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A REPUBLICAN AGENDA FOR HOBBESIAN AMERICA?

Elizabeth Mensch*
Alan Freeman**

What is a state?
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Who are the people?
***
Where resides the ultimate power or sovereignty?


I. INTRODUCTION

The Thomas Jefferson Memorial, on the banks of the Tidal Basin in East Potomac Park in Washington, D.C., is a circular colonnaded structure in the simple classical style that Jefferson admired. Inside the structure stands an imposing 19-foot statue of Jefferson on a 6-foot pedestal. The statue depicts Jefferson before the committee appointed by the Continental Congress to write the Declaration of Independence. Engraved on the interior walls of the memorial are four inscriptions based on the writings of our third president. The U.S. Park Service explains:

On the southwest wall are famous and inspiring phrases from the Declaration of Independence. It is appropriate that these words should occupy the first position in the sequence. It was Jefferson's wish that he be remembered first as the author of this most famed of American documents.¹

Looking to the southwest wall, one reads the following:

WE HOLD THESE TRUTHS TO BE SELF-EVIDENT:
THAT ALL MEN ARE CREATED EQUAL, THAT THEY

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ARE ENDOwed BY THEIR Creator WITH CERTAIN INALIENABLE RIGHTS, AMONG THESE ARE LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS, THAT TO SECURE THESE RIGHTS GOVERNMENTS ARE INSTITUTED AMONG MEN. WE . . . SOLEMNLY PUBLISH AND DECLARE, THAT THESE COLONIES ARE AND OF RIGHT OUGHT TO BE FREE AND INDEPENDENT STATES . . . AND FOR SUPPORT OF THIS DECLARATION, WITH A FIRM RELIANCE ON THE PROTECTION OF DIVINE PROVIDENCE, WE MUTUALLY PLEDGE OUR LIVES, OUR FORTUNES, AND OUR SACRED HONOR.²

The first sentence seems to end too curtly. Moreover, what is depicted as the beginning of the next sentence hardly seems to follow from the first, serving to insult Jefferson's rhetorical prowess.

In the original document, however, the first sentence does not end with the phrase "instituted among men," but goes on to say:

that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government. . . .³

Space constraints surely limited the text that could be inscribed on the memorial wall. Most of the document is in fact missing. Yet this particular editorial excision reveals the political tradition and consciousness that secured hegemonic status in post-Revolutionary America, especially those years following ratification of the Constitution. It is hardly surprising that the text inscribed on the marble wall does not celebrate the revolutionary potential associated with a living, continuing, popular sovereignty. After all, the dedication of the Thomas Jefferson Memorial occurred in 1943, not 1776.

It has become fashionable among contemporary elite legal scholars to seek to "recover," under the banner of something called "republicanism," a living, breathing version of participatory popular sovereignty. Such scholars, while not actually deploying the people themselves, seek to legitimize the rhetorical availability of popular sovereignty for purposes of constitutional law interpretation.⁴ Their

². Id.

³. G. WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 374-79 (1978) (indicating the quoted passage in both Jefferson's original and the version corrected by Congress).

⁴. Instead of responding directly to Professor Michelman's essay, we offer a more generalized response to the current effort in legal scholarship to "revive" republicanism, an
argument depends upon the existence of an identifiable, recoverable tradition through which we might resuscitate the dormant voice of the people so as to breathe new life into the otherwise shaky and stumbling discourse of liberal constitutionalism.

This essay will suggest that those who did the editorial work for the Jefferson Memorial got it right and that the best way to understand the role of popular sovereignty in American constitutional culture is through the lens of Thomas Hobbes: with the ratification of the Constitution, the American people irretrievably alienated their sovereignty, surrendering to institutionalism. Against that background, we will suggest that popular sovereignty plays a role in American culture much more ideological than real. As with any successful ideology, its utopian core might serve as the basis for an alternative political vision. Developing that core, however, requires not just a superficial and selective recovery of slogans nonthreatening to contemporary liberal consciousness, but a hard look at the issues, once central to the republican tradition, that must be addressed by those seeking to develop a participatory and communitarian political alternative.

II. Hobbesian America

The core dilemma of political theory is the legitimacy of authority.5 In our contemporary political culture, one takes for granted the notion that ultimate authority, or sovereignty, rests with "the people." This, however, is a fiction, of relatively modern origin, arising specifically and dialectically in reaction to the well-established model of legitimate authority residing in the Crown.6

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5. See, e.g., C. Hill, The Problem of Authority, in 2 THE COLLECTED ESSAYS OF CHRISTOPHER HILL 37-59 (1986). A legacy of the Reformation is the continuing struggle between "external," "arbitrary" authority and "internal" authority. Id. at 47. One can test the validity of internal authority only "in discussion with other believers." Id.

6. For a recent and masterful treatment of popular sovereignty as fiction, with an emphasis on the ideological importance of the disputes between crown and parliament, see generally E. Morgan, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988).
The scholastic natural law model, fondly adopted by the Stuarts in seventeenth-century England, rested upon the supposed unity of virtue and authority. A sovereign king, who ruled by divine right in the name of God, embodied the divinely implanted faculty of reason. Within each individual, reason brought order out of the chaos of disparate sense impression and errant appetite, freeing the soul to ascend the ladder of pure speculation. So too, in civil society, the sovereign's reason brought harmony to the chaos of historic particularity and human instability, so that earthly society could reflect the harmonious purity of the city of God.7

In seventeenth-century England, the most dramatic challenge to this hierarchical model was the radical puritanism that located sovereignty, and, hence, legitimate authority, directly in the people themselves.8 If the king (at least in his natural body) spoke for God in a flawed voice, who else but the people could audaciously claim to be his true representative? The Parliamentarians, all too eager to establish legislative supremacy, saw in the demise of divine right an opportunity to relocate legitimate authority in their representative


But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. And in this sense is to be understood that saying that the will of the sovereign has the force of law; otherwise the sovereign's will would savour of lawlessness rather than of law.

8 T. Aquinas, SUMMA THEOLOGICA, PART II, at 3 (Fathers of the English Dominican Province trans. 3d ed. 1942); see O. Gierke, supra note 7, at 40-45; A. McGrade, POLITICAL THOUGHT OF WILLIAM OF OCKHAM 157-59 (1974) (discussing whether the pursuit of the common good is limited only by divine gift or further limited by human law); C. McIlwain, supra note 7, at 194-97 (although the King, too, is restrained by law, no effective machinery existed to make this a practical reality).

theirselves.9 The more radical Puritans, however, did not see their representatives as having any more claim than had the king to speak with the uncorrupted voice of God. As if by default, then, sovereignty descended to the people, now obligated to speak in their own name.

For the most radical Puritans, this obligation was an occasion for celebration, for only the voice of the people, unmediated by political or ecclesiastical hierarchy, could speak for God. In this context, the radicals fashioned a participatory politics that was at once millennial and egalitarian. The republicanism of seventeenth-century England, even in its most theoretical and scholarly form, merged the civic humanism of Machiavelli with millennial Christianity in a manner that might cause some embarrassment to modern, secular constitutional law scholars seeking to recover the republican tradition. “The voice of the people is the voice of God,” Harrington announced, by which he meant something more complex and profound than the occasional insertion of “deliberation” into the political process.10

Thomas Hobbes found little cause for celebration in the excitement of radical puritanism. For Hobbes, the demise of royalism invited no new unity of a people speaking in their own name in a state of near grace, but rather, an awesome, conflictual atomization.11 Against a

9. E. Morgan, supra note 6, at 65. For a full historic discussion, see generally, id. at 17-77. Morgan shows that parliamentarians initially claimed to accept the divine right of kings, insisting only that the king in his natural body had been corrupted by evil aides. Id. Because “the king in his body politic always wanted what was best for his subjects, all his subjects, and surely no subject could know better what that was than the combined representatives of all his subjects, the king was obligated to listen to the advice of Commons.” Id. at 30. See also E. Kantorowicz, The King’s Two Bodies: A Study in Medieval Political Theology (1957).


11. See Shulman, Hobbes, Puritans, and Promethean Politics, in 16 Pol. Theory 426, 437 (1988). This piece suggests that it was Hobbes’ mission in Leviathan, infra note 12, to devalue the rebels’ political and religious speech through “systematic reductionism” to “de-politicize them and keep them private: His redefinitions of their key concepts separates them from God, each other, and their own experiences, to deprive them of the grounds to rebel.” Id. at 437. His goal was:
background of what he perceived as factious, turbulent discord, Hobbes sought a scientific basis for legitimate authority that would offer security in place of the vagaries of mischievous rebellion. In so seeking, however, he wanted firmer intellectual ground than the pretentious scholasticism traditionally invoked on behalf of monarchy. The resultant effort alienated both rebels and royalists. Rebels found their ardent millennial fervor reduced to base, irrational self-interest, while royalists found scant solace in a merciless pragmatism that defended their monarchy only when and because it worked.

With a ruthlessness that alarmed even his fellow royalists, Hobbes demolished all of the intellectual categories which once seemed to legitimize power. He impatiently dismissed as fictions the intricate "faculties" which had characterized scholastic epistemology. In so doing, he also rejected dualisms implicit in the scholastic account; no wonderful process existed by which the mind could translate the particularity of matter into the universality of form. According to Hobbes, a mathematician and one of the first philosophers of modern scientific positivism, the mind was no more than a continuation of a perpetually moving physical world, incapable of knowing anything not part of that world. In particular, knowledge of any supposed "good" or "evil" was impossible. Such words were just inflated terms people used to describe motions in their bodies by which they were either drawn or repulsed by external objects. Hobbes, in fact, offered more concrete substitute terms — appetite and aversion — which lacked misleading

[1] To deprive people of the grounds that made judgment of conventions, and thus revolt, possible: If ideas of God and conscience are merely private and subjective fancies, they are incapable of being publicly shared or rationally defended, cannot provide warrantable grounds by which to criticize prevailing practices, and cannot sustain an alternative form of order.

Id. at 438.

12. For some of the controversies surrounding the exact meaning of Hobbes' work, see generally K. Brown, Hobbes Study (1965) (showing the range of controversy as to interpretation of Hobbes); M. Reik, The Golden Lands of Thomas Hobbes (1977); J. Watkins, Hobbes' System of Ideas: A Study in the Political Significance of Philosophic Theories (1973) (further illustrating range of interpretation). But cf. Plamenatz, Foreword to T. Hobbes, Leviathan at 9 (Plamenatz ed. 1963) ("Part of the fascination of Hobbes is that, though he makes large demands on us, we can always come to grips with him. He does not, as Rousseau and Burke, Hegel and Marx, so often do, elude us.").

