²² Madison joined other Federalists in suggesting that safeguards be established against the unwise excesses of democracy.

Unlike the Anti-Federalists, then, the Federalists were quite fearful of the implications of popular governance. In 1786, the *Pennsylvania Packet* observed: "At the commencement of the Revolution, it was supposed that what is called the executive part of government was the only dangerous part; but we now see that quite as much mischief, if not more, may be done, and as much arbitrary conduct acted, by a legislature."²³ The *Packet* was referring to state policies such as debtor relief legislation, possession of loyalist property, and self-interested trade policies; these measures convinced Federalists that democratically-elected legislatures threatened the property rights of their constituencies. In his opening speech to the Constitutional Convention, Edmund Randolph characterized "the democratic parts of our [state] constitutions" as the foremost threat to the nation. General Henry Knox agreed with his colleague, stating that the Convention had been called to "clip the winds of a mad democracy."²⁴

John Adams feared democracy even as much as he feared tyranny; he once said that "despotism, or unlimited sovereignty, or absolute power, is the same in a majority of a popular assembly, an aristocratic council, an oligarchic junta, and a single emperor. Equally arbitrary, cruel, bloody and in every respect diabolical."²⁵ Thus, Adams and the

other Federalists supported several institutions designed to offset the potentially damaging effects of democracy.

Undemocratic Institutions in the Constitution

The Constitution contains several safeguards against democratic excess. The Bill of Rights affords freedoms that cannot be overturned by a popular majority. Additionally, the Senate and Electoral College were both designed to give disproportionate power over the national government to aristocratic minorities.

The Great Compromise concluded what was certainly the most passionately debated issue of the Constitutional Convention, namely, the nature of Congressional representation. The Virginia Plan, supported by the Federalists and more populous states, proposed that Congress be composed of a popularly elected lower house and an upper house appointed by the state legislatures. Congress was empowered to overrule state legislation, legislate in all matters where the states were deemed “incompetent,” and forcibly coerce an uncooperative state.²⁶ The Virginia plan thus undermined key elements of state sovereignty maintained under the Articles of Confederation. Even the proposed popular ratification for the Constitution was fundamentally a challenge to state authority.

In contrast, the New Jersey Plan supported by Anti-Federalists and smaller states emphasized state dominance. The actions of Congress were subject to oversight by the state legislatures and judiciaries. The executive was removable with the request of a majority of state governors and the approval of Congress. Representation among the states would remain equal regardless of population differences, and unanimous consent was required for a constitutional amendment.²⁷ The New Jersey plan was supported by Anti-Federalists who considered the state best qualified to express the will of the

people.²⁸ They feared that a strong, Federalist-controlled national government would undermine republican values. Nonetheless, the clear failings of the Confederation encouraged many Anti-Federalists to approve of limited centralization. For example, the Philadelphia correspondent “Legion” suggested that the powers of Congress be increased for a “limited time, until it could be observed how they operated and answered the purpose,” with the assurance that the powers could be withdrawn if the will of the people was subverted.²⁹

Ironically, the Federalists also argued their cause in the name of republicanism. Scholars such as James Wilson suggested that state authority might be used to counteract the popular majority. On the Convention floor, Wilson argued that the people, and not the state, should be the sovereign power: “Can we forget for whom we are forming a Government? Is it for *men*, or for the imaginary beings called States? Will our honest constituents be satisfied with metaphysical distinctions?We talk of states, till we forged what they are composed of...”³⁰

After much debate, Connecticut delegate Doctor Johnson suggested that the Senate and House each represent one element of national sovereignty. In the House, the common will would be prioritized, while the Senate represented the states’ interests. Madison agreed that “the mixed nature of the Govt. ought to be kept in view,” and the Great Compromise was quickly formulated.³¹

The Great Compromise is often painted as a simple assurance to small states that their influence would be felt in legislative proceedings. However, it was also an assurance to Federalists that the will of the majority could be subverted by the educated, wealthy aristocracy. The Constitution mandated that the Senate be appointed by the state

legislatures. Property qualifications were considered, but ultimately rejected. The states were entrusted to select appropriate individuals.³² There is no question that the Federalists expected the Senate to nonetheless be comprised of wealthy, propertied men. Hamilton predicted that the Senate would be composed of “landholders, merchants, and men of the learned professions.”³³ Thus, the Senate was a strong safeguard against the will of the common people.

