OUR CONFLICTING LIBERTY HERITAGE FROM ENGLAND AND FRANCE

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I. INTRODUCTION

The original tension of the United States of America is that it was formed based on the highly conservative nature of the English Common Law, made manifest in the Constitution of the United States, but also in the highly progressive spirit of the French Enlightenment, made manifest in the Declaration of Independence. The English Common Law looks back at past authority and embraces it by relying on precedent. The French Enlightenment looked back at past authority and rejected it in full. The Constitution is a legal document. The Declaration is an aspirational one. The word liberty appears in both. The Fifth and Fourteenth Amendments of the Constitution state that the government shall not deprive any person of "life, liberty, or property, without the due process of law."[1] The Declaration states that "Life, Liberty and the pursuit of Happiness" are among the inalienable rights possessed by human beings.[2]

Abraham Lincoln believed the Declaration and Constitution must always be viewed together and that the Declaration was the more important document, the Constitution being merely the first rough draft of making manifest the ideals of the Declaration.[3] It has been noted that at Gettysburg, Lincoln improved the Constitution for all time, implicitly changing its meaning "by appeal from its letter to the spirit."[4] But what was the origin of this spirit?

At a time when Substantive Due Process may be one United States Supreme Court vote away from disappearing, I defend a progressive interpretation of the liberty interest of Substantive Due Process by arguing that the spirit of the French Enlightenment and the Declaration must instruct the interpretation of the Constitution with its English Common Law basis. Part II provides a legal background for the twin streams of constitutional interpretation that have defined our legal history. Part III examines in detail England, the Common

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† The author would like to dedicate this article to the memory of my father, James P. Hart. Jr., who gave me my love for law and history.

1. U.S. CONST. amends. V, XIV.
2. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
3. GARRY WILLS, LINCOLN AT GETTYSBURG 101 (Simon & Schuster, 1992).
4. *Id*. at 38.

Law, and its impact on the Constitution. Part IV examines the French Enlightenment, its aspirations and historical accomplishments, and its impact on the Declaration of Independence. Part V concludes that the progressive spirit of the Enlightenment must instruct the understanding of liberty as originally received from the English Common Law.

II. BACKGROUND

The doctrine of Substantive Due Process, at its core, addresses the question of the meaning of a liberty interest. Under this doctrine, if a fundamental right is present, the United States Supreme Court reviews a statute abridging it by strict scrutiny; the law must be narrowly tailored to a compelling state interest.[5] If such a right is not present, the Court uses rational basis review; the law must only be rationally related to a legitimate state goal.[6] The right to contraception, abortion, autonomy over one's body, autonomy over raising one's children, and the right to engage in consensual sexual relationships all come under the doctrine of Substantive Due Process. Justices who believe in a more conservative interpretation of the word liberty, that it means only freedom from incarceration, deny that Substantive Due Process exists—Justice Scalia famously called it an "oxymoron."[7] They believe that the cases that guaranteed such rights, such as *Griswold v. Connecticut*[8] (contraception), *Roe v. Wade*[9] and *Casey v. Planned Parenthood*[10] (abortion), *Skinner v. Oklahoma*[11] (autonomy over one's body), and *Obergefell v. Hodges*[12] (same sex marriage) were wrongly decided.[13] Justices who take a more liberal view of the word liberty, that it encompasses the liberty of thought and behavior, adhere to the notion of Substantive Due Process and believe that these cases were correctly decided.

Thus, the meaning of the word liberty is critical. When looking to our roots for the answer, different answers come from the two nations that formed the intellectual basis for the United States of America: England and France. The conservative view that liberty means freedom from bodily restraint only is inherited from the English Common Law. The progressive view that liberty means freedom of mind and

5. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 504-07 (1977).
6. *See Moore*, 431 U.S. at 498-500.
7. United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., dissenting).
8. 381 U.S. 479 (1965).
9. 410 U.S. 113 (1973).
10. 503 U.S. 833 (1992).
11. 316 U.S. 535 (1942).
12. 135 S. Ct. 2584 (2015).
13. *See, e.g.*, Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT 253, 259 (2016).

soul is inherited from the French Enlightenment. Thus, the systems must be compared to achieve a full understanding of what liberty means.

