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**The Forgotten Bill of Rights: The Meaning of Liberty in Eighteenth
Century American Political Thought**

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Although the Bill of Rights has become a sacred part of American constitutionalism, the meaning of liberty has changed significantly since the eighteenth century. Liberty two centuries ago was generally understood in communitarian terms: the people as a whole sought bills of rights to protect themselves against the usurpations of their rulers. Today liberty is seen primarily in individual terms: the few, particularly unpopular and vulnerable minorities, invoke the Bill of Rights to secure themselves against the power of the many. Eighteenth century bills of rights thus rested upon a theory of liberty no longer remembered, a theory the author calls our "forgotten bill of rights".

"We tend to speak to the past," Herbert Storing once lamented, "rather than to let the past try to speak to us" (1985, 16). This observation is particularly true with respect to current notions about the meaning of liberty and the Bill of Rights. We revere the document as the primary symbol of what we believe our regime stands for: the protection of "individual rights." We attribute this belief to the "founding fathers" and what we think was the intellectual climate of the eighteenth century. Yet, most of the supporters of the Constitution opposed a Bill of Rights. Alexander Hamilton believed a bill of rights "would sound much better in a treatise of ethics than in a constitution of government" (1961, 513). Benjamin Rush feared that a bill of rights would be an "idle and superfluous instrument," and he was relieved that the Constitution had not been "disgraced" with one (Jensen, 1976, 433). Other leading Federalists dismissed bills of rights as "absurd," "ridiculous," "useless," and "dangerous" (Kurland and Lerner, 1987, 449, 466, 471). Even James Madison, who is generally considered to have been the "father" of the Bill

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of Rights, regarded his efforts on its behalf as a "nauseous project" (1962, vol. 11, 346).

What explains this hostility toward a bill of rights, a hostility so starkly at odds with our current veneration of the idea? The answer lies in part with the different conceptions of liberty and bills of rights held in the eighteenth century compared with today. Eighteenth century Americans would have been puzzled by the claim of Nadine Strossen (1991), president of the American Civil Liberties Union, that "the purpose of the Bill of Rights" was "to protect individual freedom from the tyranny of majority preferences." Liberty two centuries ago was generally understood in communitarian terms: the people as a whole sought bills of rights to protect themselves against the usurpations of their rulers. Today liberty is seen primarily in individual terms: the few, particularly unpopular and vulnerable minorities, invoke the Bill of Rights to secure themselves against the power of the many. Hence, we speak today of "individual rights," whereas Americans in the eighteenth century spoke of the "rights of the people." Similarly, the key to ensuring liberty then was popular control of government, which meant placing power in the legislature or "people's branch." Today, by contrast, we put primary responsibility for ensuring liberty in courts, which restrain the people in the name of individuals and minorities.

This study will attempt to recover our "forgotten bill of rights" by examining the meaning of liberty in eighteenth century American political thought. It will begin with an overview of the debate between "liberal" and "republican" interpretations of the eighteenth century. Although this debate has focused largely on the intellectual origins of the American Revolution and the federal constitution, its concern with the relationship between individual and community provides a framework for understanding the meaning of liberty and bills of rights two centuries ago. An analysis of the eighteenth century view of freedom will follow, drawing upon the tenets of English constitutionalism, the events of the American Revolution, and the debate over enacting the Bill of Rights. This analysis will show that liberty two centuries ago was generally thought to belong to the people collectively rather than to individuals or minorities, and that bills of rights served as limitations on the power of the few, not the prerogatives of the many. Finally, the study will suggest that these "forgotten" eighteenth century ideas about liberty and bills of rights can help revitalize the meaning of freedom in America by reminding us that liberty depends as much upon community as upon individualism.

**Liberalism, Republicanism, and the Meaning
of Liberty in Eighteenth Century America**

Until relatively recently, John Locke held an undisputed claim among students of American political thought to the title "America's Philosopher" (Curti, 1939). Lockean liberalism was called the "party line" of eighteenth century Americans (Miller, 1943, 170), and Locke's *Second Treatise of Government* was thought to have been the "textbook of the American Revolution" (Parrington, 1927, vol. 1, 193). In his classic study of the Declaration of Independence, Carl Becker asserted that Thomas Jefferson simply copied from Locke teachings that Americans had already absorbed "as a kind of political gospel" (1922, 27). Ultimately, Louis Hartz (1955) explained the entire "liberal tradition in America" as the heritage of John Locke. The heart of this tradition was individual liberty, particularly freedom to pursue economic self-interest through competitive capitalism, even if doing so threatened the public good by undermining a people's sense of community.

A profound change in American historiography started in the 1960s as scholars began challenging the Lockean interpretation of eighteenth century America (Bailyn, 1967; Wood, 1969; Banning, 1978). According to the revisionists, not only had Locke had a relatively minor impact on Americans two centuries ago, his ideas were actually at odds with the principles of 1776, which these scholars claimed were rooted more in the "civic humanist" ideals of "classical republicanism" than in the individualistic calculus of liberalism. In this "Atlantic republican tradition," people were public-spirited citizens willing to subordinate their private concerns so as to ensure the political and moral health of their community (Pocock, 1975). They were not, as in liberalism, selfish individualists motivated by hope of personal economic gain. Only by participating actively in public affairs while pursuing simple, frugal, agrarian lives could virtuous citizens maintain their liberty and prevent the corruption of their regime by the luxury and vice that inevitably accompanied commerce.