During the Convention, several delegates supported the democratic election of the president, while others supported his appointment by the legislature. Those who argued against entrusting presidential election to the people expressed distrust in the will of the majority. Colonel Stevens Thompson Mason compared the common man’s capacity to choose a proper president to the blind man’s capacity to decide “a trial of colours.”³⁴ After several months of debate, James Wilson’s proposal that a group of men be appointed to select the president based on the will of the people was a sufficient compromise. Thus, the Electoral College was created.³⁵ According to Article 2 Section 1, the electors are appointed by the state legislators. They count and record the number of votes for each candidate, and then present their findings to the Senate President. If a majority of “electoral votes” do not present one man with a majority, then the House of Representatives must select one of the candidates. While the elector’s role appears to be administrative, the founders conceived of the Electoral College as a possibly powerful safeguard against the popular election of an unfit candidate. Thus, the Senate and Electoral College potentially subjected majority will to aristocratic influence.

Support for Democracy in the Constitution

The Constitution provides undeniable support for the propertied classes at the potential expense of an underprivileged majority. However, the Constitution also has inconspicuous but crucial safeguards for republicanism. These include the emphatically republican Preamble and the lack of federal property qualifications for suffrage.

Republicanism in the Preamble

The Preamble to the Constitution received little fanfare at the Convention. The Committee of Detail agreed that it seemed “proper” to include a preamble; its simple purpose would be to declare “that the following are the constitution and fundamentals of government for the United States.” It was written on September 12, 1787 by the Committee of Style, and never debated on the Convention floor³⁶:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

James Wilson confirmed that the Preamble “is not an unmeaning flourish”; rather, it declares “the principle of this constitution,” the fundamentals of American governance. It establishes a nation legitimated not by a god, lawgiver, or king, but by “we the People” – this is a strong support for republican principles. As Wilson argued, the Preamble ensures that government “is ordained and established by the people themselves; and we, who give our votes for it, are merely the proxies of our constituents.”³⁷ The Constitution is predicated on the approval of the people, and its ultimate responsibility is to ensure the common good.

It is easily argued that such lofty rhetoric carried little practical meaning at a time when only propertied males were considered qualified to be part of “the People.” Even this limited constituency was not entrusted with true republican authority. However, it must be recalled that nations were not historically founded on any commitment to the common good. During a Congressional debate in 1789, Representative Elbridge Gerry pointed out that governments had historically been formed by “fraud, force, or accident,” which led one individual to become “master of the people.”³⁸

Even if the Federalists were not yet prepared to place practical responsibility for government in the hands of the common people, they did hold government responsible for the common good. This theoretical commitment to republican values had untold influence on the future development of Constitutional theory and political practice. Thus, the Preamble is a significant assurance of republican values in the Constitution.

Property and Participation

The connection between voting and political participation was well established at the time of the Constitutional Convention. British politics considered the right to vote an extension of one’s freedom, itself dependent on property ownership. In fact, Chapter 2 describes the sale of votes to wealthy aristocrats, which meant that a vote was itself considered a piece of property. In America, all states had wealth qualifications for voting.

In 1782, Madison listed a number of rights that man automatically possesses; these included “a property in his opinions and the free communication of them,” “a property in the free use of his faculties,” and “a property in his rights.”³⁹ Thus, Madison granted to all men expansive powers of political participation as an extension of their right to property.

Republican doctrine evolved to stipulate that all men are equal and deserve equal rights. And if the right to property applies equally to all, then surely the right to political participation must also. Anti-Federalists were convinced that the popular voice was most faithfully represented within the states. Additionally, Jefferson and his allies were strong supporters of near-universal male suffrage. Thus, Anti-Federalists struggled and succeeded in eradicating all federal property qualifications for enfranchisement. Additionally, Senate and House of Representatives had no property qualifications for election. Apart from being an historic re-characterization of the relationship between property and suffrage, this absence was also a great victory for republican values.

The lack of federal property restrictions held little practical meaning at a time when every single state had its own property or wealth qualifications for suffrage. Nonetheless, this absence is a meaningful gesture. Many Anti-Federalists believed that little or no property should be required for political participation; this belief was also held by many Federalists, including Madison. Ultimately, the Constitution does mark a fundamental turning point in the relationship between property and power.