13. As Richard Chamberland said: "Whilst Mr. Hobbes with one hand speciously offers up to kings and monarchs royal gifts and privileges, he with the other, treacherously plunges a dagger into their hearts." J. Watkins, supra note 12, at 49; see also E. Morgan, supra note 6, at 79 n.2. As Morgan points out, Hobbes left "little room for divine right on the one hand or popular sovereignty, as usually conceived, on the other." Id. His influence on the "growth of those fictions," lay chiefly in "simple revulsion" to his arguments. Id.
value content and thus posed starkly the problem of relativity. When people used the word "good," they referred only to what stimulated their own appetite:

For these words of Good, Evill . . . , are ever used with relation to the person that useth them: There being nothing simply and absolutely so; not any common Rule of Good and Evill, to be taken from the nature of the objects themselves; but from the Person of the man (where there is no Commonwealth). 14

14. T. Hobbes, Leviathan, pt. I, ch. VI, at 41 (A. Lindsay ed. 1950). The link between epistemology, especially scholastic faculty psychology, and conceptions of law and politics cannot be overemphasized. We still, often unwittingly, live with the consequences. See R. Unger, Knowledge and Politics 29-62 (1975). Hobbes represents a dramatic breakdown in scholastic theory, yet scholastic theory was fraught with core dilemmas at its inception, and its demolition already had begun. Scholastics had tried to reconcile theories of knowledge which remained stubbornly at odds with each other. To simplify: The dualism at the heart of the Platonic outlook implied an irrevocable separation between the sensible, changing world of phenomenal appearance and the eternal world of ideas. The particular can never partake of the absolute. In the language of Christianity, Platonism meant that the distance between God and the sensible world was forever unbridgeable through finite and intermediary steps. Aristotelianism, however, offered no sharp break between matter and form. Both were part of a single developing reality, part of a process by which form continuously flows from unmoved matter to all parts of a self-contained whole.

For a time, especially with the influence of Neoplatonism, the two systems seemed to merge. As Cassirer describes it, "[t]he Platonic category of transcendence and the Aristotelian category of development mate to produce the bastard concept of 'emanation.'" E. Cassirer, The Individual and the Cosmos in Renaissance Philosophy 18 (1964). Emanation was a kind of overflow of the absolute to produce a full universe of mediate beings. Thus occurred the flowering (especially during the Elizabethan period, when the whole cosmology was nearing collapse) of elaborate analogies that drew the universe as a vast set of macrocosms and microcosms, all arranged on planes leading from lowest to highest. Hence, the king, who exercised his sovereign reason, ruled a harmonious kingdom just as reason brought harmony to the soul of an individual. Within this system, reason functioned to ascend the cosmological ladder, achieving higher and higher levels of speculative knowledge. Jurisprudence was close to theology on this ladder, near the top, as rooted in eternal, rational principle. Medicine, with its unethereal involvement with bodies, was clearly lower. Id. at 142 n.16.

Of course, the notion of custom as law raised a hard dilemma, for custom was particular and disparate rather than universal. For a complete meditation on that problem, see St. German, Doctor and Student (1520) (Selden Soc. reprint). At one crucial point, where the law of reason evaluates maxims based on custom, St. German almost connects the law of reason to custom, but then refuses to do so definitely, stating only that the whole relation of reason to custom is "very harde and of great difficultie to knowe, and though it be harde to dyscuss . . . very necessary to be knowen for the . . . reason of the law." Id. at 69.

A core question was exactly how knowledge, if based on the senses (as Aristotle said), still could be linked to a speculative understanding that transcended mere matter. How did the mind, as Sir John Davies noted, "from things particular . . . abstract the universall kinds."? K. Wallace, Francis Bacon on the Nature of Man 104 (1967) (quoting Sir John Davies).
Thus all definition of value is particularized. No knowledge of universal moral truth lurks in the understanding; no access to pure speculation exists that transcends matter. This Hobbesian world of utter multiplicity prevents any natural unity of “the People;” the only unity possible is the artificial unity of the state (“this our Artificiall Man the commonwealth”). Of necessity, people transfer power to the state to pursue whatever draws their appetites, which means the right to define what is just or unjust. To preserve peace, sovereignty replaces the absolute moral standard which otherwise does not exist: “Would you have every man to every other man allege for law his own particular reason?”

The very artificiality of the state makes the people’s alienation of sovereignty complete. Without artificial unity there is only chaos of multiplicity; and moral multiplicity cannot yield a unified demand for a more natural community. The people can never speak in their own name.

In a fashion that parallels Hobbes’ response to what he perceived as the utter chaos of Puritan radicalism, the American constitutionalists responded to what they perceived as a chaos of multiplicity unleashed by the Revolution and permitted to fester in the 1780s, when power still rested chiefly in the states. The period between

Some, for example, said that before the imagination could present sense impressions to Reason, those impressions were “enlightened with the Light of the Understanding, and purged from the sensible and singular conditions, which they retain in the Imagination.” With that purging, they came to represent “generall” rather than “particular” things and could therefore be “embraced by the Understanding.” P. MILLER, I THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY 241 (1939) (quoting an anonymous Renaissance writer). That process, however carefully described by reference to particular faculties, ultimately was shrouded in mystery. Hence, scholars commonly assumed that some higher forms of knowledge were innate in Reason, knowable without stimulation by the concrete world of experience.

Even before Hobbes, scholastic nominalists had implicitly rejected scholastic epistemology by simply declaring God to be unknowable through the usual methods of human reasoning, and the Puritan emphasis on faith and grace had much the same effect. Francis Bacon, too, had emphasized that there was nothing “impious” in relegating religion to faith and thereby substituting direct knowledge of matter for the abstract speculation of the scholastics. Bacon somewhat modified faculty psychology, assuming that sense impressions directly contacted the intellectual faculties. He also sharply separated understanding from reason, but continued to assume that understanding, at least, contains the seeds of divinely implanted conscience and vestiges of Adam’s pure knowledge. Along with imagination, its subpart, however, understanding’s conclusions needed to be confined and measured by the standard of matter. That reversal marks a revolution in thought. Nevertheless, Bacon was still far from the reductionism of Hobbes. For these points and the complexity of Bacon’s epistemology, see generally J. STEPHENS, FRANCIS BACON AND THE STYLE OF SCIENCE (1975); K. WALLACE, supra.

16. Id. at 225.
the Revolution and the Constitution represented a crisis for both political theory and social stability. Earnest republican theorists in America, the elite whig intelligentsia, had expected that, within the relative homogeneity of the states, interests would be unified and the people wisely would choose as leaders these broad-minded "natural aristocrats" who were the fit representatives of a republican people. Instead, representatives from the new, narrowly-carved districts proved to be stubbornly wedded to the specific concerns, prejudices, and sometimes corruptions of their own particular areas. Moreover, they seemed to lack that more expansive conception of the universal good which gave stability to government. Even state senates, like the lower houses, allowed sectional interests to prevail, providing no aristocratic check on "irresponsible" popular legislation. America's state legislatures, the most democratic bodies in Western history, passed laws that violated the treaty with Great Britain, provided expansive debt relief, confiscated property, authorized paper money, refused to pay for national expenses, etc. Such laws, enacted, repealed, and reenacted with an alarming haste, seemed irrefutable evidence that anarchy prevailed — an anarchy that had the force of law and was therefore tyranny as well.

These new representatives were also of a decidedly lesser social standing than those whom more respectable Whigs expected to find in positions of influence. "When the pot boils the scum will rise," James Otis had warned in 1776, and his prediction came true with a vengeance. The egalitarianism implicit in republican theory became too much the political reality, so that a man fit only "to patch a shoe" might actually feel qualified to "patch the state," "fancying himself a Solon or Lycurgus." Everywhere "[s]pecious, interested designing men," "men respectable neither for their property, their virtue, nor their abilities," were becoming leaders, courting "the suffrages of the people by tantalizing them with improper indulgences." This was not responsible republicanism, but the unchecked ascent of an alarmingly unvirtuous rabble.

Moreover, during the post-Revolutionary period Americans continued to show a disconcerting readiness for direct action, reseizing, as it were, sovereignty from their institutional representatives and

18. G. Wood, supra note 8, at 476.
19. Id. at 477.
20. Id.
locating it, once again, in the "people out of doors." Crowd assembled to challenge or supplement state legislation, local communities organized to suppress Tories or curb profiteers, and even interstate conventions formed to demand, for example, lower prices for necessities. Shay's Rebellion in Western Massachusetts in 1787 confirmed the conservatives' grimmest predictions: Republican liberty meant nothing but endless, anarchic upheaval.

Those like Professor Michelman, who now seek to read deliberative republicanism into the Constitution, forget the extent to which the choice for constitutionalism was explicitly a choice against the dangers of local participatory democracy and a choice for a broad national structure of carefully counterpoised institutions designed to filter out faction, local particularism. A close reading of Federalist No. 10, for example, shows that Madison had no faith in the people as careful, reasoned deliberators. No less than Hobbes, Madison saw people as driven by passions, with reason too closely linked to passion to provide a dependable check on human appetite. Passion lay at the root of faction—chiefly, the passion for economic gain, but sometimes, for political or religious rivalry instead—and it was unbridled faction which threatened to undermine the young republic.

Madison's solution was not to institute republicanism as the voice of a more localized, deliberative people. By the late 1780s the "people" already had proved themselves unworthy. No locality seemed small enough to speak with a unified voice; everywhere, unity was dissolving into a Hobbesian nightmare of multiplicity, with democratic legislation representing nothing more than an aggregation of unreason and faction. Therefore, instead of celebrating the process of local republican deliberation, Madison quite dramatically turned republicanism on its head. No doubt following David Hume, he argued that decency in government would result from an expanded (i.e., national) territory

21. Id. at 319. For the tendency toward direct action, see E. Morgan, supra note 6, at 257; G. Wood, supra note 8, at 323-28.
22. For an excellent analysis of Shay's Rebellion and its continuing meaning for American constitutional culture, see generally Appleby, supra note 17.
and a federal institutional structure that stifled faction and filtered democratic passion out of public life. Hume's oft-quoted statement on the subject, taken to be Madison's inspiration, is revealing:

In a large government, which is modelled with masterly skill, there is compass and room enough to refine the democracy from the lower people, . . . to the higher magistrates, who direct all the movements. At the same time, the parts are so distant and remote, that it is very difficult, either by intrigue, prejudice, or passion, to hurry them into any measures against the public interest.²⁵

According to Madison, the constitutional goal was not simply to create a standoff of inevitably conflicting interests. A balance of powers meant that no factious majorities would be able to take control, as they had in the state legislatures. Nevertheless, Madison still believed in a unified conception of the public good. The real advantage of the Constitutional scheme lay in the anticipated "substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and to schemes of injustice."²⁶ In a federal scheme, power would more likely rest with "men who possess the most attractive merit and the most diffusive and established characters," men elevated above the clamors of men "of factious tempers, of local prejudices, or of sinister designs."²⁷

Both Federalists and Anti-Federalists understood the extent to which the Constitution was an attempt to return government to the hands of the natural aristocrats.²⁸ In a sense, however, this faith in the "natural" aristocrat was merely a fragile attempt to mediate between the chaos of true democracy and the bleak landscape of full-fledged Hobbesian realism, with its consequent surrender to the artificiality of positivist institutionalism. A more critical step was to discern how "the people," the only authoritative basis for ultimate political legitimacy, could have deployed their sovereignty while simultaneously recasting themselves as a set of federal institutions forever beyond their own immediate control. Direct national elections lent some factual credence to the fiction of popular sovereignty, but Hamilton's famous argument for judicial review, in Federalist No. 78²⁹ later given rhetorical flourish by John Marshall in Marbury v. Madison,³⁰ became the

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²⁵ Adair, supra note 23, at 494; see also, G. Wood, supra note 8, at 504.
²⁶ G. Wood, supra note 8, at 505.
²⁷ Id.
²⁸ Id. at 506-18.
³⁰ 5 U.S. (1 Cranch) 137 (1803).
real cornerstone of American constitutionalism, regarded not merely as a Hobbesian covenant, but as a kind of political transubstantiation.