During the past decade, Lockean scholars have launched a vigorous counterattack against the revisionist contention that eighteenth century American political thought was not about protecting individual liberty but about defending republican virtue against political corruption (Kramnick, 1982; Appleby, 1984; Diggins, 1984). Criticizing the republican theorists on both methodological and interpretive grounds, these

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scholars insist that Lockean liberalism was "the unvarnished doctrine" of Americans two centuries ago (Dworetz, 1990; Pangle, 1988). In their view, the colonists' objective was "the modern one of securing individual rights rather than the classical one of creating virtues of character" (Webking, 1988, 128). Moreover, they accuse the revisionists of undermining the foundations of our liberties; for "civic virtue, the preeminent value in republican ideology, can be incompatible with personal freedom, which only... liberalism seems to defend by instinct rather than merely for convenience" (Dworetz, 1990, 4-5).

Neither school of thought has yet vanquished the other in establishing conclusively the true intellectual underpinnings of eighteenth century America. Both sides are partly right, for the evidence suggests that liberalism and republicanism coexisted two centuries ago and that the two traditions were more complementary than dichotomous (Dworetz, 1990; Ackerman, 1991). Nonetheless, the republican interpretation illuminates particularly well two important aspects of our "forgotten bill of rights": the idea of "the people" as a sovereign organism rather than a collection of individuals, and the notion of rights as belonging more to the people as a whole than to citizens individually. Taken together, these two concepts formed the communitarian ideal of "public liberty," which Gordon Wood has described as "the combining of each man's individual liberty into a collective governmental authority," resulting in "the institutionalization of the people's personal liberty" (1969, 24). This ideal was at the heart of eighteenth century thinking about bills of rights, and it is relevant to current controversy over the meaning of liberty and the relationship between individualism and community.

The roots of "public liberty" were in the republican concept of "virtue," which Forrest McDonald says entailed an "unremitting devotion to the weal of the public's corporate self, the community of virtuous men" (1985, 70). Republican virtue, he contends, was "at once individualistic and communal: individualistic in that no member of the public could be dependent upon any other and still be reckoned a member of the public; communal in that every man gave himself totally to the good of the public as a whole" (McDonald, 1985, 70-71). Similarly, Wood argues that "the sacrifice of individual interests to the greater good of the whole formed the essence of republicanism," the goal of which was "a harmonious integration of all parts of the community" (1969, 53, 60). As John Dickinson put it in 1767, "a *people* is travelling fast to destruction, when *individuals* consider *their* interests as distinct from *those of the public*"

(1970, 397). Because citizens were thought to be linked to one another organically, what served the good of all was considered ultimately to serve the good of each. The "community" was thus not simply the sum of its parts but a separate entity "prior to and distinct from the various private interests of groups and individuals" (Wood, 1969, 58).

While today we might regard this emphasis on the public good as a threat to individual liberty, eighteenth century Americans saw the two concepts as perfectly compatible. Indeed, "liberty" was the only term they invoked more often than "the public good" (Wood, 1969, 55). Their idea of liberty reflected their idea of community. Because the people are united in their fundamental interests, individuals need not fear degradation of their rights by their fellow citizens. A "democratical despotism" John Adams insisted in 1775, would be a "contradiction in terms" (1977, vol. 2, 287). The people's relations with their rulers, however, are a different matter. Not only do rulers and ruled share no common bond, their interests are fundamentally at odds, for rulers want power whereas citizens are threatened by it. Governmental power, not community, is thus the real threat to liberty. Viewing the community as a corporate commonwealth, Americans two centuries ago stressed not "the private rights of individuals against the general will" but "the public rights of the collective people against the supposed privileged interests of their rulers" (Wood, 1969, 61). In fact, said one American in 1773, individual liberty "must depend upon the collective power of the whole, acting for the general interest" (quoted in Wood, 1969, 62).

The communitarianism of eighteenth century Americans and their conception of liberty as a public rather than a private value shaped their understanding of bills of rights. They acted, Donald Lutz (1988, 6) has written, not as an aggregate of individuals but "*as a people* by achieving a shared psychological state in which they recognize themselves as engaged in a common enterprise and as bound together by widely held values, interests, and goals." Accordingly, they not only saw no necessary tension between individuals and the community, they believed that active participation in civic affairs was the best way for individuals to remain free and to achieve their full potential as human beings. Individual rights and the public good were thus one and the same, as shown by the emphasis in early bills of rights on the "rights of the people." In short, in the republican understanding of the eighteenth century, a bill of rights served less as a "legalistic limit on the power of government" than as a "public elaboration, almost a celebration, of a people's fundamental values" (Lutz,

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1988, 32). By tracing the roots of those values, we can rediscover our forgotten bill of rights and better understand the meaning of liberty two centuries ago and in our time as well.