The English Common Law is inherently conservative systemically. It is proudly and unapologetically built on the foundation of the past. In code law countries that use a modern version of the Roman Law, whether the *Code Napoleon* or other, legislators discuss and adopt a series of rules of law that make sense to them going forward.[14] Any statute agreed upon is entirely forward looking, and may not be applied retroactively in a substantive sense. As was said in ancient Rome, *nulla poena sine lege*, no punishment without law.[15] Since all Roman law was codified, this could more accurately be translated as no punishment without a statute.

If code law countries start the legal process by looking forward, the English Common Law looks back. If a defendant is being sued, the court will be bound if years in the past another court with superior jurisdiction made a ruling concerning a similarly situated defendant. Today, if a revocation of a contract offer is communicated to the recipient after the recipient has posted an acceptance, the revocation is void, based solely on the strength that in 1818 a court at the King's Bench made a similar ruling in *Adams v. Lindsell*.[16]

Where the English Common Law embraced past authority, the French Enlightenment rejected it. There were two primary forces that had governed Europe after the collapse of Rome on September 4, 426: the Church and the Monarchy.[17] It is not sufficient to say that the *philosophes* of the Enlightenment merely challenged both; they destroyed both. Where the English Common Law looked back in time for what to embrace, the French Enlightenment looked back in time for what to reject. The might and wit of Voltaire, Diderot, Montesquieu, Rousseau, *et al.* destroyed what 2,000 years of armed conflict had not.

The *philosophes* concentrated first on the Church. The Church had such power that Edward Gibbon, perhaps too much so, credits it with causing the fall of Rome.[18] Since its founding as a Kingdom in

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14. *See generally* 3 JOHN H. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 981-1098 (St. Paul West Publishing Co., 1928) (providing a historical perspective of the development of the English Common Law and the legal system in code law countries).

15. *See* RICHARD BAUMAN, CRIME AND PUNISHMENT IN ANCIENT ROME 124-25 (Routledge, 1996).

16. (1818) 106 Eng. Rep. 250; 1 Barn. & Ald. 681.

17. *See generally* WILL DURANT, THE AGE OF FAITH (Simon & Schuster, 1950) (providing a comprehensive history of the emergence of the Church and then the royal houses of Europe).

18. *See generally* EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 145-49 (W.H. Smith Publishers Inc., 1985).

800 B.C., thence to a Republic and on to an Empire, Rome had withstood a millennium of foreign invasion. Yet it could not withstand the power of the Church. As the historian Will Durant has written, "Caesar and Christ had met in the arena, and Christ had won."[19] The Church then survived as a dominant ruling force for 2,000 years, against all manner of attack. It survived a split in the Papacy in the Fourteenth Century, with contesting Popes in Rome and Avignon for nearly 70 years. It survived the corruption and depravity of the Borgias. It survived as a ruling force through the challenge from within of the Reformation and the separation by Henry VIII. It survived as a ruling force the challenge from without of the Renaissance, when "man turned his back towards death and face towards life."[20] Yet after the attack of the Enlightenment, it ceased to function as a governing institution.

The Age of Voltaire paved the way for Rousseau, Revolution, and the assault on the Monarchy. The Enlightenment gave people the confidence and ability to reason for themselves and judge what they saw; when looking at royal houses that had governed them, the judgment was harsh. The Enlightenment led to the death of Louis XVI. Napoleon's subsequent ascendancy caused such panic in the other royal houses of Europe that they declared war on him and France, and they were rewarded with obliteration at the battle of Austerlitz in 1805. In the opening years of the Nineteenth Century before he crowned himself Emperor, Napoleon was seen as liberating Europe from tyrants. Puccini's *Tosca* captured the time and place perfectly: the rebels cheering Napoleon's victory at Marengo, and Baron Scarpia trembling at Napoleon's advance.[21] Napoleon, of course, was subsequently deposed twice, as was Charles X after the Bourbon Restoration.[22] It would be a century before World War I ended most of the royal houses for all time, but it was the Enlightenment that set the groundwork.