Conclusion: The Constitutional Conflict between Democracy and Property

Significant assurances of republican governance did exist in the Constitution. However, these passages carried little meaning when the Constitution was written. The Preamble was overshadowed by the undermining of republican values within the text itself; additionally, state qualifications made the lack of federal property requirements for suffrage trivial.

The Constitution was therefore written with a strong bias towards the interests of the propertied classes. It prioritized protection of private property over assurance of the common good. Additionally, taxation and trade were structured to benefit the wealthy. In 1787, then, the Constitution's support for the propertied classes fundamentally undermined republicanism. However, the definition of property was easily expanded by Madison to incorporate a republican worldview. Additionally, the Preamble established a nation fundamentally dependent on the will of the people for legitimacy, and there were no federal barriers to universal suffrage. Despite its flaws, then, the Constitution established a nation with the potential to become a truly republican state.

¹ Siegan, Bernard H. Property Rights: From Magna Carta to the Fourteenth Amendment, 2001, p. 66.

² Ely, James W. Jr. The Guardian of Every Other Right: The Constitutional History of Property Rights, 1992, p. 43-45.

³ Ely, p. 45.

⁴ Hamilton, Alexander. "No. 7: The Same Subject Continued." The Federalist Papers. 1787. Penguin Group, 1961, p. 59-60.

⁵ Ely, p. 43-45.

⁶ Martin, Luther. "Genuine Information," 1788. The Founders' Constitution, 1987, vol. 3, p. 394.

⁷ Madison, James. "No. 44: Restrictions in the Authority of the Several States." The Federalist Papers. 1787. Penguin Group, 1961, p. 278.

⁸ Madison, James. "Notes for Speech Opposing Paper Money." 1 Nov. 1786. The Founders' Constitution, 1987, vol. 3, p. 392.

⁹ Madison, James. "No. 54: The Apportionment of Members Among the States." The Federalist Papers. 1787. Penguin Group, 1961, p. 334.

¹⁰ Madison, "No. 54: The Apportionment of Members Among the States," p. 335-336.

¹¹ Brown, Stuart Gerry. The First Republicans: Political Philosophy and Public Policy in the Party of Jefferson and Madison, 1954, p. 27.

¹² Madison, "No. 44: Restrictions in the Authority of the Several States," p. 279.

¹³ Madison, James. "Preface to the Debates in the Convention of 1787." 1787. The Founders' Constitution, 1987, vol. 2, p. 410.

¹⁴ Hamilton, Alexander. "No. 30: Concerning the General Power of Taxation." The Federalist Papers. 1787. Penguin Group, 1961, p. 184.

¹⁵ "Federal Farmer, no. 3." 10 October 1787. The Founders' Constitution, 1987, vol. 2, p. 413.

¹⁶ Ely, p. 43-45.

¹⁷ Hamilton, Alexander. "Continentalist, no. 5." 18 April 1782. The Founders' Constitution, 1987, vol. 2, p. 477.

¹⁸ "An Old Whig, no. 6." Fall 1787. The Founders' Constitution, 1987, vol. 2, 414.

¹⁹ Ely, p. 43-45.

²⁰ Madison, James. "Property." 29 March 1792. The Founders' Constitution, 1987, vol. 1, p. 598.

²¹ Siegan, p. 67.

²² Siegan, p. 82.

²³ Siegan, p. 66.

-
- ²⁴ Jensen, Merrill. The New Nation: A History of the United States During the Confederation 1781-1789, 1950, p. 125.
- ²⁵ Siegan, p. 64.
- ²⁶ Kelly, Alfred H. and Winfred A. Harbison. The American Constitution: Its Origins and Development, 1955, p. 122-123.
- ²⁷ Mason, Alpheus Thomas. "What Was the Federalist-Anti-Federalist Debate About?" The Confederation and the Constitution: The Critical Issues, 1973, p. 44.
- ²⁸ Kelly, p. 153.
- ²⁹ Mason, p. 39.
- ³⁰ Mason, p. 47.
- ³¹ Mason, p. 46.
- ³² "Records of the Federal Convention." 1787. The Founders' Constitution, 1987, vol. 2 p. 239-242.
- ³³ Ely, p. 47.
- ³⁴ "Records of the Federal Convention." 1787. The Founders' Constitution, 1987, vol. 3 p. 536-550.
- ³⁵ Kelly, p. 116.
- ³⁶ "Records of the Federal Convention." 1787. The Founders' Constitution, 1987, vol. 2 p. 2-3.
- ³⁷ Wilson, James. "Speech at the Pennsylvania Ratifying Convention." December 11, 1787. The Founders' Constitution, 1987, vol. 2 p. 3-4.
- ³⁸ "House of Representatives, Amendments to the Constitution." August 14, 1789. The Founders' Constitution, 1987, vol. 2 p. 14-15.
- ³⁹ Madison, "Property," vol. 1, p. 598.