Both in its form ("We the people . . . do ordain and establish") and mode of ratification (the state conventions) the Constitution expressed popular will, not in an ordinary text, but a legal one. As a legal text, it was not susceptible of interpretation by common sense — that natural reason now located in the sovereign people rather than in the Crown — but only through the peculiar artificial reason of those learned in the law. As Hamilton emphatically stated:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, . . . .

John Marshall made exactly the same claim in Marbury: "It is emphatically the province and duty of the Judicial department to say what the law is." The people, in other words, through the constitutional text, alienated their active sovereignty to a set of structured insti-

31. Coke, of course, claimed the authority of "artificial reason" against King James's assertion of royal prerogative in the name of "natural reason." 77 Eng. Rep. 1342, 1343 (K.B. 1608); see also CONSTITUTION AND THE FEUDAL LAW: ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 30-55 (1967); J. POCOCK, MACHIEVELLIAN MOMENT, supra note 10, at 16. From the natural law tradition of descending authority James was surely correct; only the ascending notion of consent over time gave credence to Coke's claim, given the problematic authority of "custom" as law. With the shift of sovereignty from the king to the "people" came a shift in the location of reason as well.

Conventional thought at the time, including that of Hobbes, understood the conceptual link between reason and sovereignty. Thomas Paine, for one, was perfectly comfortable with that connection and endlessly hailed the natural reason of the people, their "Common Sense." Unlike Madison, however, he also believed that the "people" should retain the right of direct participation, "forming or reforming, generating or regenerating constitutions and governments," T. PAINE, The Rights of Man, in II THE WRITINGS OF THOMAS PAINE 397 (M. Conway ed. 1867) (1894). Paine envisioned a right to sovereignty not monopolized by any generation, one not encumbered by any conditions. Id. at 452. Similarly, Paine had no respect for legal precedent, which he saw as simply a substitute for faith in human reason. Id. at 441. Nor did he approve of careful institutional arrangements designed to "balance" powers, since they, too, removed government from direct accountability to the people. Id. at 383-85.

Paine, in other words, represents the complete relocation of sovereign reason, so that it really did rest with the "people." Notably, the Federalists were determined to locate "reason," not with the people directly (whom they described as passionate, not reasonable), but with the judicial process of textual interpretation. So, too, the Federalists separated the exercise of "rights" from both reason and consent, a more dramatic departure from tradition than we now realize.

32. THE FEDERALIST No. 78, at 506 (Hamilton) (E. Earle ed. 1937).
33. 5 U.S. (1 Cranch) 137, 177 (1803).
tions subject to judicial oversight. In subsequent years, the Supreme Court confirmed three key features of the sovereignty that had been thoroughly institutionalized: the irrevocability of its alienation, its nationalization, and its subordination to privatized rights.

Alienation was a clearly once-and-for-all affair: The people lost all right to any exercise of power not confined by institutional forms. This point, implicit in Marbury, was confirmed by Luther v. Borden, which dealt quite summarily with an actual instance of an extra-institutional assertion of popular sovereignty (in other words, direct republicanism). A large group of Rhode Islanders, led by conservative lawyer Thomas Dorr, still believed in peaceable revolution through popular will. This group actually held an extra-institutional election to ratify a new, more democratic, state constitution to replace the seventeenth-century charter under which Rhode Island still operated. Central to their claim was that the highest sovereign authority was the voice of the people themselves. Dorr's group received a dramatic electoral victory throughout the state, from which they naively believed they could derive authority for a new government. Instead, they were ruthlessly suppressed by the (existing) Charter Government, which declared martial law. An invasion of the home of a Dorrite pursuant to that martial law offered the factual setting for a legal challenge to the continuing legitimacy of the Charter Government following the successful ratification of the People's Constitution.

The Supreme Court flatly refused to question the legitimacy of the Charter Government, making clear at the outset that the legitimacy of the existing state government lay in its ability to prevail. That con-

34. For a similar argument, see Miller, The Ghostly Body Politic: The Federalist Papers and Popular Sovereignty, 16 POL. THEORY 99 (1988). Miller's article, based on careful reading of The Federalist Papers, distinguishes the ideological form, "popular sovereignty," implicit in the Federalist theory from "democracy," which is direct and participatory. See generally id. Michelman seemingly scurries from Miller's argument, dismissing it in a footnote as "obvious hyperbole." Michelman, Law's Republic, supra note 4, at 1500 n.23. He later characterizes it as "the most extreme account," which would amount to thinking " luridly" about the framers. Id. at 1509.

35. 48 U.S. (7 How.) 1 (1849).

36. For a thoughtful and sophisticated account of the Dorr war and its political and legal aftermath, including Luther v. Borden, see generally G. DENNISON, THE DORR WAR: REPUBLICANISM ON TRIAL 1831-1861 (1976) (arguing that the suppression of the Dorr rebellion, confirmed by the Supreme Court with a vengeance in Luther, marked the final demise of any living theory of "peaceable revolution" in American political life, ironically setting the stage for the Civil War). For further commentary on the historical events, see generally M. GETTLEMAN, THE DORR REBELLION: A STUDY IN AMERICAN RADICALISM, 1833-1849 (1973).

37. See 48 U.S. at 38-42.
clusory treatment of the issue left no room for any theory of peaceful revolution, for any expression of popular sovereignty neither institutionally confined nor militarily successful. Then, in a move often regarded as the origin of the modern "political question" doctrine, the Court went on to relegate the "republican form of government" clause of the Constitution to the institutional competence (or will) of Congress and the president, leaving no substantive route by which the people could directly express their sovereignty outside of the constitutional distribution of spheres of authority.

An important feature of the people's one-time alienation of sovereignty, true to Madison's goal, was the subordination of that sovereignty to a nationalized regime of privatized rights to be secured by institutionalized judicial power. State governments, once thought the natural successors to the republican city/state tradition, were not so regarded by the Supreme Court. Thus, when the Georgia legislature tried to recapture, through legislative repeal, some thirty-five million acres of public land that the previous legislature, via an outright bribery led by one of Georgia's United States senators, corruptly had deeded to speculators, the Supreme Court, through Chief Justice Marshall in *Fletcher v. Peck*, invoked the supremacy of the national constitution to annul Georgia's assertion of its own state sovereignty. As the basis for his decision, Marshall, again borrowing from Hamilton, deployed a deft blend of natural law, selective analogy to English common law, and positivist interpretation of constitutional text via the contract clause. In *Fletcher*, the people of Georgia found themselves reprising in the particular case the one-time alienation of sovereignty represented by the Constitution itself. Once alienated (literally), their sovereignty over the vast tract of public land in question (more than the entire state of Mississippi) became the institutional property of the national government to be reserved by its judiciary (albeit in the name of the people, à la *Marbury*) for the protection of its rights-bearing purchasers.

Despite such setbacks, some, like John C. Calhoun, argued that the Constitution was no more than a compact among the several states,

38. Id. at 43.
40. Hamilton wrote an opinion letter shortly after the Georgia repeal legislation. The memo, written many years earlier, bears strong resemblance to Marshall's argument in *Fletcher*. See *Fletcher*, 10 U.S. (6 Cranch) at 87. The memo is reprinted in C. McGrath, supra note 39, at 149-60.
granting certain powers in trust to the federal government, as the states' agent.\textsuperscript{41} Justices Marshall and Story\textsuperscript{42} strived to undercut that view, treating sovereignty as residing in the people as a whole when they ratified the Constitution, not as something still residing in particular states. Remembering from Marbury who gets to speak "for the people," consider the irony in Marshall's assertion of popular sovereignty as against the states in the following excerpt from his classic opinion in McCulloch v. Maryland.\textsuperscript{43} The passage, which is an elaboration of Hamiltonian political theory,\textsuperscript{44} bears on the merits of the case only insofar as it undercuts the competency of Maryland \textit{as a state} to speak with special authority in interpreting the Constitution:

In discussing this question, the counsel for The State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.\textsuperscript{45}

It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State Legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification."\textsuperscript{46} This mode

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\textsuperscript{42} For the crucial role after 1829 of both Story in particular and the Harvard Law School in general in securing hegemony for the conservative, nationalist constitutionalism within the peculiar interpretative province of the judiciary, see Newmyer, Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence, 74 J. AM. HIST. 814 (1987). With the recent ascension of conservative Robert Clark to its deanship, one might safely suppose that Harvard Law School has now returned to its historic mission of serving as an energetic and active apologist for the existing order.

\textsuperscript{43} 17 U.S. (4 Wheat.) 316 (1819).

\textsuperscript{44} For the substance of Marshall's McCulloch argument, see A. HAMILTON, Opinion as to the Constitutionality of the Bank of United States, in IV THE WORKS OF ALEXANDER HAMILTON 104-38 (J. Hamilton ed. 1850) (1791).

\textsuperscript{45} 17 U.S. at 402.

\textsuperscript{46} Id. at 403 (quoting from previously quoted passage).
of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States - and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these Conventions the constitution derives its whole authority. The government proceeds directly from the people; is ordained and established in the name of the people; and is declared to be ordained, “in Order to form a more perfect Union, establish Justice, insure domestic tranquility, and secure the blessings of Liberty” to themselves and to their posterity. The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties . . .

The government of the Union, then, (whatever may be the influence of this fact on the case,) is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. 48

Thus, Marshall named the people as authors of their own destiny, yet left them estranged from government, in the hands of an impersonal institutional structure.

The point of describing our constitutional structure as “Hobbesian” is not simply to get the label right, especially on a historical issue as elusive as “intent.” Rather, the description clarifies reality, for American political life is at least partly a creature of the presuppositions about both public and private life that were built into American con-

47. Id. at 403-04 (quoting U.S. CONST. preamble).
48. Id. at 402-05.
stitutionalism. That is a point often missed by the pluralist/empiricist strand of American political science.

Robert Dahl, for example, has described politics as naturally and inevitably situated in processes of influence, by which particular individuals promise reward or threaten punishment to induce other self-interested individuals to act. Like Hobbes's, Dahl's view is positivist and mechanistic; he describes the notions of influence as "very similar to those on which the idea of force rests in mechanics." He conceives politics to be universally a relation between particular self-interested individuals, and offers no way of distinguishing legitimate from illegitimate "influence," for all values are subjective. Dahl adopts a Hobbesian impatience with normative language or moral argument, dismissing any possibility of a shared conception of public good. Both inequality and conflict are unavoidable; the function of government is to provide an institutional structure to contain and manage conflict. While this may be an accurate description of American political life, the scientific naivete lies in supposing that this Hobbesian reality is a description

49. See F. Coleman, Hobbes and America: Exploring the Constitutional Foundations 154-56 (1977) (viewing American constitutionalism as essentially Hobbesian, effectively pointing to Dahl as an example of the empiricist fallacy). Coleman's is a biting critique of the failure of American politics to cope with the evident shortcomings in American life. Id.