The Constitution of the United States is largely shaped by the English Common Law. The Declaration of Independence is largely shaped by the French Enlightenment. To begin the exploration of this contradiction, we turn our attention back 1,000 years.

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19. WILL DURANT, CAESAR AND CHRIST 652 (Simon & Schuster, 1944).

20. The origins of this saying are unclear; for an overview of the era, see generally WILL DURANT, THE RENAISSANCE (Simon & Schuster, 1953).

21. *See* GIACOMO PUCCINI, TOSCA Act 2 (premiered January 14, 1900 in Rome).

22. *See generally* WILL DURANT & ARIEL DURANT, THE AGE OF NAPOLEON (Simon & Schuster, 1975) (providing an overview of the history of the age of Napoleon).

III. THE ENGLISH COMMON LAW

A. The Common Law

It was so long ago that England looked different.[23] Winters were colder; the Thames froze with some regularity.[24] There were denser and wider forests and therefore fewer meadows.[25] Droughts were more common.[26] The English Channel, having widened in earlier centuries, provided protection and isolation to the island nation. John H. Wigmore notes that this physical situation played an important role in the development of English law: "In the first place, it was an island, and therefore isolated, and thus its peoples and customs tended to unity."[27]

Upon this terrain, forbidding yet beautiful at once, William arrived with his conquering army from Northern France in 1066. At first, no effort was made to adapt to the customs of the inhabitants of the Island.[28] The Normans viewed the Britons as "louts and boors," and "ruled by the force of sharpened steel."[29] In the nature of things, members of the opposite sexes found reason to get along, and there was some initial exchange of cultural ideas.

Any such progress was greatly halted by William's death in 1087. He was succeeded by his son William II, who was succeeded by another of his sons, Henry I, but there was much disagreement as various relatives asserted rights to the throne. The young country dissolved into civil war for decades.[30] Upon this chaotic scene emerged Henry II, the grandson of Henry I, in 1154.

It was Henry's purpose to unify the island. To achieve that, he knew that he had to have a cohesive structure of law throughout the land. The new King had the wisdom to know that the Norman conquest was recent enough that had he attempted to impose any foreign law on the Britons, it would be rejected.[31] "Digests and codes imposed in the Roman manner by an omnipotent state on a subject people were alien to the spirit and tradition of England."[32] Rather, he sent advisors to the corners of the island to study the customs that already ex-

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23. Richard Barber, Henry Plantagenet 1-2 (Roman and Littlefield Inc., 1964).
24. *Id.* at 1.
25. *Id.* at 2.
26. *Id.* at 1.
27. 3 Wigmore, *supra* note 14, 1054.
28. 1 Winston Churchill, A History of the English-Speaking Peoples 169 (Dodd, Mead and Company, 1956).
29. *Id.*
30. *See generally id.* at 166-98 (providing historical background on William the Conqueror and subsequent rulers).
31. *Id.* at 216.
32. *Id.* at 224.

isted. Henry II is known as the father of the English Common Law because he created structures that preserved existing customs, not because his court arrived at new legal principles *per se*.

These structures of preservation included a system of royal courts designed to handle the increasing number of cases, an increased use of the jury, and a system of writs. Through these structural changes, Henry "gave to English law a conservative spirit which guarded and preserved its continuity from that time on in an unbroken line."[33]

The law, with its conservative nature established in the first instance by the study of existing customs, took hold fast. In the 1100s, a foreign traveler in England noted that, "England was wholly given over to the study of law."[34] The pride in the law was such that even monks studied secular as well as sacred law; as it was said at the time, *nullus clericus sine causidicus*, no cleric without the law.[35] Westminster Hall, which would hold the trial of King Charles I, of Warren Hastings, and otherwise be the center of English legal life, was built in 1099.

This initial system of studying past customs provided the origin of precedent and our system of relying on past decisions rather than forward looking statutes. Already the law "rested on the unwritten custom of the land as declared by the inhabitants and interpreted, developed, and applied by the judges. Lawyers could only ascertain it by studying reports and records of ancient decisions."[36] To aid in this endeavor, they organized themselves into Inns of Court.