Bibliography

- Adams, John. "Defence of the Constitutions of Government of the United States." 1787. The Founders' Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 1, 540-544.
- "An Old Whig, no. 6." Fall 1787. The Founders' Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 2, 413-415.
- "Articles of Confederation." Found in: Jensen, Merrill. The Articles of Confederation. Wisconsin: The University of Wisconsin Press, 1940.
- Bayly, C.A. The Birth of the Modern World, 1780-1914. Oxford: Blackwell, 2004.
- Bentham, Jeremy. The Principles of Morals and Legislation. 1780. Amherst, New York: Prometheus Books, 1988.
- Berman, Harold. Law and Revolution: The Formation of the Western Legal Tradition. Cambridge, Massachusetts: Harvard University Press, 1983.
- Blackstone, William. Commentaries on the Laws of England. 1765-1769. Facsimile of the First Edition. Chicago: The University of Chicago Press, 1979.
- "The Body of Liberties of the Massachusetts Collonie in New England." 1641. The Founders' Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 1, 428-429.
- Bowen, Catherine Drinker. Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787. Boston: Little, Brown and Company, 1966.
- Bowles, Samuel and Herbert Gintis. Democracy and Capitalism: Property, Community, and the Contradictions of Modern Social Thought. New York, New York: Basic Books, Inc., Publishers, 1986.
- Brown, Stuart Gerry. The First Republicans: Political Philosophy and Public Policy in the Party of Jefferson and Madison. Syracuse, New York: Syracuse University Press, 1954.
- Cassirer, Ernst. The Philosophy of the Enlightenment. Trans. Fritz C.A. Koelln and James P. Pettegrove. Princeton, New Jersey: Princeton University Press, 1951.
- "The Concessions and Agreements of the Proprietors, Freeholders, and Inhabitants of the Province of West New-Jersey." 2 March 1677. The Founders' Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 1, 429-431.

- “The Declaration of Independence.” Words that Built a Nation: A Young Person’s Collection of Historic American Documents. Ed. Marilyn Miller. New York, New York: Scholastic Inc., 1999. 18-23.
- Ely, James W. Jr. The Guardian of Every Other Right: The Constitutional History of Property Rights. New York : Oxford University Press, 1992.
- “Federal Farmer, no. 3.” 10 October 1787. The Founders’ Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 2, 412-413.
- Fortescue, John. “On the Merits and the Laws of England.” 1471. Trans. S.B. Chrimes. Medieval Political Philosophy. Ed. Ralph Lerner and Muhsin Mahdi. Ithaca, New York: Cornell University Press, 1963. 507-526.
- Franklin, Benjamin. Benjamin Franklin to Robert Morris.” 25 December 1783. The Founders’ Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987, vol. 1, 589.
- The French Declaration of the Rights of Man and of the Citizen and the American Bill of Rights: a bicentennial commemoration issued pursuant to S.J. Res. 317, 100th Congress. Washington, D.C.: U.S. Senate, 1989.
- Furet, Francois. The French Revolution, 1770-1814. Cambridge, Massachusetts: Blackwell, 1996.
- Groot, Roger D. “The Early-Thirteenth-Century Criminal Jury.” Twelve Men Good and True. Ed. J.S. Cockburn and Thomas A. Green. New Jersey: Princeton University Press, 1988. 3-35.
- Hamilton, Alexander. “No 1: General Introduction.” The Federalist Papers. 1787. Ed. Clinton Rossiter. New York, New York: Penguin Group, 1961. 27-30.
- Hamilton, Alexander. “No. 7: The Same Subject Continued.” The Federalist Papers. 1787. Ed. Clinton Rossiter. New York, New York: Penguin Group, 1961. 54-59.
- Hamilton, Alexander. “No 12: The Utility of the Union in Respect to Revenue.” The Federalist Papers. 1787. Ed. Clinton Rossiter. New York, New York: Penguin Group, 1961. 86-91.
- Hamilton, Alexander. “No. 30: Concerning the General Powers of Taxation.” The Federalist Papers. 1787. Ed. Clinton Rossiter. New York, New York: Penguin Group, 1961. 183-188.
- Hamilton, Alexander. “Continentalist, no. 5.” 18 April 1782. The Founders’ Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 2, 477-479.