English Constitutionalism and the Philosophical Roots of the Bill of Rights

The notion of a written bill of rights explicitly protecting specific personal liberties was the product of Anglo-American constitutionalism. Only after the principle of limited government had been firmly established in England and America could bills of rights be implemented. English political struggles concerned attempts to limit the power of the king in order to protect the liberty of the people generally. They did not involve checking the power of the majority to secure freedom for individuals or minorities. Hence, England's Bill of Rights of 1689 focused more on the distribution of power in the British constitutional system than on personal freedoms. Constitutional checks upon the monarchy were viewed as a kind of bill of rights. When Parliament later invaded what American colonists thought of as their rights, the idea emerged that rights should be explicitly cited in formal declarations and given special protection against violation by any organ of government. Ironically, it was English exponents of constitutionalism such as John Locke, the philosopher of liberalism, and John Trenchard and Thomas Gordon, two republican journalists, who helped provide the philosophical roots of American thinking about liberty and bills of rights.

No political tract familiar to the founding generation analyzed the problems of securing liberty under government more thoroughly or, to Americans, more convincingly than did John Locke's *Second Treatise of Government*.¹ Yet, Locke's idea of liberty differs sharply from that associated with the Bill of Rights today. Contemporary libertarians focus on the liberty of individuals taken singly or in small groups in relation to the majority and the government that represents it. By contrast, Locke was more concerned with the liberty of individuals taken collectively in relation to rulers who threaten to oppress the people as a whole. He saw individuals united for common purposes that can be endangered not just by tyrannical government but also by isolated individuals who do not share the community's beliefs. This perspective, and its implications for individual rights, can be seen in Locke's discussion of consent, majority rule, and the right of resistance.

Consent is crucial in the transition from natural liberty to civil liberty, but the need for individual consent applies only to the initial creation of civil society, not to approval of the actions of government once it is established. For that purpose "the *Majority* have a Right to act and conclude the rest" (sec. 95, 375). Since public policies are unlikely to win unanimous approval, it is necessary that society "should move that way with the greater force carries it, which is the *consent of the majority*" (sec. 96, 375). Thus, by consenting with others to leave the state of nature for civil society, individuals put themselves "under an Obligation to everyone of that Society, to submit to the determination of the *majority*, and to be concluded by it" (sec. 97, 376). Government by individual rather than majority consent "would make the mighty *Leviathan* of a shorter duration, than the feeblest Creatures" (sec. 98, 377).

The consequences for individual rights of Locke's discussion of consent and majoritarianism emerge clearly in his treatment of the right of resistance. He denied individuals a right to resist government whenever they feel aggrieved since that would "unhinge and overturn all Polities, and instead of Government and Order leave nothing but Anarchy and Confusion" (sec. 203, 449). Only the collective judgment of the greater part of the community may determine when government has become unjust, thereby making resistance legitimate. Those who resist otherwise are guilty of subversion, "the greatest Crime" imaginable, and are "justly to be esteemed the Common Enemy and Pest of Mankind" and "to be treated accordingly" (sec. 230, 467). After all, said Locke, the "*first and fundamental natural Law*" is "*the preservation of the Society*, and (as far as will consist with the publick good) of every person in it" (sec. 134, 401).

Although Locke's understanding of liberty was a far cry from today's, it was readily embraced by eighteenth century Americans, for in their minds "majority rule and the common good were inextricably linked" (Lutz, 1988, 29). Accordingly, early Americans shared Locke's belief that personal rights could be limited when the good of the whole required it. Such a view could oppress individuals or minorities, but protecting the unpopular few against the tyrannical many was not the central concern of Anglo-American constitutionalism during the seventeenth and eighteenth centuries. This largely modern problem was almost irrelevant to the burning conflict of that time, which was the people versus the king, or to be more precise, Parliament versus the king. Locke thus discussed at length the right of the people to resist unjust monarchs but barely mentioned the possibility of majority tyranny. He believed that freedom is

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maintained through the principles and institutions of constitutional government, whereas modern libertarians insist that freedom, especially for individuals and minorities, can be secured only through the specific protections of a bill of rights.

More explicit concern for personal rights was shown by the journalists John Trenchard and Thomas Gordon in their highly influential "Cato's Letters,"² a series of essays published between 1720 and 1723 and widely read in the American colonies. Whereas Locke regarded liberty as something enjoyed more by the people as a whole than by the people as individuals, and while he could more easily imagine liberty being threatened by tyrannical rulers than by a majority of citizens, Trenchard and Gordon were closer to modern libertarians in recognizing that freedom can be denied to individuals and minorities by oppressive majorities. Hence, "Cato" called it a "mistaken Notion in Government, that the Interest of the Majority is only to be consulted," for "the greater Number may sell the lesser" through "a Conspiracy of the Many against the Minority" (No. 62, 128-129). Similarly, he advocated a broader degree of personal freedom than the majority might like. "True and impartial Liberty," said "Cato" in language evocative of John Stuart Mill, is "the right of every Man to pursue the natural, reasonable, and religious Dictates of his mind; to think what he will, and act as he thinks, provided he acts not to the Prejudice of another" (No. 62, 130).