The original fourteen have coalesced into the modern four: Lincoln's Inn, Gray's Inn, Inner Temple, and Middle Temple.[37] The legal apprentices lived, ate, and learned the law together.[38] Critically, these Inns were as conservative structurally as the law was substantively. The Inns were "the fortress[es] from which an army of professional devotees fought stubbornly in defence of English law."[39]

And who were these devotees? They were, unsurprisingly, sons of the English ruling class. This had quite literally been true since the Normans.[40] As Fortescue wrote, "Only the sons of gentlemen do study the law in these hostels; there is scarce an eminent lawyer who is not

33. *Id.* at 221.
34. 3 WIGMORE, *supra* note 14, at 1061.
35. *Id.* at 1062.
36. 1 CHURCHILL, *supra* note 28, at 223.
37. 3 WIGMORE, *supra* note 14, at 1064.
38. *Id*.
39. *Id*. at 1081.
40. *Id*. at 1083.

a gentleman by birth and fortune."[41] Of all of the fine attributes of the English ruling class, accepting change is not one of them.

In the Thirteenth Century, the early English scholar Henry de Bracton wrote his famous *De Legibus Angliae*.[42] Whereas the great Code of Justinian was just that, code law, Wigmore notes that Bracton "composed most of his text from his observations of cases decided in court. So his book represented in substance a native English, not a Romanesque, practice of law."[43] It was not that Roman law simply failed to take hold; it was actively rejected.[44] In the late 1400s, Chief Justice Fortescue wrote *De Laudibus Legum Angliae*, or *In Praise of the English Law*.[45] Not only did it praise the English Common Law system, it actively attacked Roman code law. The imperial designs of Charles V of France (where Roman law was practiced) and the blatant corruption of Rodrigo Borgia (Pope Alexander VI) made it somewhat easier for England, swelling with patriotism, to reject anything Roman. In the Sixteenth Century, Fortescue's successor, Chief Justice Coke, continued this theme with his Institutes on the Lawes of England.[46]

Nor is there disagreement when viewed from across the English Channel. Justinian's Code from 533 A.D. specifically rejects the idea of precedent, stating it to be "impossible" that a previous legal ruling be considered binding.[47] This spread across the continent and the centuries. Edwin Patterson has noted that, "The categorical rejection of case law as 'binding' was continued in civil law countries, with some modifications."[48] The most famous modern incarnation is, of course, the Code Napoleon; in France a single decision of the highest court is not considered binding ("*en droit*") on that court or any other.

In addition to continuing the work of Fortescue in solidifying the continuity of the conservative nature of the English Common Law, Sir Edward Coke, followed by Sir William Blackstone, famously espoused the English idea of Natural Law. Blackstone described Natural Law as follows:

> Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter . . . so, when he created man . . . he laid

41. *Id*. (quoting SIR. JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE (ca. 1543)).
42. *Id*. at 1062.
43. *Id*. at 1064.
44. *See id*. at 1077.
45. *Id*. at 1078.
46. *Id*. at 1078-79.
47. EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 207 (The Foundation Press, Inc., 1953).
48. *Id*.

> down certain immutable laws . . . and gave him the faculty of reason to discover the purport of those laws.[49]

Winston Churchill described the views of Chief Justice Sir Edward Coke in a similar way: "Coke himself was reluctant to admit that law could be made, or even changed. It existed already, merely awaiting revelation and expostulation."[50] "The law was already there, in the customs of the land, and it was only a matter of discovering it by diligent study and comparison of recorded decisions in earlier cases, and applying it to the particular dispute before the court."[51]

Note the implications towards a conservative viewpoint. It is conservative enough to rely on precedent rather than statute. It is equally conservative enough to have the law preserved by a conservative part of society. Yet Blackstone and Coke achieved a new level of conservatism, perhaps unwittingly; *if the law existed in nature, how could it be changed? On what basis could it be challenged?* Patterson describes this theory as one in which the law is "absolute, immutable and of universal validity for all times."[52] One is reminded of the lyrics of Sir William Gilbert in Gilbert & Sullivan's *Iolanthe*:

> The Law is the true embodiment
> Of everything that's excellent.
> It has no kind of fault or flaw,
> And I, my Lords, embody the Law.[53]

It should be noted that Sir William was in possession of a law degree.