- Harding, Alan. A Social History of English Law. Baltimore, Maryland: Penguin Books, 1966.
- Hobbes, Thomas. Leviathan. 1651. New York: Oxford University Press, 1998.
- “House of Representatives, Amendments to the Constitution.” August 14, 1789. The Founders’ Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 2, 14-15.
- “House of Representatives of Massachusetts to Denny de Berdt.” 12 January 1768. The Founders’ Constitution. 1987, vol. 1, 587.
- Hume, David. The History of England. 1778. Reprint. Indianapolis: Liberty Fund, 1983.
- Irving, Washington. Rip Van Winkle. 1819. New York: R.H. Russell, 1897. Digitized on: books.google.com.
- Jameson, J. Franklin. The American Revolution Considered as a Social Movement. Boston: Beacon Press, 1961.
- Jefferson, Thomas “Thomas Jefferson to James Madison.” 28 October 1785. The Founders’ Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 1, 539-540.
- Jensen, Merrill. The New Nation: A History of the United States During the Confederation 1781-1789. New York: Alfred A. Knopf, 1950.
- Kelly, Alfred H. and Winfred A. Harbison. The American Constitution: Its Origins and Development. New York, New York: W.W. Norton & Company, 1955.
- Kern, Fritz. Kingship and Law in the Middle Ages. Trans. S.B. Chrimes. London: Henderson and Spalding, 1948.
- King, P.J.R. “ ‘Illiterate Plebeians, Easily Mised’: Jury Composition, Experience, and Behavior in Essex, 1735-1815.” Twelve Men Good and True. Ed. J.S. Cockburn and Thomas A. Green. New Jersey: Princeton University Press, 1988. 254-304.
- Krieger, Leonard. Kings and Philosophers, 1689-1789. New York, New York: W.W. Norton & Company, Inc., 1970.
- Larkin, Paschal. Property in the Eighteenth Century: With Special Reference to England and Locke. New York: Howard Fertig, Inc., 1969.

- Lawson, P.G. "The Composition and Behavior of Hertfordshire Juries, 1573-1624." Twelve Men Good and True. Ed. J.S. Cockburn and Thomas A. Green. New Jersey: Princeton University Press, 1988. 117-157.
- Leder, Lawrence H. Liberty and Authority: Early American Political Ideology 1689-1763. Chicago: Quadrangle Books, 1968.
- Locke, John. A Letter Concerning Toleration. 1689. Amherst, New York: Prometheus Books, 1990.
- Locke, John. Second Treatise of Government. 1764. Cambridge: Hackett Publishing Company, Inc., 1980.
- MacPherson, C.B. Property: Mainstream and Critical Positions. Buffalo: University of Toronto Press, 1978.
- Madison, James. "No. 10: The Same Subject Continued." The Federalist Papers. 1787. Ed. Clinton Rossiter. New York, New York: Penguin Group, 1961. 71-78.
- Madison, James. "No. 39: The Conformity of the Plan to Republican Principles." The Federalist Papers. 1787. Ed. Clinton Rossiter. New York, New York: Penguin Group, 1961. 236-242.
- Madison, James. "No. 44: Restrictions in the Authority of the Several States." The Federalist Papers. 1787. Ed. Clinton Rossiter. New York, New York: Penguin Group, 1961. 277-284.
- Madison, James. "No. 54: The Apportionment of Members Among the States." The Federalist Papers. 1787. Ed. Clinton Rossiter. New York, New York: Penguin Group, 1961. 333-337.
- Madison, James. "No. 57: The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation." The Federalist Papers. 1787. Ed. Clinton Rossiter. New York, New York: Penguin Group, 1961. 348-353.
- Madison, James. "Notes for Speech Opposing Paper Money." 1 Nov. 1786. The Founders' Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 3, 392-393.
- Madison, James. "Preface to the Debates in the Convention of 1787." 1787. The Founders' Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 2, 410.
- Madison, James. "Property." 29 March 1792. The Founders' Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 1, 598-599.