Still, like Locke, Trenchard and Gordon did not call for a formal bill of rights ensuring the freedom of individuals and minorities against the arbitrary exercise of power by majorities. The primary political problem in their time was safeguarding the liberty of the people as a whole against tyrannical rulers. So despite having a greater sensitivity than Locke did to the plight of dissidents and minorities, "Cato" was ultimately more a tribune of "the People" than a defender of individual or minority rights. He thus stressed the dangers of rulers rather than the dangers of majorities. Indeed, whereas Locke considered tyranny an aberration, "Cato" was highly suspicious of those with power. Even the best rulers "grow mischievous when they are set above Laws," he wrote, and "arbitrary Power in a single Person had made greater Havock in human Nature, and thinned Mankind more, than all the Beasts of Prey and all the Plagues and Earthquakes that ever were" (No. 25, 68-69). The appetites of rulers are therefore "carefully to be observed and stayed, or else they will never stay themselves" (No. 60, 119). Because power is "apt to break its Bounds, in all good Governments nothing...ought to be left to Chance, or the Humours

of Men in Authority: All should proceed by fixed and stated Rules" (No. 25, 71).

In this context, Trenchard and Gordon did not call for a written bill of rights but, like Locke, depended instead upon constitutional principles and structure to maintain liberty. Hence, they defined "free Countries" as those where "Power is fixed," where rulers cannot "break Bounds without Check, Penalties or Forfeiture," and where "the People have no Masters but the Laws" (No. 68, 178). Equally important to them for ensuring freedom was making "the Interests of the Governors and of the Governed the same, as far as human Policy can contrive" (No. 60, 120). Since the best way of doing so, direct democracy, is rarely possible, "Cato" recommended as a "necessary and laudable Passion" a healthy streak of "Political Jealousy" in the people toward their rulers since it "tends to preserve Liberty" (No. 33, 85). This emphasis of English constitutionalists like "Cato" and Locke upon the collective rights of the people and upon the tension between the people's interests and the ambitions of their rulers greatly influenced the American understanding of liberty in the eighteenth century, thereby helping to lay the cornerstone of our "forgotten bill of rights."

The American Revolution and the Political Roots of the Bill of Rights

The conflict between Britain and the American colonies, culminating in the War for Independence, was a watershed in the development of American thinking on liberty and bills of rights. It confirmed all that Americans had learned from Locke, "Cato," and their own experience about the danger to a people's freedom posed by governmental authority. As one colonist wrote in 1768, "never was there a People whom it more immediately concerned to search into the Nature and Extent of their Rights and Privileges than it does the people of America at this Day" (quoted in Rossiter, 1953, 362). Once Britain threatened to upset their established constitutional order with its new imperial policies, Americans were convinced they had encountered the tyranny that the English Whigs had warned against. Accordingly, they made their "appeal to heaven." One veteran of the fighting reflected the American consensus when he wrote of the "bloody and distressing war, which we have sustained in defense of the liberties and indefeasible rights of mankind" (Storing,

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1981, 5.13.2).³ Indeed, to Americans the whole point of the revolution was to restore the freedom of a people.

The British could not understand the American perspective since by the middle of the eighteenth century the two peoples had come to have profoundly different notions of the relationship between freedom and authority. The crucial political events of seventeenth century England involved the great struggle for constitutional liberty by Parliament and the common law courts against the absolutist Stuart kings. The outcome was limited monarchy and parliamentary supremacy. Yet, Americans believed that Parliament had limited itself by reaffirmations of Magna Carta and passage of the Petition of Right of 1628, the Habeas Corpus Act of 1679, and the Toleration Act and Bill of Rights of 1689. In addition, they regarded the British constitution, like their own colonial charters, as a body of fixed and fundamental principles, rooted in divine and natural law, and binding on king and Parliament alike. No government could abridge the "essential rights" derived from these sources, said Sam Adams (1968, 24 and 185), "without destroying its own foundation."

In reality, the English constitutional documents limited only the power of the Crown, not that of Parliament. Moreover, they gave little protection to popular rights, being aimed more at securing the prerogatives of the House of Commons. Americans believed otherwise because their constitutional theory derived from a "highly selective and romanticized image of seventeenth-century England," an image that flourished in America long after it had died out in England (Levy, 1987, 293). To Americans, the English constitutional documents were important pillars of the rule of law and the idea of liberty. Like such colonial documents as the Massachusetts Body of Liberties of 1641, the Concessions and Agreements of West New Jersey of 1677, and the Pennsylvania Charter of Privileges of 1701, they were regarded as part of an ancient tradition. Furthermore, the American tendency to equate the constitutional rights of British subjects with the natural rights of all human beings was a significant refocus of Lockean theory away from limiting primarily executive power to limiting legislative power as well. It thus implied restraints on the power of majorities in the name of individual rights.

Nevertheless, discussion of liberty during the revolutionary era tended to reflect the earlier view of Locke and "Cato" that rights belonged to the people taken as a whole rather than as individuals, and that they were threatened more by the tyranny of the few than by the tyranny of the many. Freedom of speech and press, for example, were regarded not as individual

rights but as the concomitants of free government. As one writer told the *Boston Gazette* in 1767: one has freedom of speech only "so far as the laws of a community will permit, and no farther: all beyond is criminal, and tends to the destruction of Liberty itself." When exercised properly, he continued, freedom of speech "keeps the constitution in health and vigour," thus ensuring "our preservation as a free people" (Levy, 1966, 95-96). Americans similarly emphasized the social utility of a free press over its value to individual writers and publishers. The Continental Congress thus praised freedom of the press in 1774 for advancing "truth, science, morality, and arts" as well as for "its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs" (Kurland and Lerner, 1987, 442).