B. The Influence on the Constitution

Which leads us to the United States of America. The English Common Law came over with the Mayflower. Justice Story has written, "Our ancestors brought with them the general principles of the common law, and claimed it as their birthright . . . ."[54] King George III instructed the Virginia Council, "the disposing of all causes happening within the same" should be "done as near to the common laws of England and the equity thereof as may be."[55] There was no objection. It was noted a century later that, "the common law of England is

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49. 1 Sir William Blackstone, Commentaries on the English Law 38-40 (University of Chicago Press, 1979) (1763).

50. 2 Winston Churchill, A History of the English-Speaking Peoples 155 (Dodd, Mead & Co., 1956).

51. 1 Churchill, *supra* note 28, at 224.

52. Patterson, *supra* note 47, at 333.

53. William S. Gilbert & Arthur Sullivan, Iolanthe act 1, sc. 2 (1882), https://gsarchive.net/iolanthe/iollib.pdf.

54. 3 Wigmore, *supra* note 14, at 1100 (quoting Justice Story (1853)).

55. *Id.* at 1098-99 (quoting King George III, *Instruction to the Virginia Council* (1606)).

the common law of the plantations."[56] Critically, on the eve of our Revolution in 1774, the Continental Congress wrote that it was fitting to declare that, "the respective colonies are entitled to the common law of England."[57]

The Inns of Court themselves influenced the Constitution. Arthur Middleton, afterwards Chairman of the Committee of Five at Philadelphia to draft the Constitution, studied at Middle Temple.[58] The Commentaries on the English Law of Sir William Blackstone, a former apprentice at Middle Temple, were of such popularity that 2,500 copies were sold in the colonies before independence was declared.[59] More than 200 American lawyers had trained at one of the Inns in the 1700s.[60] Several of them became Chief Justices of state supreme courts, and critically, several sat in the Constitutional Convention.[61]

Numerous Justices have noted how the English Common Law instructed the drafting of the Constitution. While there is great debate as to whether and how that history should be applied in modern times, there is far less disagreement than it seems on the actual historical influence.

Take, for example, the Second Amendment. In *McDonald v. City of Chicago*,[62] Justice Alito noted the impact of English legal history on the Framers' approach to drafting the Second Amendment:

> [T]he 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, and . . . by 1765, Blackstone was able to assert that the right to keep and bear arms was "one of the fundamental rights of Englishmen."
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> Blackstone's assessment was shared by the American colonists. As we noted in *Heller*, King George III's attempt to disarm the colonists in the 1760's and 1770's "provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms."
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> The right to keep and bear arms was considered no less fundamental *by those who drafted and ratified the Bill of Rights*. "During the 1788 ratification debates, the fear that the federal government would disarm the people in order to

56. *Id.* at 1099 (quoting Mr. West, attorney general to the Board of Trade (1720)).
57. Resolved, N.C.D. 5, 1st Continental Cong. (1774), https://www.ushistory.org/declaration/related/decres.html#:~:text=5.,the%20course%20of%20that%20law.
58. 3 WIGMORE, *supra* note 14, at 1083.
59. *Id.* at 1098.
60. *Id.*
61. *Id.*
62. 561 U.S. 742 (2010).

> impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric." . . . This is surely powerful evidence that the right was regarded as fundamental in the sense relevant here.[63]

Justice Alito further noted that St. George Tucker, Professor of Law at William and Mary during the drafting of the Bill of Rights, cited Blackstone describing "the right to keep and bear arms as 'the true palladium of liberty' and explained that prohibitions on the right would place liberty 'on the brink of destruction.'"[64] Justice Scalia relied similarly on English history and context in another Second Amendment case, *District of Columbia v. Heller*.[65] Justice Scalia refers to the Restoration and Revolutionary period in England as to why the right is so important:

> [W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny . . . . [English] history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.[66]

Critically, the English Common Law and legal history were instructive in drafting the Fifth Amendment, its phrases and the meaning of the word liberty later borrowed by the Fourteenth Amendment. Justice Thomas gave a detailed description of what the word liberty meant at English law, and it is worth quoting at length:

> As used in the Due Process Clauses, "liberty" most likely refers to "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.
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> Both of the Constitution's Due Process Clauses reach back to Magna Carta . . . . Although the 1215 version of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest changes to its wording as follows: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be

63. *McDonald*, 561 U.S. at 768-69 (citations omitted) (emphasis added).
64. *Id*. at 769 (quoting 1 BLACKSTONE'S COMMENTARIES, EDITOR'S APP. 300 (S. Tucker ed., 1803)).
65. 554 U.S. 570 (2008).
66. *Heller*, 554 U.S. at 598.

> outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land."
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> . . . .
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> The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to "life, liberty, or property." State decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word "liberty" to refer only to freedom from physical restraint . . . .
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> In enacting the Fifth Amendment's Due Process Clause, the Framers similarly chose to employ the "life, liberty, or property" formulation . . . . When read in light of the history of that formulation, it is hard to see how the "liberty" protected by the Clause could be interpreted to include anything broader than freedom from physical restraint.
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> . . . As one later commentator observed, "[L]iberty in the eighteenth century was thought of much more in relation to 'negative liberty'; that is, freedom from, not freedom to, freedom from a number of social and political evils, including arbitrary government power." Or as one scholar put it in 1776, "[T]he common idea of liberty is merely negative, and is only the absence of restraint."[67]

Agree or disagree with Justice Thomas's jurisprudence, this history is generally not questioned. English law from the Magna Carta through Blackstone was utterly consistent, that liberty meant only not being in a prison of some sort. Thus are we presented with overwhelming evidence of what the liberty interest passed to us from England meant in its original form. To contemplate the liberty interest passed from the Enlightenment we now turn our gaze across the English Channel to that fairest country on earth, France.

IV. THE FRENCH ENLIGHTENMENT

A. THE ENLIGHTENMENT

The Age of Enlightenment extended, of course, past the borders of France; France cannot, and does not, claim the movement entirely for herself. England gave us Locke, Germany gave us Kant, and Scotland

67. Obergefell v. Hodges, 135 S. Ct. 2584, 2632-35 (2015) (Thomas, J. dissenting) (emphasis omitted) (citations omitted).

gave us Hume. Nevertheless, France remained the epicenter of it all, and "all educated Europe looked to France for the latest notions."[68] It is not surprising; during the Early and Middle Ages, many of the precious documents and much of the learning and knowledge survived the 1,000 years of darkness between the fall of Rome and the Renaissance in the safety of French hands.

The *philosophes* led the movement. They were a group of great minds and huge personalities; often eccentric, sometimes incorrect in hindsight, yet always questioning and searching. They did not accept conditions as they found them. If the Renaissance "turned its back towards death and face towards life"[69] and embraced beauty and humanity, the *philosophes* built on this legacy and used reason to replace ignorance. That of course had a cascading effect; the more knowledge one acquires in life, the more knowledge one desires. Though the *philosophes* admitted the limitations of reason (especially Hume, if he truly can be considered one), there was no doubt that the reasoning of the Enlightenment threw off the two main pillars that had ruled during the Early and Middle Ages: the Catholic Church and the Monarchy. Rather than viewing liberty as merely freedom from bodily restraint, they sought a broader liberty, that of soul and mind.

During its first period, the Enlightenment aimed itself squarely at the Church. It was not aimed at God *per se*; even Voltaire, while attacking every aspect of organized religion, professed a belief in God for his entire life[70] (though it is said he did decline to reject Satan on his deathbed as "this was no time to be making enemies"). The argument was, in the words of the great historian Will Durant, "an argument between the *philosophes* and Catholic Christianity as it then existed in France."[71]

Numerous reasons existed for the *philosophes* to argue against the rule of the Church. Like in England, the Church in France was monumentally wealthy in gold and land; unlike England, the French Church was accountable to a foreign power.[72] While refusing to pay taxes, it drained a tremendous amount of money away from a populace often desperately poor.[73] When Jefferson arrived in France, he was amazed that a country with the most perfect soil and air on earth could produce so much hunger. The Church controlled nearly all of the schools, "inculcating the minds of the young with stupefying ab-