For efforts of modern political scientists to grapple seriously with problems of democracy, see, e.g., J. Burnheim, Is Democracy Possible? (1985); J. Mansbridge, Beyond Adversary Democracy (1980); E. Meidinger, Regulatory Culture and Democratic Theory (1987) (working paper, Baldy Center for Law and Social Policy).

For an argument that Madisonian constitutionalism did not repudiate traditional republicanism, but instead created an "intermediate" form of republicanism located in the deliberative interaction of wise and responsible representatives, see Sunstein, Interest Groups in American Public Law, 33 Stan. L. Rev. 29, 31-48 (1985). Sunstein seeks to deny that Madisonianism is best understood as a realization of Dahlsian pluralism. Id. at 30 & n.6. Thus, while he concedes the "close practical relationship between the concern for private property and the Madisonian governmental structure," he assures us that "the relationship is hardly one of logical necessity." Id. at 45. Similarly, he concedes that redistribution of wealth was "neither the hope nor the expectation of the Federalists," but imagines that the representatives chosen through those Federalist institutional structures might in their "deliberation" opt for redistribution and still be "consistent with their [the Federalists'] underlying conception of politics and representation . . . ." Id. To support his version of that underlying conception, he quotes passages from Hamilton, see id. at 41, 46, that we think are better understood as expressions of ideology rather than sincerity.

50. F. Coleman, supra note 49, at 154 (quoting Dahl).
of "natural" and universal reality, rather than a contingent version created by political theory itself.

The emphasis on Hobbes also punctures reformist fantasy. Hobbes, at least, was an utter realist, completely and corrosively honest. In contrast, Locke, whom we prefer to claim as one of our intellectual founders, reinvented the natural law tradition, even while robbing it of moral content, to justify what was essentially a Hobbesian view of political life. The Lockean conception of inalienable rights rooted in natural

51. Locke was guilty of playing a disingenuous rhetorical game with the reader, while Hobbes, at least, was intellectually honest. For example, Locke, like Hobbes, refuted the notion of innate moral ideas. Pointing to the diversity of world views, he took values to be culturally relative. See, e.g., J. Locke, An Essay Concerning Human Understanding ch. 3, at 6-9 (P. Nidditch ed. 1975). Unlike Hobbes, however, Locke was unwilling to surrender the moral authority which words like "reason" and "natural law" provided. Thus, he asserted that while reason could not be a direct source for a knowledge of morality, it could nonetheless deduce moral principle from sense impression and experience. Reason could formulate deductions and intermediate ideas which eventually would lead to important "truths" about morality and justice that were almost mathematically demonstrable. Id. ch. 4, at 7. He even advocated conformity to the general principles of justice which were virtually universal in their application. Id. ch. 28, at 7-13. This curious vacillation runs through Locke's reasoning, making moral truth alternatively "quite uncertain" and "mathematically demonstrable." See L. Stephen, II History of English Thought in the Eighteenth Century 72 (1962).

Locke's argument is patently self-contradictory, but in the Natural Law Essays, he underscores the political implications of his redefinition of reason. J. Locke, Essays on the Law of Nature 161 (W. von Leyden ed. 1954) (1676). While his definition disassociated natural reason from the divinely sanctioned monarch, it did not distribute natural reason to the people. Locke is unambiguous on that point:

"The voice of the people is the voice of God." Surely, we have been taught by a most unhappy lesson [apparently, the Civil War] how doubtful, how fallacious this maxim is, how productive of evils, and with . . . what cruel intent this ill-omened proverb has been flung wide [lately] among the common people. Indeed, if we should listen to this voice as if it were the herald of a divine law, we should hardly believe there was any God at all. For is there anything so abominable, so wicked, so contrary to right and law, which the general consent . . . of a senseless crowd would not at some time advocate? Hence we have heard of the plunder of divine temples, the obstinacy of insolence and immorality, the violations of laws, and the overthrow of kingdoms. And surely if this voice were the voice of God, it would be exactly the opposite of that first fiat whereby He created and furnished this world, bringing order out of chaos; nor does God even speak to men in such a way — unless He should wish to throw everything into confusion again and reduce it to a state of chaos.

Id. (footnotes omitted).

Instead, natural law, the law of reason, is known specifically by those industrious enough to undertake a thorough inquiry into the "order, array, and motion" of the world, which is "so regular and in every respect so perfect . . . ." Id. at 153. This examination would show that God not only exists but also intends that people obey law and live in an orderly world. Most people will of course be too lazy to undertake the industrious study of the world which yields
law and protecting “liberty” serves to provide a kind of fantasy version of American life; what we celebrate in the name of property and freedom is a self-interest and avarice best described as an expression of Hobbesian “appetite.”

Likewise, the fiction of “sovereignty of the people,” which legitimates a constitutional structure far removed from direct, participatory democracy, serves to perpetuate the illusion that as Americans we really do speak as “the people,” even though the political reality is far closer to the alienated, transactional world of Dahl (or Hobbes). Instead of indulging in reformist fantasies — like the effort to “recover,” in a modern, palatable, nonthreatening “liberal” version, a long-deceased republican tradition — which divert energies and sustain self delusion, we should confront our Hobbesian reality directly, and seek to fashion a politics in response. The “liberal” era of constitutional law, if it ever existed at all, is over. In fact, if ever there were a fit candidate for “structural amendment” of the Constitution, it would be the Nixon/Reagan redirection of the federal courts (from bottom to top). Those courts are back on track, back in the spirit of both Alexander Hamilton and John Marshall. The paradigmatic case in American constitutional jurisprudence is, unfortunately, not Brown v. Board of Education, but Fletcher v. Peck.

As conservative apologists for the existing order again learn to celebrate the judicial activism they so vehemently denounced, those with more progressive agendas must stop playing the supplicant role

an understanding of natural law, although all have an equal opportunity to do so, just as most people are too lazy to understand geometric principles. Locke did not advocate rule by scientists and mathematicians alone, however. The real point was wealth, for, like geometric principles, riches in the Earth are available for all who seek them, “yet from this we do not conclude that all men are wealthy.” Id. at 135. Riches do not “present themselves to idle and listless people,” but only to those with the zeal to search them out. Id. Reason, in other words, now resided with the successful few, not with the monarch or the multitude. Id. It followed, of course, that those same industrious few should also exercise sovereignty.

Notably, when sovereignty was safely in the hands of the propertied, “rights” as against sovereignty were not of crucial importance to Locke. J. Locke, Second Treatise on Government § 94 (P. Laslett rev. ed. 1963); see also F. Coleman, supra note 49, at 67-72 (also describing Locke as adopting essentially Hobbesian premises but surrounding them with more pleasing rhetoric).

52. From Coleman’s perspective, American life may be less “hazardous and short” than the Hobbesian state of nature, but is nevertheless “solitary, poor, nasty, and brutish.” F. Coleman, supra note 49, at 4.


55. 10 U.S. (6 Cranch) 87 (1810).
before a judiciary that will become more unresponsive before it gets better, if it ever does, many years from now. And it will never get better unless we focus on real politics instead of self-indulgently conjuring up sly and rhetorical moves good for only occasional incremental movement, as, for example, a strong dissenting opinion.

III. A REPUBLICAN AGENDA

Despite the best efforts of Michelman and others to locate long-buried threads of republicanism in American constitutionalism, the case for discontinuity, outlined in the preceding section, is stronger. The institutionalized federal structure, with its crucial incorporation of the liberal individual rights model, signifies a wholesale rejection of an authentic republican tradition. Yet, the imagery of popular sovereignty is so powerful that it serves a profound ideological role, as illustrated by Marshall's long passage from *McCulloch v. Maryland*. Instead of taking its ideological traces as reality, one might focus instead on republicanism's utopian core, the core that makes the idea of republicanism so appealing. At one time, people very seriously considered the question of how to realize republicanism in practice.

The following sections reintroduce the most hotly debated issues of seventeenth- and eighteenth-century republican theorists. While "republicanism" was never unified or consistent enough to yield a single position on these topics, at least all were up for grabs to an extent that modern liberals would find disquieting. We will discuss, in turn, property, membership, representation, and virtue.

A. Property

Liberal reformers routinely point out that vast disparities of economic power affect (and distort) the political process. The economically powerful make themselves heard through highly visible methods that need no surreptitious resort to corruption, although corruption is also a mainstay of American political life. Current publicity about congressional ethics, for example, may dampen the zeal in Washington for shifty money-making schemes, but it will undoubtedly leave intact the processes of private campaign financing by which the wealthy legally buy officials their positions. Also, as editorialists often noted


after the last presidential campaign, most Americans feel no particular stake in the outcome of elections. In the one ritualized exercise of popular sovereignty available to Americans at the national level — the opportunity to choose between the two presidential candidates — turnouts are extraordinarily low, and most Americans are otherwise uninvolved in the political process. Moreover, the level of involvement drops dramatically depending on where one is situated in the economy: The wealthy vote, and otherwise enjoy access to the political process, while the poor tend not even to bother showing up for elections.

These realities are well-known. We stare them in the face, yet refuse to consider the distribution of wealth as raising a starkly political question. The liberal (anti-republican) split between public and private grips our consciousness so firmly that we almost dare not think of private property as a public issue of sovereignty.\(^5\)

By way of contrast, consider the great republican theorist of England, James Harrington, whose work was so influential in the colonies. In his famous conception of “balance,” Harrington unequivocally linked politics to land distribution. Following Aristotle (and the ancients’ “learned disciple Machiavel”),\(^6\) he categorized government as either monarchy, aristocracy, or commonwealth. Ideally, political form followed the distribution of property. Thus, in a monarchy, one person would own three quarters of the land (the “over-balance”);\(^61\) in an aristocracy, a minority would own the overbalance; and in a commonwealth, the “whole people” would hold the major part of the land. These normative Aristotelian categories assumed a congruence between the form of government and the distribution of property. In-

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58. For a more extended treatment of this subject, see Freeman & Mensch, The Public-Private Distinction in American Law and Life, 36 BUFFALO L. REV. 259 (1987).

59. Both Sunstein and Michelman, in their versions of republicanism, are willing to deny property rights a presocial or “exogenous” status. See Michelman, Possession vs. Distribution, supra note 4, at 1330-37; Sunstein, supra, note 4, at 1549-53. In this respect, they are both in the grand tradition of liberal legal realists going all the way back to Justice Johnson’s famous opinion (one of four for the majority) in Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 271 (1827), in which John Marshall, who did believe in presocial property rights but was outvoted four to three, dissented in a constitutional case for the first and only time in his career as Chief Justice. Id. at 332 (Marshall, C.J., dissenting).

From our perspective, however, their positions do not really stray outside the modern liberal tradition. While they surely diverge from radical libertarianism, they both still see law (and politics) as basically operating alongside a given (and grossly unequal) distribution of wealth, with hopefully some capacity to tinker with distributional arrangements. However, we view the core republican insight as this: Distribution is prior to politics, and necessarily the foundation for politics conceived as a moral enterprise.