The rights of assembly and petition were also considered in terms of their value in a representative government as a means of enforcing the "collective right of we the people to control government" (Amar, 1991, 1152). As the towns of Middlesex County, Massachusetts declared in 1774, "every people" has a right to meet and discuss "common grievances" (quoted in Rossiter, 1953, 386). Concern for maintaining the collective rights of the people as the foundation of republican government also helps to explain the American emphasis on civilian control of the military so as to ban standing armies and the quartering of troops in private homes. Sam Adams spoke for many in 1768 when he expressed doubt that "any people can long remain free, with a strong military power in the very heart of their country" unless the force was accountable to "the people" (1968, 264). Trial by jury and representation in the legislature were particularly thought of more as instruments of popular control than protections for individual freedom. "In these two powers consist wholly the liberty and security of the people," wrote John Adams in 1766, for they provide "a popular check, upon the whole government" (1977, vol. 1, 168-169).

Official American statements reflected this communitarian view of rights. In 1765 the Stamp Act Congress implored Britain to respect "the most essential rights and liberties of the colonists" (Perry and Cooper, 1978, 270). In 1774 the First Continental Congress condemned Parliament for violating "the rights of the people," adding that "the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council" (Perry and Cooper, 287). Shortly thereafter, Congress told the inhabitants of Quebec that representative

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government, trial by jury, habeas corpus, and freedom of press and conscience were among the rights "without which a people cannot be free and happy" (Kurland and Lerner, 1987, 442). After hostilities had broken out in 1775, the Second Continental Congress issued its "Declaration of the Causes and Necessity of Taking Up Arms," which spoke of "our cause," "our liberties," and the "freedom that is our birthright," while warning Britain that the colonists were "with one mind resolved to die freemen rather than to live slaves" (Perry and Cooper, 1978, 299).

This communitarian conception of rights found its ultimate expression in the Declaration of Independence, the most important and eloquent statement of the principles and objectives of the American Revolution. The Declaration is often read as a manifesto of individualism, given its invocation of the "unalienable rights" of "all men." As Donald Lutz argues, however, the Declaration was not "an abstract essay on individual rights," for "it is not individualism that permeates the list of abuses," but concern for the injustices that "Americans had suffered as a people" (1988, 78). Similarly, Harvey Mansfield notes that "the same liberal principles we usually see used to protect individuals against government" are used in the Declaration to "defend one people against another people" (1979, pp. x-xi). In explaining why it had become necessary for "one people" to break its political bands with another, Jefferson proclaimed that "we" hold certain truths to be self-evident, a vital one being the "right of the people" to alter or abolish their government should it act contrary to the public good (Perry and Cooper, 1978, 319). The Declaration was thus concerned not with individual rights in the modern sense but with the "people's right" to ensure that government rests on the consent of the governed.

With the coming of independence, Americans set forth their liberties as a people in their new state constitutions, most of which included formal declarations of rights. Virginia's stated that government is formed for the "common benefit, protection, and security of the people," and that "a majority of the community" has a right to change government in whatever way necessary to promote the "public weal" (Perry and Cooper, 1978, 311). Eleven of the document's sixteen sections speak of "rights of the people," such as free elections, representative government, and protection against standing armies. Only five cite rights bearing more on individuals, such as freedom of conscience and procedural fairness in criminal cases. Pennsylvania's declaration of rights also was directed largely to "the people," "the community," and the "common good" (Perry

and Cooper, 1978, 329 and 331). Protection against arbitrary searches and seizures and freedom of speech and press were listed as rights of "the people," as were the right to bear arms and the right to assemble and petition. As in Virginia, only the rights of conscience and property, along with protections for criminal defendants, were described more in individualistic terms.

The communitarian understanding of freedom was even more striking in the declarations of rights of Delaware and Maryland. These states regarded "the foundation of liberty and of all free government" to be not, as we might today, the right of individuals to privacy or freedom of expression, but the right of "the people" to control their representatives (Perry and Cooper, 1978, 338 and 347). Moreover, while both states guaranteed liberty of conscience to all citizens, "the people" to whom equal rights were extended was limited to Christians (Perry and Cooper, 1978, 338 and 349). Maryland thus required its officeholders to swear belief in Christianity. Its legislature was also permitted to spend public funds to promote the Christian faith. Massachusetts went further, providing in the longest section of its declaration of rights that since "the happiness of a people" depends upon "piety, religion, and morality," the state legislature could require citizens to attend religious services and support Protestant ministers (Perry and Cooper, 1978, 374). Tax revenues could even be used to fund denominations to which contributors did not belong.

Constitutional provisions such as these and the majoritarian premises upon which they rested clearly could oppress religious minorities. Test oaths, established churches, and persecution of religious dissenters were in fact common. These practices were not regarded as problematic, however, since liberty was largely thought of as belonging to individuals as members of a broader community. The libertarian tradition that Americans had inherited from Locke and "Cato" saw the threat to individual freedom coming not from the many making up the community but from the few occupying positions of power. So long as "the people" controlled government, liberty would be secure. Accordingly, John Adams (1977, vol. 1, 169) extolled America in 1766 as a land where one "can be subjected to no laws, which he does not make himself, or constitute some of his friends to make for him: his father, brother, neighbour, friend, a man of his own rank, nearly of his own education, fortune, habits, passions, prejudices." Modern libertarians would note that those outside the mainstream, such as religious minorities, political dissidents, or those loyal to England, might not feel, or be, as secure.