68. WILL DURANT & ARIEL DURANT, THE AGE OF VOLTAIRE 606 (Simon & Schuster, Inc., 1965).
69. *See supra* note 20.
70. DURANT, *supra* note 68, at 606.
71. *Id*.
72. *Id*. at 608.
73. *Id*.

surdities."[74] The Church had been behind the massacres of Huguenots and numerous other sects. The *philosophes* saw and rejected this past, initially aiming their strongest intellectual guns at the Church. They sought liberty of the soul from the superstition of the practices of the day.

Voltaire must be mentioned first. The approach of Voltaire's intellectual attack, as with other *philosophes*, was somewhat new.[75] They were not "solemn recluses, talking to themselves or their like in esoteric gibberish."[76] They wrote, if not for the 'common man' (who most likely could not read), then in a manner and style that was accessible. They used wit; they prized brevity and clarity. Responding to a 1,000-page treatise arguing that all political systems and decisions could be attributed to the weather, Voltaire responded as Durant describes: "He thought it more likely that England had gone Protestant because Anne Boleyn was beautiful than because Henry VIII was cold."[77] This style popularized the movement, and again "all educated Europe looked to France for the latest notions."[78] So did young men across the Atlantic.

Voltaire's ire had risen when he was young, his brilliance in writing causing him both exile[79] and imprisonment[80] sanctioned by both the Church and Crown. They picked the wrong enemy.

His works often included the expression *écrasez l'infâme*, or "crush the infamous," referring to abuses by the clergy and royalty.[81] The phrase refers to abuses of the people by royalty and the clergy that Voltaire saw around him and the superstition and intolerance that the clergy bred within the people.[82] His numerous writings chipped away piece by piece at the rule of the Church. In *Candide*, Voltaire used a conversation between an old man and Candide in Eldorado mercilessly.[83] After initial inquiries as to the tenets of the old man's religion, Candide asked to see some of their priests.[84] The old

74. *Id*.
75. *Id*. at 606.
76. *Id*.
77. *Id.* at 357.
78. *Id*.
79. *Id*. at 41.
80. *Id*. at 3.
81. *Écrasez L'infâme*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/%C3%A9crasez%20l%27inf%C3%A2me (last visited Aug. 18, 2020); *see also* GOOGLE TRANSLATE, https://translate.google.com/?um=1&ie=UTF-8&hl=en&client=tw-ob#view=home&op=translate&sl=fr&tl=en&text=%C3%A9crasez%20l'inf%C3%A2me (last visited Sept. 14, 2020).
82. *See generally* DURANT, *supra* note 68, at 736-44.
83. Aslan, *What Ways Did Voltaire Criticize the Church and Religion?*, GRADESAVER.COM (Feb. 26, 2012, 5:53 AM), https://www.gradesaver.com/candide/q-and-a/what-ways-did-voltaire-criti-cize-the-church-and-religion-64689.
84. *Id*.

man responded that they all had direct relationships with God and therefore had no need of priests as an intermediary.[85] Candide replied in surprise: "What! You have no monks who teach, argue, rule, plot and burn people who don't agree with them?" The old man did not understand.[86] In his 1763 *Treatise on Toleration*, Voltaire attacked more directly and with less humor the persecution caused by the Catholic Church.[87] These are but two examples of a lifetime's work.

Nor did Voltaire limit his attack on the Church to the written word. He was so outraged by the case of Jean Calas that he waded into the dense French legal system.[88] In 1761, Jean Calas was falsely accused of murdering his own son; in reality, his only crime was being an outspoken Protestant. The Catholic Church ordered witnesses to come forth with nothing more than hearsay and threatened excommunication for those who did not do so.[89] This use of blackmail by way of superstition was precisely what offended Voltaire the most. He spent years clearing Calas' name, which he succeeded in doing in 1778. Upon returning to Paris from Toulouse, Voltaire was publicly embraced by Benjamin Franklin. Voltaire said, "Superstition sets the whole world in flames; philosophy quenches them."[90] Describing his life, the great historian Will Durant wrote, "When we cease to honor Voltaire we are unworthy of freedom."[91]