60. Harrington, supra note 10, at 162.

61. Id. at 163.
deed, lack of congruence would cause “confusion.” If, for example, a single ruler attempted to govern as an absolute monarch without holding at least three-quarters of the property, he would govern by force rather than “naturally” and could be called a tyrant. Likewise, an aristocracy holding less than three-quarters of the land would become an “oligarchy,” and a republic in which the people did not own the overbalance would become an anarchy: “[G]overnment not according unto the balance, . . . is not natural but violent,” wrote Harrington, for those with political power would try to force a commensurate redistribution of property, or those with an overbalance of land would try to seize commensurate political power.63 The Harringtonian ideal was an overbalance already in the hands of the many, followed by a quiet adjustment of the form of government to a republic (commonwealth), thereafter secured by the enactment of an agrarian law to prevent any return of the overbalance to the hands of a few.64 He claimed such limits to ownership were “first introduced by God himself, who divided the land of Canaan unto his people by lots. . . .”65

Notably, Harrington conceded that people would tend to act in their own self-interest, yet he also argued that politics could transcend (rather than merely manage) conflict. Politics could rise to the level of “reason” and “law” in something like the old scholastic sense — infusing “soul” into the multitude, making them “incapable of passion.”66 The key to transcending conflict lay in proper political management of property, so as to produce a unity of interest;67 when, through devices like the agrarian law, the people as a whole shared an interest in the nation’s property, and also exercised sovereignty, the government became a government of laws, not of men.68

A government of laws did not mean a government by fixed legal formalism, for Harrington thought lawyers should play no role in a true republic.69 Law was not abstract form, but relation — specifically,

62. Id. at 164. Which is surely the case in the contemporary United States, where in 1983, even before the full impact of the Reagan years, an estimated 10% of households owned 72% of the wealth. DEMOCRATIC STAFF OF THE JOINT ECONOMIC COMMITTEE, The Concentration of Wealth in the United States 35 (1986) (based on data, analysis, and assistance provided by James D. Smith).
63. Harrington, supra note 10, at 164.
64. Id. Radicals made a serious attempt to include such an agrarian law in the Pennsylvania Constitution of 1776. See Nash, Smith & Hoerder, Labor in the Era of the American Revolution: An Exchange, 24 LAB. HIST. 414, 431-32 (1983); see also G. WOOD, supra note 8, at 64, 89.
65. Harrington, supra note 10, at 164.
66. Id. at 838.
67. See id. at 835.
68. Id. at 401, 838.
69. Id. at 98.
the correct relation between property and popular sovereignty. In a monarchy or aristocracy, even where a "balance" of property and power exists, laws will be "more private than comes duly up unto law (the nature whereof lieth not in partiality but in justice)." In contrast, in a commonwealth, the interest "of the whole people, coming up to the public interest (which is none other than common right and justice, excluding all partiality or private interest), may be truly called the empire of laws and not of men." On this point (unlike some others) Harrington was unambiguous. The correct relation between power and property constituted law:

To come unto civil laws: if they stand one way and the balance another, it is the case of government which of necessity must be new modelled; wherefore your lawyers, advising you upon like occasions to fit your government unto their laws are no more to be regarded than your tailor if he should desire you to fit your body unto his doublet. There is also danger in the plausible pretence of reforming the law, except the government be first good, in which case it is a good tree and (trouble not yourselves overmuch), bringeth not forth evil fruit. Otherwise, if the tree be evil, you can never reform the fruit . . . .

Royalist critics, skeptical of applying the classical conceptions of republicanism to the realities of seventeenth century England, pointed to one obvious problem. Harrington's notion of "balance," and the whole idea of an economically independent citizenry based on republicanism, defined "property" as land. But as the Hobbesian royalist Wren pointed out, England already possessed many other sources of wealth. According to Wren, it was the early decision to establish money and a market exchange value for "acquiring and possessing" goods that in fact necessitated sovereign power. And how could land remain the basic unit of wealth when the king could derive money from many sources: rents from land, mining, colonies, duties and customs, and usury? Indeed, according to Wren, even in ancient times, Aristotle had told of Phaleas, who tried to introduce republican equality through redistribution of land, ignoring other riches — "in all of

70. Id. at 401.
71. Id.
72. Id. at 187.
73. M. WREN, MONARCHY ASSERTED 17-41 (1659).
74. Id. at 22.
which He ought to have settled the same Equality or Moderate Pro-
portion, or else altogether to have omitted that Phansie."

For a time, some Americans were optimistic about the degree to
which republicanism and at least an entrepreneurial form of capitalism
could coexist, but Harrington himself never envisioned republicanism
as other than agrarian. The problem was the one Wren identified:
How could capitalism conform to the need for balance — the need for
the sovereign people to own at least three-quarters of the property?

Gordon and Trenchard, whose articles became the most widely
read English political theory in the American colonies, drew explicitly
upon Harrington, but at the same time celebrated, like Locke, the
process of capital investment and economic development. As with
Locke, the “reason” they hailed was not the reason of natural law
scholasticism, nor the people’s “common sense,” but, rather, the reason
that served to facilitate industry, acquisition, and exchange:

REASON has invented all Science, pointed out all Commerce, and framed all Schemes for social Happiness. To REASON we are beholden for all the Comforts and Conveniences of Life . . . . The Earth with all its Abundance affords but rude and unpleasing Entertainment, without the Dexterity and Refinements of Reason . . . . Without REASON we had lived like the Brute Creation upon raw Fruit, tasteless Herbs, and cold Spring . . . .

Gordon and Trenchard followed Harrington, but also reinterpreted
his work to make it consistent with capitalism. They rejected monarchy
and concluded that government should be by and with the consent of
those who took part in the hearty process of market accumulation and

75. Id. at 17-41. Pocock clearly states that Harrington understood republicanism to rest on
a foundation of land, not commercial wealth. Pocock, Foreword to J. HARRINGTON, THE POLITICAL WORKS OF JAMES HARRINGTON (J. Pocock ed. 1977). In that sense, Wren could dismiss
Harrington as already obsolete. Wren also mocked Harrington for his contrived use of moralistic
language and what Wren took to be his sermonizing, given Harrington's many references to
Scripture. Like Hobbes, Wren saw the words of morality as deluding, as being nothing but
“Words and Names.” He called Laws and Liberty “the only true Charms, that I know of in Nature, which by the mere sound of Words produce Great and Reall Effects.” M. WREN, supra
note 73, at 17-41. The charge seems utterly accurate as against Locke. Whether Harrington
sought a more complicated point about the relationship of morality to a polity's material founda-
tion, a new relationship of mind and matter, is a hard question, which Wren dismissed too quickly.


77. J. TRENCHARD & T. GORDON, INDEPENDENT WHIG No. 35 (Wilkins, Walthoe, Wood-
ward & Peele eds. 1724).
exchange. In a market economy, monarchy would mean tyranny because of the Harringtonian imbalance. Gordon and Trenchard expended much rhetoric to describe the “passion” of tyrants, who seized national wealth by force, for personal and political ends, rather than sensibly leaving it to the nation for further economic development. But the passion of tyrants was mirrored by the “passion” of the general public, who would certainly plunder capital wealth if given political power to do so: “[e]very Man would be plundering the Acquisitions of another; the Labour of one Man would be the Property of another; and one Man’s industry would be the cause of another man’s idleness.” The fear of plunder verged on paranoia: “For all bodies of Men subsisting on their own Substance, or upon the Profits of Trade and Industry . . . have justly such terrible Apprehensions of Civil Disorders which destroy every thing that they enjoy . . . .”

As good Harringtonians, Gordon, and Trenchard understood that the task of political theory was to “observe this Fluctuation and Change” in property relations, and to “adjust the political to it by precedent Precautions and timely Remedies.” Balance attained through “gentle and insensible Methods” would avoid the worst convulsions of civil disruption. Yet Gordon and Trenchard never suggested a return to Harrington’s commonwealth ideal. Indeed, the message they drew from Harrington was not the republican ideal of popular sovereignty through shared interest, but a grim and practical lesson: If the people have political power, they will try to seize property as well.

Thus, on the eve of American constitutionalism, our framers confronted what they perceived as a Harringtonian nightmare: The people had too much political power and were using it with lusty vigor to seize and plunder the property of the few. Those, like Madison and Hamilton, who recognized that in a growing commercial economy inequality of wealth would be the norm, needed a distinctly un-Harringtonian solution to the problem. The “balance” of aristocracy would too blatantly repudiate the Revolution, while the “balance” of commonwealth required redistribution to stave off chaos and disorder. The answer, illustrated so well by Fletcher v. Peck, was simultaneously to distance the people from their sovereignty through the creation of

79. Id. at 59.
80. Id. at 85.
81. 10 U.S. (6 Cranch) 87 (1810).
a carefully structured, institutional web of operative political power while insulating property from sovereignty through the mediating protective wall of the liberal rights model.

Missing from Harrington’s careful analysis was the power of ideology to compensate in belief for the absence of balance in fact. Thus, the people could learn to believe that the Constitution was an expression and retention of their sovereignty and learn to forget that authentic sovereignty presupposed a commensurate distribution of property. Even more striking is the way we have internalized and normalized the basic structure of inequality. Implicit in Locke and fully realized in the nineteenth century is the most powerful and disabling feature of American individualistic ideology—equality of opportunity—which presupposes by fiat the legitimacy of acquired wealth and naturalizes and even celebrates inequality as the just outcome of processes regulated by choice, will, and “talent.” Just as wealth distorts political process, leading to domination by the few in the name of the many, inequality of “cultural” capital serves to distort the claimed procedural fairness of meritocracy, insuring a reality of power closely akin to hereditary aristocracy. In either case, the legacy of Harrington for a modern republican agenda is to remember that the question of distribution cannot be relegated to a sideline of ethics or economics; the issue is necessarily one of politics.

B. Membership

Seventeenth-century theorists knew that the question of membership was crucial to republicanism, for the flip side of republican inclusiveness was its exclusiveness. Hobbes could comfortably suppose a

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83. Michelman does try to persuade us that a “republican, inclusionary” vision of property has lingered to the point where it is rhetorically available to contemporary constitutional discourse. Michelman, *Possession vs. Distribution*, supra note 4, at 1330-34. To be sure, the most radical, republican (and especially evangelical) versions conceived property as “an extension of the sovereign will of the people, and therefore subject to whatever controls were necessary to promote harmony, participation, and equality.” Mensch, *Religion, Revival, and the Ruling Class: A Critical History of Trinity Church*, 36 BUFFALO L. REV. 427, 470-79 (1987). The piece recounts how the discredited, pre-Revolutionary established Anglican church in New York, in the safe and guiding hands of Alexander Hamilton and other New York Federalists, managed to retain her extensive land holding despite “[t]he egalitarian logic of the Revolution which challenged virtually every aspect of Trinity’s structure.” Id. at 471. She succeeded even though “[h]er very existence seemed inconsistent with revolutionary republicanism.” Id. See also Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFFALO L. REV. 635 (1982).