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The Constitution, the Bill of Rights, and the Decline of the Traditional Understanding of Liberty

Although the delegates to the Constitutional Convention were well aware of both the theory and practice of securing liberty through bills of rights, they did not attach one to the federal constitution. Their decision was due neither to oversight nor to devaluation of the importance of rights but to the nature of their enterprise. The state bills of rights reflected a popular desire during the Revolution to restrain power so as to promote liberty. By contrast, the framers of the federal constitution gathered not to limit national power but to enlarge it, for the travails of the Confederation period had convinced them that liberty can be endangered as much by a weak government as by a strong one. Unlike localists, who praised bills of rights as the cornerstone of free government, the nationalists meeting in Philadelphia feared that restrictions on federal power could become the Achilles' heel of their new system by undercutting stable and effective government, which to them was the best security for private as well as public liberty.

In any case, virtually all the framers of the constitution believed that the institutional character of the government they were creating obviated the need for explicit recognition of traditional liberties. Because the national government would possess only enumerated powers, the framers reasoned, it could not invade the rights of the people. In fact, they believed that since the Constitution provided for separation of powers, checks and balances, republicanism, bicameralism, judicial independence, federalism, a broad suffrage, and the possibility of amendment, the entire document was in essence a bill of rights, and one that provided more dependable protection than the "parchment barriers" attached to the state constitutions. Similarly, the delegates thought the vast expanse of the American continent would ensure liberty by encompassing such a wide variety of geographically scattered interests as to make unlikely the emergence of a domineering majority. Finally, they insisted that no bill of rights could possibly list all the "natural rights" of the people (see Levy, 1987, 262-269).

Whatever the merits of these ideas, omitting a bill of rights was a serious miscalculation on the part of the convention, for it almost caused the Constitution to be rejected. To its foes, many of whom were motivated as much by states' rights sentiment as by libertarianism, the document promised a "consolidated" government wherein an omnipotent national

legislature would abolish state autonomy and thereby extinguish the rights of the people. Asked one of many Anti-Federalists, "where is the bill of rights which shall check the power of this Congress; which shall say, Thus far shall ye come, and no farther?" (Elliot, 1907, vol. 2, 80). The Anti-Federalists thus saw in the Constitution the same danger of tyranny over the people by the powerful few that Locke and "Cato" had warned against and that the American Revolution had sought to end. As James Madison wrote to Thomas Jefferson, the Constitution's critics believed that the framers "had entered into a conspiracy against the liberties of the people at large, in order to erect an aristocracy for the rich, the *well born* and the men of Education" (1962, vol. 10, 519).

In calling for a bill of rights, then, the Anti-Federalists were "fighting the good old Whig cause in defense of the people's liberties against the engrossing power of their rulers" (Wood, 1969, 521). For example, Richard Henry Lee of Virginia argued that "universal experience" demonstrated the need for "express declarations and reservations" to protect the "just rights and liberty of Mankind from the silent powerful and ever active conspiracy of those who govern" (Kurland and Lerner, 1987, 448). New York's Robert Yates demanded a bill of rights to protect "public liberty" and "the rights of the people" against the "encroachments of their rulers" (Storing, 1981, 2.9.25). Only rarely did the Constitution's critics consider rights as belonging to individuals as such or see them threatened by the community. Praising "the people as the great centre of all," one Kentucky Anti-Federalist squarely defended majority rule, asserting that "in no instance ought the minority to govern the majority." He saw no danger to individual liberty in this approach since he thought of individuals in communitarian terms. Thus, in referring to the "liberty of the community" he argued that no community can ever have but "one common public interest," that being "the greatest good of the whole and of every individual as a part of that whole" (Storing, 1981, 5.13.4, 5, 7).

As during the Revolutionary War, rights were understood as belonging more to the people as a whole than to individuals. For instance, Richard Henry Lee argued that trial by jury is as vital to those serving as jurors as it is to those being tried. Jury service, he said, "is among "the wisest and most fit means" the people have to protect themselves against "the few" and "the well born," for it "enables them to acquire information and knowledge in the affairs and government of the society" so that they might act "as the centinels and guardians of each other" (Storing, 1981, 2.8.54-55). Lee similarly viewed a free press in communitarian terms,

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calling it a "channel of communication as to mercantile and public affairs" and the primary means by which a people "ascertain each others sentiments" and are "enabled to unite, and become formidable to those rulers who adopt improper measures" (Storing, 1981, 2.8.203). Freedom of speech, the right to assemble and petition, and protection against standing armies and the quartering of troops were also understood by most Anti-Federalists as belonging to the people collectively rather than individually because they were, Lee said, liberties "essential to their political happiness" (Storing, 1981, 2.8.196).

Because Anti-Federalists believed the real threat to freedom came from tyrannical rulers, not oppressive majorities, they regarded bills of rights primarily as protections for the governed against their governors. This position puzzled most Federalists, who considered bills of rights unnecessary where political power rested in the hands of the people themselves. Alexander Hamilton contended that because guarantees of rights were originally "stipulations between kings and their subjects" they had no application to constitutions founded upon "the power of the people, and executed by their immediate representatives and servants" (1961, 512-513). The "leading principle" of American constitutionalism, added James Wilson, is that "supreme power resides in the people" who have "a right to do what they please" with their government (Elliot, 1907, vol. 2, 434-435). "Of what use, therefore, can a bill of rights be," James Iredell asked, "where the people expressly declare how much power they do give, and consequently retain all they do not?" (Elliot, 1907, vol. 4, 148).