- Martin, Luther. "Genuine Information." 1788. The Founders' Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 3, 394.
- Mason, Alpheus Thomas. "What Was the Federalist-Anti-Federalist Debate About?" The Confederation and the Constitution: The Critical Issues. Boston, Massachusetts: Little, Brown and Company, 1973.
- "The Mayflower Compact." Words that Built a Nation: A Young Person's Collection of Historic American Documents. Ed. Marilyn Miller. New York, New York: Scholastic Inc., 1999. 4-5.
- McLane, Bernard William. "Juror Attitudes toward Local Disorder: The Evidence of the 1328 Trailbaston Proceedings." Twelve Men Good and True. Ed. J.S. Cockburn and Thomas A. Green. New Jersey: Princeton University Press, 1988. 36-64.
- Notestein, Wallace. The English People of the Eve of Colonization. New York, New York: Harper & Brothers, 1954.
- Paine, Thomas. Rights of Man. 1791. New York, New York: Penguin Books, 1985.
- Pollock, Sir Frederick and Frederic William Maitland. The History of English Law. New York, New York: Cambridge University Press, 1968.
- Pomeranz, Kenneth. The Great Divergence: Europe, China, and the Making of the Modern World Economy. Princeton: Princeton University Press, 2000.
- Powell, Edward. "Jury Trial at Gaol Delivery in the Late Middle Ages: The Midland Circuit, 1400-1429." Twelve Men Good and True. Ed. J.S. Cockburn and Thomas A. Green. New Jersey: Princeton University Press, 1988. 78-116.
- "Records of the Federal Convention." 1787. The Founders' Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 2, 239-242.
- "Records of the Federal Convention." 1787. The Founders' Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 3, 536-550.
- Rousseau, Jean-Jacques. "Discourse on the Origin and the Foundations of Inequality among Men." 1754. The Discourses and other early political writings. Trans. Victor Gourevitch. New York, New York: Cambridge University Press, 1997. 112-222.
- Rousseau, Jean-Jacques. "Essay on the Origin of Languages." 1743. The Discourses and other early political writings. Trans. Victor Gourevitch. New York, New York: Cambridge University Press, 1997. 247-299.

- Rousseau, Jean-Jacques. "Last Reply." Circa 1750. The Discourses and other early political writings. Trans. Victor Gourevitch. New York, New York: Cambridge University Press, 1997. 63-85.
- Rousseau, Jean-Jacques. "Of the Social Contract." 1762. The Social Contract and other later political writings. Trans. Victor Gourevitch. New York, New York: Cambridge University Press, 1997. 39-152.
- Rousseau, Jean-Jacques. "Preface to *Narcissus*." Circa 1750. The Discourses and other early political writings. Trans. Victor Gourevitch. New York, New York: Cambridge University Press, 1997. 92-106.
- Siegan, Bernard H. Property Rights: From Magna Carta to the Fourteenth Amendment. New Brunswick: Transaction Publishers, 2001.
- Smith, Adam. The Wealth of Nations. 1776. New York, New York: Dutton, 1934.
- Webster, Noah. "Miscellaneous Remarks on Divisions of Property...In the United States." February 1790. The Founders' Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 1, 552-554.
- Wilson, James. "Of Man, as a Member of Society, Lectures on Law." 1791. The Founders' Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 1, 555-556.
- Wilson, James. "Speech at the Pennsylvania Ratifying Convention." December 11, 1787. The Founders' Constitution. Ed. Phillip B. Kurland and Ralph Lerner. Indianapolis: Liberty Authority, 1987. vol. 2, 3-4.
- Wood, Gordon S. The American Revolution: A History. New York: The Modern Library, 2002.
- Wood, Gordon S. The Creation of the American Republic 1776-1787. Williamsburg, Virginia: The University of North Carolina Press, 1969.