84. See Michelman, *Possession vs. Distribution*, supra note 4, at 1330.
relatively inclusive membership for his “original” convenantors, since he did not envision their participation in an ongoing political process with ethical dimension. Those seeking to reform England in the name of the “people,” however, had to decide just who those “people” were. There is a continuing cautionary message in recalling how obvious it seemed at the time to exclude women and servants from suffrage. They were naturally dependents, and as such, politically not “people” at all. According to classic republicanism, property freed men to take part in citizenship. As Harrington stated, an estate owner “may have some servants or a family, and consequently some government, or something to govern.” This experience of governing others rendered the citizen fit to take part in the larger polity. Although somewhat ambiguous on the point, Harrington seems to have assumed that servants should play no political role. Most republican theorists could hardly have imagined such a possibility, just as it was beyond the bounds of male imagination to picture women in the role of vigorous, arms-bearing republican citizens of the classical description.

Traditional notions of membership were transported to the colonies, where property qualifications were the norm, and the celebrated republican citizenry was clearly both white and male. Blacks, for example, fought in great numbers during the Revolution, but how many whites even today picture the soldier-citizen of the Revolution, the

86. Harrington, supra note 10, at 63.
87. C. HILL, supra, note 85, at 282.
88. The republican rhetoric of the Revolutionary period in America did exert ideological pressure on the traditional membership/dependency assumptions concerning women. Predictably, however, the equalitarian potential of that pressure was carefully contained by the dominant culture, chiefly through the redefinition of the family as an autonomous sphere within which women could experience some degree of authority, but within which they were also to be confined. See, e.g., J. FLIEGELMAN, PRODIGALS AND PILGRIMS: THE AMERICAN REVOLUTION AGAINST PATRIARCHAL AUTHORITY 1750-1800 (1982); M. GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH CENTURY AMERICA (1985); L. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA (1980); M. NORTON, LIBERTY’S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800 (1980); M. SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA (1986).
89. See M. GROSS, THE MINUTEMEN AND THEIR WORLD 151 (paperback ed. 1976). While the classical republican ideal had been the arms-bearing citizen-soldier whose property ownership gave him a stake in defending the polity, the actual “citizens” of the young republic were apparently content to let the landless do the bulk of the fighting. By 1778 the Revolution was being fought principally by landless younger sons, the permanent poor, and by blacks. Id.
prototypical republican ideal, as having black skin? The framers, recognizing these unresolved membership problems, delegated the issue of voter qualifications to the states. Property qualifications were only gradually removed over the first four decades of the nineteenth century. The Dorr rebellion in Rhode Island was in fact occasioned by the Rhode Island Legislature's refusal to modify a system that limited the franchise, as well as jury service and access to courts, to male freeholders and their eldest sons. Yet even the Dorrites, who with their People's Constitution, were trying to reclaim the state in the name of "the people" and true republicanism, decided to limit their franchise to white males. And how can one forget one of the most shameful instances in American constitutional history, the decision that Native Americans were not part of the polity, and therefore not entitled to sue in federal courts as "citizens"? In so denying the claim, John Marshall invoked the classic language of dependency:

[T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.

Of course, property qualifications for voting were gradually removed. This inclusionary move usually hailed as unambiguously progressive, also served to mask the dilemma posed by the coexistence of a supposedly republican form of government and an economically dependent work force. Under ideological pressure, independence was redefined for citizenship purposes, not as property ownership but as the legal right to sell one's labor for wages. For a time in the early nineteenth century, pauper exclusions from voting emerged: Paupers, unlike wage earners, could not support themselves and were therefore singled out for their dependency. The theoretical independence of wage earners was defined by the dependency of paupers, and the binary split between them mediated the tension produced by the power of

91. As a trade-off for their disenfranchisement, nonvoters were exempted from taxation and militia duty. Frederick Douglass, the abolitionist and ex-slave, was not impressed. See G. DENNISON, supra note 36, at 44.
93. Id. at 17. For an excellent discussion of Cherokee Nation and the other Marshall Court cases involving Indian tribal status, see Ball, Constitution, Court, Indian Tribes, 1987 ABF RES. J. 3, 23-34.
property owners in a society where all were supposed to be free. Once property had been relegated to a realm of privacy and had taken on an essentially apolitical character, dependence equated only with the legal category of pauperism.94 The eventual disappearance of even that category, and with it pauper voting restrictions, may have been a triumph of democratic inclusiveness, but in another sense it also marked the triumph of liberalism and the death of republicanism, for it meant that the economy could be defined as wholly private and essentially irrelevant to the question of sovereignty.

The Civil War and the fourteenth and fifteenth amendments formally, at least, resolved racial membership issues; inclusion of women came much later with the nineteenth amendment. Those who seek to resurrect the republican tradition, however, cannot afford to be complacent about membership questions, for the problems they raise — essentially problems of territoriality and hierarchy — are central to the tradition itself.

As Professor Levinson's essay points out, the process of assigning the franchise to citizens within any single geographically defined nation-state is neither logical nor functional.95 Inevitably, the rules break down at the margins. Inherently arbitrary membership criteria serve to exclude people who have a substantial stake in the outcome of state decisionmaking. "Marginal" categories include undocumented "aliens," people who routinely cross borders for work, people who live in metropolitan areas that sprawl across national boundaries, and Mexicans who work in American factories set astride the border to take advantage of peculiar American laws.

The territorial problem, however, lies not just at the margins. In a world in which the economic and political policies of a nation-state like the United States can affect deeply the lives of people abroad (many of whom labor to provide Americans with their abundance of wealth), the utter exclusion of "foreigners" from the American franchise seems grotesque. In Central America, after all, people suffer torture and death for United States policies on which they cannot vote, yet their exclusion seems no less "natural" than did the exclusion of women in the seventeenth century. Our debt and environmental policies and our mismanagement of the environment create devastation in the Third World, where people daily bear the costs of the "externalities" we have imposed.96 We proudly remember the American col-

94. For an insightful and detailed description of this process, see Steinfeld, supra note 90.
96. For a current summary of such effects, see L. BROWN, STATE OF THE WORLD (1989).
onists' refusal to be taxed without representation. Yet a Third World demand for representation in the American polity (given the economic equivalence of tax and externality) would no doubt unleash a paranoia as intense as did the spectre of working class suffrage during the eighteenth century.

The goal of classical republicanism, however, was not more territorial inclusiveness — world citizenship — but less. It may, of course, simply be too late to propose a return to small units of governance, such as town meetings, as a way of running a world characterized by multinational corporations and nuclear missiles. No unit is small enough to avoid affecting the larger world, or to remain unaffected by it. Yet the nation-state may be a less stable entity than we have supposed. Recent events in the Soviet Union illustrate the fragility of the supposed assimilation of ethnic and geographic pluralism into a single monolithic unit, while starkly geographical differences in election results in our last presidential election suggest a less dramatic but similar Balkanization in the United States.

Can a modern version of republicanism deal with both the interconnectedness and the geographical polarization that exists in the United States? The republican agenda includes an effort to revitalize local politics, where face-to-face participation is still at least a possibility. But to extol the virtues of local autonomy is to raise almost immediately some hard questions about the nature and meaning of community in our culture. Given the starkly geographical way in which status and wealth are distributed in America, localism run rampant would reinforce the selfish, hierarchical, exclusionary, and even colonial, character of existing land use and local governmental arrangements.

Perhaps the most "republican" Supreme Court decision of the past two decades was *Milliken v. Bradley,* which affirmed local autonomy

97. 418 U.S. 717 (1974). However, to characterize the Court's recent decision, in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), as "republican" strains credulity, despite Professor Farber's facile effort, Farber, Richmond and Republicanism, 41 FLA. L. REV. 623 (1989), to turn Michelman on his head by doing so. In the best republican tradition, the City of Richmond, through its deliberative political process, chose to redistribute property (in the form of access to government contracts) so as to make its process more economically and politically inclusionary. The Supreme Court, in the tradition of *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), deployed a liberal rights-based trump, in the form of property rights (vested expectations of contractual access) in the guise of equality rights (as if "reverse discrimination" had anything to do with egalitarianism). The Court insisted that such rights could be modified only through something tantamount to the judicial/adjudicatory process usually required by courts (traditional guardians against the redistributitional passions of the rabble). See generally, *id.* at 130-39.
of the suburbs around Detroit) as a cherished constitutional value; the instrumental result was to render those suburban boundaries inviolable for the purpose of desegregating Detroit’s school system. What is striking about the decision is that happenstance jurisdictional units are touted as instances of community autonomy. Such units, largely the product of historical whimsy, were empty forms (perhaps experienced as something more like community when sparsely settled), given content through racial segregation and hierarchical exclusion. Against this background, it is difficult to find republican solace in cases like City of Eastlake v. Forest City Enterprises, Village of Arlington Heights v. Metropolitan Housing Development Corp., Holt Civic Club v. City of Tuscaloosa, City of Mobile v. Bolden, City of Memphis v. Greene, or Village of Belle Terre v. Booras, all of which protected the integrity of local political processes against rights-based federal constitutional challenges. Ironically, such deferential outcomes might be defensible (and even admirable) in a context where one felt a lot less queasy about community membership rules. Like it or not, we have to learn to talk about the difference between alienated and authentic community.

100. 429 U.S. 252, 264-66 (1977) (suburb’s denial of rezoning for low-income housing did not raise inference of racial discrimination despite racially disproportionate effect, evidence of some racist motive, and fact that of 64,000 residents of town, only 27 were black).
102. 446 U.S. 55, 61-65 (1980) (at-large voting rooted in progressive era reform sustained despite fact that blacks — who were 30% of the community — had never elected a black under the at-large system).
103. 451 U.S. 100, 120-24 (1981) (city decision to close street at behest of residential neighborhood seeking reduction in traffic flow upheld, despite fact it was an all-white neighborhood blocking largely black “traffic”).
104. 416 U.S. 1, 7-9 (1974) (upholding local decision limiting “unrelated” families to two persons only).
105. For a serious, and empirically-rooted, contemporary effort to grapple with such issues, see generally M. Taylor, Community, Anarchy & Liberty 1-10, 32-38, 95-139, 150-71 (1982). For a long and careful argument on behalf of a communitarian as opposed to a libertarian vision of social life, see G. Alexander, Dilemmas of Group Autonomy: Residential Associations and Community, 75 Cornell L. Rev. ____ (forthcoming, 1989).
C. Representation

Representation is a metaphysical puzzle, a presence by virtue of an absence. The representative who claims to speak with the “voice of the people” cannot really do so. The claim is always fictitious, no less now than when the king supposedly spoke with the voice of God. In fact, representation is required precisely because neither God nor the people can speak for themselves.

The gap between represented and representatives is fully transcended only in the religious tradition, through the mythic concept of embodiment. The most intense example, of course, is Christ: in his actual body he was said to be both God and human, and, some said, he was human in the sense of being all people. Thus could his particular sacrifice become the basis for a universal redemption. Neither kings nor popes claimed to speak for God in the sense of the real embodiment claimed for Christ; nor did seventeenth-century English parliamentarians, for that matter, claim to embody the people in the fullest sense, for that, too, would have presumed the role of Christ himself. Thus, true representation as embodiment must remain mythic. No secular version exists. For any worldly authority to speak in such terms is simply blasphemous.