Anti-Federalists did not agree that popular sovereignty obviated the need for a federal bill of rights. Building upon traditional Whig theory, they believed that power is inherently dangerous and likely to corrupt its possessors, be they monarchs or elected representatives. William Grayson of Virginia insisted that power "ought to be granted on a supposition that men will be bad" (Elliot, 1907, vol. 3, 563). "The lust of power is so universal," noted "Centinel," that a "speculative unascertained rule of construction would be a *poor* security for the liberties of the people" (Storing, 1981, 2.7.38). The ultimate security against the dangers of governmental power, Anti-Federalists thought, was a bill of rights. Since "it is the nature of power to seek its own augmentation," argued Robert Whitehill of Pennsylvania, "loss of liberty is the necessary consequence" unless the people "erect a permanent landmark" by which their rulers "may learn the extent of their authority, and the people be able to discover the first encroachments on their liberties" (Kurland and Lerner, 1987, 456).

Most Anti-Federalists thus argued for a bill of rights within the traditional understanding of liberty, which emphasized what "An Old Whig" called "struggles between the rulers and the people" (Storing, 1981, 3.3.23). Some, however, were beginning to see bills of rights not just as protections for the liberties of the people as a whole against the tyranny of the few, but also as guarantees of the rights of individuals and minorities against the tyranny of a majority exercising its will through its elected representatives. "A Farmer" in Maryland claimed that in popular governments "the tyranny of the legislative is most to be dreaded" since "the rights of individuals are frequently opposed to the apparent interests of the majority." Unless rights in a popular government are "clearly and expressly ascertained" in a bill of rights, he warned, "the individual must be lost" (Storing, 1981, 5.1.15). Writing as "Agrippa," James Winthrop of Massachusetts reasoned that because "unbridled passions produce the same effect whether in a king, nobility, or a mob," it is "as necessary to defend an individual against the majority in a republic as against the king in a monarchy." A bill of rights would "secure the minority against the usurpation and tyranny of the majority" (Storing, 1981, 4.6.73).

Sparked largely by majoritarian abuses of individual rights in some of the more democratic states during the Confederation period, a profoundly new understanding of liberty and bills of rights was emerging, one that threatened to undermine traditional beliefs about the goodness of the people and the need for civic virtue in maintaining a free community. Traditionalists viewed bills of rights as agents of political socialization helping to unite citizens by instilling in them affection for the principles of public liberty upon which free government ultimately depends. Richard Henry Lee, for instance, thought a bill of rights would "establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forgot" (Storing, 1981, 2.8.196). "Many" argued that the nation's basic principles should be expressed "in a few words, yet plain, and pithy, to which the people would pay a similar deference, as to the decalogue" (Storing, 1981, 5.20.2). A bill of rights could thus "inspire and conserve...affection for the native country," claimed "A Delegate Who Has Caught Cold," thereby providing "the first lesson of the young citizens" (Storing, 1981, 5.19.16).

In the emerging understanding of liberty, by contrast, a formerly unified community was seen as giving way to what one Virginian called "faction, dissension, and consequent subjection of the minority to the caprice and arbitrary decisions of the majority, who instead of consulting

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the interest of the whole community collectively, attend sometimes to partial and local advantages" (Elliot, 1907, vol. 3, 107). Hence, "the people" increasingly were regarded as no more virtuous than princes; and because the people had become sovereign, private liberty was thought to be as much in jeopardy as was public liberty. This perspective on freedom led to an understanding of bills of rights closer to today's in its distrust of the people collectively and its emphasis on securing the rights of individuals and minorities against the deprivations of a majority of the community exercising its power through government. This intellectual movement away from republicanism and toward liberalism also had within it the seeds of our current fixation with individual and group interests, which often works to the detriment of public or common interests.

Ironically, the most articulate proponent of this new view was not an Anti-Federalist but James Madison, the "father of the Constitution." Madison initially opposed a bill of rights as unnecessary and ineffective, but he eventually became its primary catalyst out of fear that demands for protecting basic freedoms, if unaddressed, might help defeat the Constitution. Moreover, he was being heavily lobbied by Thomas Jefferson who insisted that "a bill of rights is what the people are entitled to against every government on earth...and what no just government should refuse, or rest on inference" (1955, 440). Jefferson followed the traditional view that bills of rights protected the liberties of the people as a whole from invasion by tyrannical rulers. More modern, Madison believed that since power in the United States rested with "the majority of the Community," danger to "private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents" (1962, vol. 11, 298).

Although Madison embraced the emerging understanding of liberty, he did not completely repudiate the traditional view. Hence, he argued that bills of rights are desirable in part because the "political truths" they contain might "acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion" (Madison, 1962, vol. 11, 297). He considered the symbolic and educative functions of a bill of rights to be particularly important in a fragmented, pluralistic society where the clashing interests of selfish groups could cause people to forget the principles of free government. A bill of rights could serve as a beacon to highlight those principles and remind people of their

importance. Moreover, the ideals of freedom contained in a bill of rights could "rouse the attention of the whole community" against the zealous pursuit of popular sovereignty by an overbearing majority, helping to restrain them "from those acts to which they might be otherwise inclined" (Madison, 1962, vol. 12, 204-205).