By the seventeenth century, however, worldly authorities had moved to secularize the mythic, making merely representative what was once embodiment. It was then that the modern notion of the representative person, or “public person,” first emerged, both in theology and in politics. Adam represented the whole of humanity; because of his sin we all sinned. Christ, as our representative, paid for our sins on our behalf, almost as our agent (or lawyer?). This emphasis on Adam and Christ as representative figures coincided with the legalist version of covenant theology; because of Christ’s suffering “for us,” we were entitled to salvation, for the terms of God’s covenant had been satisfied. Not surprisingly, the vocabulary of the covenant closely paralleled the emerging legal vocabulary of contracting on the market. God was creditor; we were debtor; as our representative, Christ pays the debt, and we can claim our contract rights.

We now forget, of course, how naturally theology and politics once intersected in the question of representation. Even Locke, the great


liberal, felt obligated to spend much of the *First Treatise* disputing Adam's original dominion over the natural world, a dominion that Adam supposedly handed down to subsequent kings as his successors in representation.\(^{108}\) This was a crucial first step in establishing a less patrimonial and more possessive conception of property and a more contractual conception of government.

In both religion and politics, parallel problems emerged as theorists increasingly turned the notion of representation into something more secular and contractarian than mythic. Most theorists, for example, delicately obscured a central question: Who is represented? Puritans were convinced that, of course, only the “elect” (i.e., “chosen of God”) were saved, and in that sense Christ represented some, not all. Similarly, seventeenth-century parliamentarians began claiming to represent “the people,” never for a moment supposing they represented the poor in anything but the most tenuously “virtual” sense. Radicals of the seventeenth century, however, insisted that representation was something closer to true embodiment, which necessarily means an insistence on inclusion. A Christ who *is* all of us, in his suffering, includes within himself the least as well as the greatest. So, too, a parliament that “is” us must embody all of us in some direct and “actual” sense, not indirectly and artificially. Or, even more extremely (except for the instance of Christ) only the people can speak in their own name. Representation, in all of its artificiality, can never be an adequate substitute for the people themselves.\(^{109}\)

That claim, combined with the core Christian notion of Christ as our embodiment and not just our artificial “representative,” became the basis for seventeenth-century millennial thought. Thus the voice of the people, and only the voice of the people, became the voice of God on earth. Anyone who claimed thereafter to “represent” us was just an artificial and meddlesome intermediary. These were the radical political claims that so frightened Hobbes.\(^{110}\) While other royalists scrambled to shore up some conception of the Crown as embodiment of all the people, Hobbes was more honest: representation is both absolutely required and inescapably artificial.\(^{111}\) Without the sovereign as representative, unity and order dissolve; the people, in all their


\(^{109}\) C. Hill, *supra* note 85.


multiplicity, can never be the voice of God, but only the voice of disparate appetite. Hobbes created no fantasy about the artificial unity of representation as any sort of mythic embodiment; it was simply the people's surrender to secular institutionalism. Hobbes' insistence on the artificiality of representation, says Christopher Hill, marks the beginning of modern political theory.112

To an extraordinary degree, however, old, pre-Hobbesian notions linger; the triumph of representation as pure Hobbesian artificiality could never be complete, or else we might all be contented royalists. We still, after all, engage in the ritualized process of "election": the people stand in, in choosing the "elect," as the only legitimate substitute for God. The discomfiting incompleteness of the Hobbesian triumph accounts, in turn, for a number of the dilemmas that plague our modern theory of representation. For example, still unresolved is the problem of the "virtual" and the "actual." If the people retained their sovereignty, then is not their actual consent required for every act of representation? Some communities after the American Revolution took this view and hauled their representatives home whenever they deviated from specifically drawn instructions.113 This implied no surrender of sovereignty at all, and in extreme form meant that no authority could be exercised over or against the people. Wren, the astute royalist, succinctly summed up the resultant state of affairs: "That Representative not having the Sovereign power, there is not any such power and strength, which . . . implies the absence of all government."114

Yet by what theory could a representative legitimately claim to represent "virtually" (rather than actually)? Americans had rejected virtual representation when the English Parliament claimed to virtually represent the colonists even though no colonists were members of parliament. Has not the representative who substitutes her own

112. See C. HILL, supra note 85, at 319.
113. See G. WOOD, supra note 8, at 188-96.
114. See generally M. WREN, supra note 73, at 86. Harrington believed no less than the Federalists that a natural aristocracy would emerge. See Pocock, supra note 10, at 66. He proposed a division of function, so that the Senators would "propose" and the Assembly would "choose." Id. at 67. Harrington called this division the difference between debate and result, id. at 66, likening it to a schoolgirl game, where one girl cuts a cake while the other gets first choice of the pieces. Id. at 65. Wren had no patience with the notion of a natural aristocrat: "Is it not much more Naturall to every Man to think himself Wise enough to advise about his own Affaires, and to suspect all Persons of a greater Reach then himself?" He considered the debate and result notion just a confusion of sovereignty theory. M. WREN, supra note 64, at 53-54.
judgment for the judgment of the representative's electors assumed sovereignty, so that the representatives, taken as a whole, become sovereign over the people? This is satisfactory only if representatives form an aristocracy of virtue and wisdom. Such aristocrats are the natural aristocrats whom even the Federalist framers and Harrington (anticipating Burke) envisioned as their leaders.\textsuperscript{116}

Notably, however, Madison refused to place his faith in representation as such. Certainly the republic differed from a democracy precisely by the fact of representation, which allowed the republic to encompass a broad geographical area, thereby filtering out undesirable effects of direct rule by the factious people. Nevertheless, as Madison warned ominously, "[e]nlightened statesmen will not always be at the helm."\textsuperscript{116} For Madison, the real meaning of representation lay in the separation of institutions, the careful formal structure by which factious interests are "broken," "controlled," and "balanced" against each other to produce "stability."\textsuperscript{117} Thus, for Madison, representation was really the institutionalization of interests: a way of bringing together sources of conflict in a central forum for balancing and stalemating. In that sense, representation for Madison required no choice between actual and virtual, for it really meant the institutional arrangement of the federal government. It is only through the affirmation of this Hobbesian artificiality that the otherwise problematic choice becomes immaterial.

Because we take our particular system of representation so much for granted, we forget that in our history theories of representation were once hotly debated. Calhoun (who morally discredited himself forever by championing slavery) nevertheless understood with some astuteness the tenuous nature of representational claims. Calhoun recognized the dangers posed by a large national bureaucracy, especially given its tendency to align itself with a "separate monied interest,"\textsuperscript{118} and he witnessed the growth of political parties ready to sacrifice principle and honesty in the manipulative scramble for votes. In response, he sometimes simply yearned for rule by the natural (property) aristocracy (of which he clearly counted himself a member). But

\textsuperscript{116} See Pocock, \textit{supra} note 1, at 149 (on the importance of the belief in the natural aristocracy). On Burke, see H. Pitkin, \textit{supra} note 111, at 168-89.

\textsuperscript{117} See H. Pitkin, \textit{supra} note 111, at 194 (quoting \textit{The Federalist} No. 10, at 44 (J. Madison)).

\textsuperscript{118} Id. at 195 (quoting Madison). For a detailed etymology of the word "representation," see id. at 241-52.
he also understood that Madisonianism posed hard theoretical problems of representation. The larger the community, he pointed out, the greater the potential for oppression, especially since Madisonianism rested on rule by simple numerical majorities. Calhoun argued that if Madison's real concern had revolved around "interests," a concern with which Calhoun absolutely agreed, then the nation, and any separate locality within it, ought to be understood as composed of separate, identifiable interests.119 For Calhoun, of chief importance were class and geographical differences. To prevent oppression of any majority, he proposed a rule of representation requiring a "concurrent majority,"120 meaning that government action could proceed only with the agreement of a majority of the representatives of each interest; any single interest would have an effective veto over government action.

Like any good republican theorist, Calhoun was able to point to models from antiquity and classical theory to support his view. Notably, he also cited the model of the Iroquois Nations. In that federation, absolute unanimity of the separate nations was required, for the goal was formation of real community, not just surrender to those representing the majority interest.121

Calhoun was not alone in looking to the Iroquois as an ideal republican model against which American constitutionalism should be measured. The League of the Iroquois, formed between AD 1000 and 1400 under a constitution called the Great Law of Peace, extended from New England to the Mississippi.122 By the time Europeans arrived, the Iroquois had already achieved a successful combination of democracy and federalism, rooted in a relationship to nature that was at once more spiritual and more practical than most Europeans could comprehend. Benjamin Franklin consistently and vigorously argued that American colonists should enact the Iroquois model of federalism in detail, but most founding fathers were not prepared to incorporate all aspects of the Iroquois representational structure.123 For example, Iroquois women had the power of impeachment: If an elected leader (Sachem) behaved improperly or lost the confidence of the people, the women of his clan impeached him and chose a new sachem.124 Nevertheless, a number of specific features of American constitutionalism, with

119. Id. at 131.
120. Id. at 129-63; see also Abrams, Law's Republicanism, 97 YALE L.J. 1591, 1607 (1988).
121. A. SPAIN, supra note 41, at 137.
123. Id. at 136 (quoting R. HECHT, CONTINENTS IN COLLISION 71 (1980)).
124. Id. at 138-39.
no real European counterpart, were drawn from the Iroquois. It is a testament to the usual presumption of Western culture that those who now seek to recover "the republican tradition in America" are looking only to European sources, apparently ignoring as primitive and irrelevant (despite its marked influence) what may be the single most successful republic in history.

In response to our concern with the theoretical problems of representation, one might accuse us of fussing in the face of pragmatic institutions that accommodate varied interests in a pluralist society. But the problems we raise are not merely theoretical: We live and experience these contradictions in our daily lives and they have much to do with why many people find our politics (and much of our social existence) remote, alien, and devoid of meaning.

Take, for example, the question of self-interest, which is as current, as the extraordinary greed that characterized the recent Housing and Urban Development scandal, or as problematic as the debate over congressional ethics. We are taught to believe that we should pursue selfish goals, for economic individualism is what America is all about. Combined with the subjectivity of values that supposedly marks our basic stance toward ethical issues (though no one really believes this), our vision of representation becomes one of electing those who will best pursue our selfish, private interests. Our theoretical framework leaves no room for an independent vision of the public good. Similarly, the self-interest of the legislative representative centers on reelection and securing material gain to compensate for the foregone opportunities during years of public service. Given an economically unequal society and the utility of wealth in securing reelection, the representative must advance the interests of his or her most powerful constituents. The line that purports to separate corruption from acceptable practice is arbitrary, not unlike the line for duress in contract law: by segregating corrupt practices from sanctioned ones, it serves chiefly to legitimate those left unchallenged. Unless current scandals call into question the underlying ideology of self-interest, government reforms will be no more than capricious exercises in line-moving.

The notion of "interest" not only blurs the line between its private sense and its public one, but also confuses our individual and group identities. As voters, we are theoretically individual rights-bearers. Although we may occasionally enter into alliances with others when interests seem to coincide, rights are not supposed to attach to groups

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125. Id. at 134-43.
as such. Reality, however, contradicts this supposition; group identities may be more significant, experientially, than the mere sum of atomic individuals. The paradigm case in American culture is race, a group identity thrust upon an oppressed minority to facilitate and normalize oppression. Once we recognize that minority racial groups are made up of victims of discrimination and include that reality in the political process, we must, despite Professor Alexander’s remarks to the contrary, mandate proportional representation to assure that group interests will in fact be represented.

To place race first on the agenda of proportionality simply recognizes that in that area we have made at least a tentative constitutional and statutory commitment to eliminating “discrimination” in voting. The idea of proportional or interest-based representation need not be so confined. For if simple numerical majorities overrepresent those with economic power through manipulative elections based on the purchase of imagery, we might well reconsider the basis of representation. To the extent we live our lives not as atomic units, but as members of ethnic, cultural, or religious communities, perhaps we would be better represented in those capacities.

It is an ultimate and ironic testament to the unsatisfactory nature of representation as mere artificiality that the most successful modern politicians are those who seem to “embody” the people and take on their mythic identity. Ronald Reagan is surely an example, for he seemed to incorporate all the cherished illusions of American national life so fully that his particular policies were irrelevant to his role as “true representative.” For those oppressed by Reagan’s policies the phenomenon seemed, rightly, a dangerous one, although tamer than other modern examples of representation as mythic embodiment: Hitler as mythic embodiment of the German Volk or Lenin’s “vanguard

127. For a more detailed argument that a serious liberal concern with voting discrimination leads inevitably to a mandate for proportional representation, see Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049, 1079-88, 1102-07 (1978). Thus, while Sunstein is to be applauded for his endorsement of proportional representation, see Sunstein, note 4, at 1585-89, his position is not inconsistent with liberal premises.
128. For a view consistent with the “embodiment” version of Reagan, see G. WILLS, REAGAN’S AMERICA: INNOCENT AT HOME 1-4, 191-211, 271-88 (1987). See also M. ROGIN, RONALD REAGAN, THE MOVIE AND OTHER EPISODES IN POLITICAL DEMONOLOGY 1-43 (1987). That Reagan was a movie actor makes perfect sense in this regard, since the Hollywood he represented had come to embody America for so many movie-watching Americans. What is somewhat ironic, however, is that Hollywood was largely the invention of entrepreneurial Russian Jews.
party" as embodiment of the proletariat. Those examples suggest that we leave unresolved the metaphysics of representation only at our peril.

D. Virtue

Without questioning their good faith, we think that the proponents of neo-republicanism are part of a continuing and fruitless effort to shore up the incoherent and morally empty claims of liberal legalism. As such, they are atop a tradition going back to post-World War II efforts along similar lines, which culminated in the “legal process” school with its peculiar combination of “institutional competence” (still reflected in pieces like the Alexander essay) and “reasoned elaboration.”

Under siege since the 1970s from the simplistic reductionism of the law and economics school and the despairing nihilism of some critical legal theorists, defenders of liberal constitutionalism have conjured new theories with increasing frequency. Failing to capture the terrain with either “shared values” or “neo-interpretivism,” they followed with the “hermeneutic ploy,” which recast the process as one of dialogic engagement. The “republican” emphasis on deliberation offers a broader institutional context for this notion.

The basic problem with this republicanism, unlike its rich historical tradition, is that it is recast to accommodate the continuing assumptions of liberal constitutionalism even though it purports to be other than “liberal.” Thus it tells us we can move from strategic self-interest to a “deliberative” version of the same. In both cases, the subjectivity of values remains the rule, the latter offering a new mediation in the form of deliberative process.

This is hardly surprising, since liberal culture does not offer a vocabulary for talking about issues of virtue, issues of good and evil.


Such issues usually arise in religious or spiritual contexts, which liberal legalism relegates (and trivializes in so doing) to privatized realms. Such privatization would seem strange to the republicans of the seventeenth century, whose political theory was inextricably rooted in theology as well.\textsuperscript{134} Predictably, contemporary republicans work to distance themselves from those roots, reaffirming religion as a private right to be kept in the closet and treating almost as a bad joke that one might want to take, say, “Calvinism,” seriously.\textsuperscript{135}

The reality is that religion does not stay in the closet; it has no meaning unless it speaks to issues like our relationship to one another in communities. This observation would be hardly surprising, except for the fact that we are living in a time warp. As historical actors, we universalize our own moment and project its absence onto other times as a measure of their deficiency. We therefore readily and complacently forget that, for most of American history (including Native American history), religion has been central to the political quest for a morally and spiritually satisfying life.\textsuperscript{136} To be sure, we are a

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\item \textsuperscript{134} Even the most extreme version, seventeenth century “communism,” was firmly rooted in theology, although theology of a somewhat heretical nature. See C. HILL, The Religion of Gerrard Winstanely, in II THE COLLECTED ESSAYS OF CHRISTOPHER HILL 185-252 (1986).
\item \textsuperscript{135} See, e.g., Sunstein, supra note 4, at 1555 & n.85, 1563. A willingness to look beyond the dismissive label of “Calvinism,” however, reveals a rich, complex, and diverse actuality of life. See generally D. HALL, WORLDS OF WONDER, DAYS OF JUDGMENT: POPULAR RELIGIOUS BELIEF IN EARLY NEW ENGLAND (1989).
\item \textsuperscript{136} For a recent overview, see Smith, Religious Activism: The Historical Record, 27 WM. & MARY L. REV. 1087 (1986). And, as Appleby reminds us, the “most important source of meaning for eighteenth-century Americans was the Bible.” Appleby, supra note 17, at 809. For the influence of religion, along with egalitarianism, in the lives and work of three of our leading 19th-century reformers, see generally J. THOMAS, ALTERNATIVE AMERICA: HENRY GEORGE, EDWARD BELLAMY, HENRY DEMAREST LLOYD, AND THE ADVERSARY TRADITION (1983).
\end{itemize}

Turning to the modern era, the black civil rights movement was in large part a religious movement, in which churches played a crucial role. After all, Martin Luther King, Jr. was first and foremost a preacher. As a preacher, he gave voice to the embodied spirit of his people as a community, transcending the liberal distinction between politics and religion. See generally A. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT I-16, 77-99 (1984). For a detailed account of the theology of Martin Luther King, Jr., see Cook, From Autonomous Individualism to Community: A Comparative Analysis of the Critical Theory of Dr. Martin Luther King, Jr. (unpublished manuscript, forthcoming HARV. L. REV. (1990)). And one of the most exciting and promising political movements of our time, Liberation Theology, through its inversion of hierarchy, rejects the claim of universal rationality, locates spirituality within the community of the poor, and transcends the political-religious distinction. See Kramer, Letter From the Elysian Fields, The New Yorker, Mar. 2, 1987, at 40. See generally P. BERRYMAN, LIBERATION THEOLOGY (1987). Moreover, the recovery of spirituality in a left political context is not limited to Christian belief or practice. See generally 1 TIKKUN 1 (A Quarterly Jewish Critique of Politics, Culture and Society) (1986).
“pluralistic” society, but that may not mean that we should continue
to privatize our pluralism and mask it with the veneer of an as-
simulationist culture that is as devoid of meaning as the shopping malls
that serve as its temples.

Our modern, secular culture has combined positivist science, instru-
mental rationality, and process pluralism to bring us a world on the
verge of environmental disaster and nuclear armageddon, a world of
poverty and emptiness for too many of us, existing alongside a self-in-
dulgent materialism that celebrates greed as its only substantive value.
In the eighteenth and early nineteenth centuries, the most common
mode of republican discourse was the decidedly nonprocess-oriented
jeremiad, during which the people were reminded how far short they
fell from the requirements of true republican virtue. In modern
America, the political right has exploited the issue of “virtue,” tapping
a deeply felt anxiety about the problem of moral emptiness in a polity
dedicated to nothing more than the careful management of interest-
group acquisitiveness. People almost sense, it seems, a need for the
jeremiad.

To insist on a hegemonic secular culture in the face of that need
simply alienates those whose experience is negated by that culture,
creating a politics of frustration and rage. The Republican Party has
cleverly pandered to the alienated with inflated, patriotic rhetoric and
a manipulative focus on abortion, the one issue upon which many
people seem, perhaps distortedly, to project their desire for a less
self-indulgent society. The liberal Democrats simply turn the other
way, embarrassed by the “God talk,” and hoping, somehow, to perfect
the political process so completely as to suppress and deny the reality
of moral conflict. Yet, we may already be witnessing the death of
liberal pluralism, as we move into savagely warring camps over issues
like abortion, homosexuality, and race. Is it possible to fashion a more
substantive form of pluralism?

Central to a substantive pluralism must be a recovery of difference,
in place of the false, abstracted pretense of similarity. Difference
speaks with many voices, some so starkly sectarian as to unhinge
liberal rationalist listeners. Nevertheless, we cannot retreat behind
essentialist universals that deny and mask the richness and irreducible
particularity of human experience, while hierarchically privileging the

This is not to suggest that the terrain is uncontested, or that everything is rosy. The point
is that religion is in public and political life, and not to be pretended away by liberal self delusion.
For some contemporary reality, via the inimitable empiricism of Studs Terkel, see S. Terkel,
rationalist orthodoxy of an elite few. Detail defeats ideology\textsuperscript{137} including the ideology of secular rationalism. At the same time, we cannot accept the familiar and defensive sectarian close-out that simply deploys “it’s my religion” as an unanswerable trump. Instead, as real republicans, we may need to create a context of mutual respect for voices that seek to name virtue. In short, we must recover the tradition of feisty theological debate.

Today even legal scholars are recognizing that there are some specific issues we cannot address without resort to religious discourse.\textsuperscript{138} As Milner Ball has said, “if not theology, what?”\textsuperscript{139} From our current vantage point, of course, a serious theological discussion of public issues seems almost unimaginable, for we are inevitably stuck in our own historical moment, a moment in which both “God” and “the people” have been effectively eliminated from the bounds of acceptable discourse: liberalism flattens our language, forcing it into the confines of a safe middle ground. Harrington, for one, insisted on the Biblical vocabulary, and searched through Scripture for an understanding of the commonwealth. At the same time, he reconceptualized that vocabulary in terms that called for a new understanding of the relation between the material world and a realm that was once both political and spiritual. We can now barely comprehend what he might have meant.

\begin{itemize}
\item[137.] \textit{See Talk of the Town: Notes and Comment, The New Yorker, Aug. 21, 1989, at 23-24.} For an especially thoughtful discussion of substantive pluralism, see H. Cox, \textit{Many Mansions, A Christian's Encounter with Other Faiths} (1988). Cox takes as a given the decline of secularism and addresses the reality of religious pluralism in all its sectarian particularity.
\item[138.] \textit{See K. Greenawalt, Religious Convictions and Political Choice 30-84, 173-95 (1987).} For an “emphatically anti-liberal” celebration and extension of the same point, see Perry, \textit{Comment on The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment, 27 WM. & MARY L. REV. 1067 (1986); see also M. Perry, Morality, Politics, and Law 180-84 (1988).}
\item[139.] M. Ball, \textit{Lying Down Together: Law, Metaphor and Theology} 124 (1985). For the rich and moving context of the quote, see \textit{id.} at 3-20, 119-38.
\end{itemize}