Madison thus tried to accommodate the emerging individualistic understanding of liberty and bills of rights to the traditional communitarian perspective in the belief that securing the rights of both individuals and communities depended upon maintaining the essential principles of free government. By the end of the 1780s, however, Americans had come "to regard public and private liberty as antagonistic rather than complementary" (Wood, 1969, 609). As individualism increasingly eclipsed community, the traditional understanding of liberty and bills of rights was overshadowed by the new one, obscuring the classic eighteenth century conviction expressed so eloquently by Richard Henry Lee: if people expect their political systems to endure, they "ought to recognize the leading principles of them in the front page of every family book" (Storing, 1981, 2.8.196). The new understanding would eventually evolve into a more radically individualistic vision of liberty where community and citizenship play little role. This is the twentieth century bill of rights. That of the eighteenth century was based on a tradition of liberty scarcely remembered. As such, it constitutes our "forgotten bill of rights."

Conclusion

How is the "forgotten bill of rights" of the eighteenth century relevant to American politics today? Its relevance lies in the concern of both liberals and conservatives that the meaning of liberty in our time may be less conducive to the political and moral health of our regime than was the meaning held by Americans two centuries ago. The educative function of the Bill of Rights has not been realized in the way its advocates had hoped, for the lesson many of us have learned is not that liberty depends upon community, but that community exists simply to promote liberty. We have been so insistent on enforcing our "individual rights" against one another that we have spawned a troubling litigiousness that has undermined our sense of mutual obligation and transformed the role of the judiciary in our political system. Public issues regularly are reduced to questions of "rights" to be resolved by courts rather than by citizens (McDowell, 1993). Ironically, the rhetoric of rights thus threatens to debase liberty, making it

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something selfish and taken for granted rather than, as in the eighteenth century, something communal and actively maintained. In short, "the ghost of Republicanism has long since deserted the center of American life, where Liberalism is now Hegemonic" (Ackerman, 1991, 29).

Yet, neither a zealously individualistic liberalism nor an ardently communitarian republicanism can hope to ensure either true freedom or civic responsibility in modern pluralistic America. Emphasizing one set of values to the exclusion of the other ignores what Forrest McDonald has called the tension between "liberty to participate in the governing process and liberty from unlimited government" (1985, viii). When taken to extremes, both liberalism and republicanism fail to deal adequately with this tension. As for liberalism's focus on individual rights, Nathan Tarcov warns that "our public discourse is impoverished if we only invoke our rights and never debate what is good for us, if we only assert our right to pursue happiness and never discuss what would make us happy" (1985, 125). On the other hand, Stephen Dworetz asserts that whatever the vices of liberalism, it is "the only doctrine that instinctively requires political constitutionalism and the freedoms associated with it, while civic republicanism, whatever its virtues, lacks internal theoretical constraints upon the use of political power" (1990, 38).

Is a synthesis of liberalism and republicanism possible? The debate between contemporary liberals and communitarians seems to belie the possibility, for the two sides tend to frame the issue as though it were an "either/or" proposition. Nevertheless, liberalism and republicanism may share some common ground. Dworetz, a liberal, believes that because the two doctrines coexisted in the eighteenth century, "constructive interactions" between them are attainable today (1990, 191). Another liberal, Bruce Ackerman, rejects altogether the dichotomy between liberalism and republicanism and calls for "liberal republicanism," a combination of both doctrines based on the idea that "the foundation of personal liberty is a certain kind of political life--one requiring the ongoing exertions of a special kind of citizenry" (1991, 29-30). Benjamin Barber (1984), a communitarian, advocates just such a "strong democracy" where public-spirited citizens actively pursue their interests by participating in civic associations. Other communitarians such as Morris Janowitz (1983) and George Fletcher (1993) also emphasize the interplay in a free society between civic involvement and personal liberty.

The eighteenth century understanding of liberty and bills of rights reflected this republican emphasis on dedication to the community. Yet, it

also reflected the liberal belief that the community is composed of individuals and exists to ensure their welfare. Without good individuals there could be no good community; but without a good community there could be no good individuals. These symbiotic public and private interests were linked in the concept of "public liberty," the idea that freedom is the responsibility of all as much as it is the right of each. Hence, the generation that founded our polity believed that "the fate of private freedom in America...depended upon a realistic appreciation of what could, and could not, be expected of American citizens" (Ackerman, 1991, 30). That was the essence of liberty two centuries ago and the challenge today for those trying to reconcile the perennial tension between the individual and the community: the paradox that in a truly free society, freedom is a duty as well as a right. By thinking of our "rights" in terms of our dual roles as both individuals and citizens we can rediscover our "forgotten bill of rights" and perhaps revitalize the meaning of liberty in America today.

Notes

1. I cite Locke's *Second Treatise of Government* according to the Laslett edition (Locke, 1960), using section and page.
2. I cite "Cato's Letters" according to Jacobson (1965), using section and page.
3. All citations of Storing (1981) use his three-part numbering system indicating volume, position of an essay within that volume, and paragraph.

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