Any such discussion must include the *Encyclopedie* of Denis Diderot. Diderot had a youth of wide but unfocused learning; "he never learned discipline, but he learned nearly everything else."[92] This broad knowledge led to his work on the *Encyclopedie*. Its contribution may not be measured in specifics but in its breathtaking scope. In philosophy, it included works of Bacon, Descartes, Hobbs, Locke, and Spinoza; in science, Copernicus, Galileo, Descartes, and Newton.[93] Diderot took this world of knowledge and aimed it at the Church. The Archbishop Cristophe de Beaumont condemned it as an

85. *Id*.

86. *Id*.

87. Eleanor Beardsley, *After Paris Attacks, Voltaire's 'Tolerance' is Back in Vogue*, NAT'L PUB. RADIO (Feb. 15, 2015), https://www.npr.org/sections/parallels/2015/02/15/385422239/after-paris-attacks-voltaires-tolerance-is-back-in-vogue.

88. Ken Armstrong, *Broken on the Wheel*, PARIS REV. (Mar. 13, 2015) https://www.theparisreview.org/blog/2015/03/13/broken-on-the-wheel/.

89. *Id*.

90. Bob Desautels, *Superstition sets the whole world in flames; philosophy quenches them*, BOB DESAUTELS (May 30, 2019), https://www.bobdesautels.com/blog/2019/5/30/superstition-sets-the-whole-world-in-flames-philosophy-quenches-them-fra-nois-marie-arouet-voltaire.

91. DURANT, *supra* note 68, at 786.

92. *Id*. at 623.

93. *Id*. at 633.

attack on religion, and in February of 1762 Diderot was arrested.[94] Voltaire tried to arrange protection for Diderot through Fredrick II (whom Voltaire called "Le Grand," a description which stuck);[95] Thomas Jefferson recommended the *Encyclopedie* to his friends.[96] Its influence was such that forty-three editions were published in twenty-five years in numerous countries.[97] It was the summation of the movement, the "revolution before the Revolution."[98] It should be noted today that the French Constitution of 1958 begins with the words: "France is an indivisible, *secular*, democratic and social Republic."[99] The *philosophes* won.

The Enlightenment turned its sights next on the Monarchy, seeking liberty in more earthly matters. To the *philosophes*, the monarchy was as much, if not more, responsible for the pathetic condition of France's citizens. Equally critically, justification for the Monarchy had no more basis in rational thought than did justification for the Church. The Monarchy was, of course, based on the "[m]ediaeval concept of the divine right of kings."[100] Aristocratic birth indicated actual superiority.[101] Noble blood was thought to make one actually better, not just more fortunate.[102] The great historian Barbara Tuchman has noted that before the Industrial Revolution it was thought there was inherent superiority in "captains and kings," and that afterwards the idea has formed that there is inherent wisdom in the "common man."[103] Probably neither is more true or false than the other.

The Baron D'Holbach took especially fierce aim. Born to nobility and wealth, he betrayed his class with equal vigor to Franklin Roosevelt. His influence was widespread, described as the "best loved of the *philosophes*."[104] He was at the center of it all; Horace Walpole,

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94. *Id*. at 639.

95. *Id*.

96. *Id*. at 649.

97. *Id*.

98. *Id*.

99. MINISTÈRE DE L'EUROPE ET DES AFFAIRES ÉTRANGÈRES, https://www.diplomatie.gouv.fr/en/coming-to-france/france-facts/secularism-and-religious-freedom-in-france/article/secularism-and-religious-freedom-in-france (last visited Aug. 18, 2020).

100. Steven J. Schroeppel, *Foreign Influence: Thomas Jefferson and the Thinkers of the French Revolutionary Era* 31 (Mar. 15, 2015) (M.A. thesis, Georgetown University) (emphasis omitted), https://repository.library.georgetown.edu/bitstream/handle/10822/760883/Schroeppel_georgetown_0076M_12843.pdf.

101. *Id.*

102. *Id.*

103. *See generally* BARBARA W. TUCHMAN, PRACTICING HISTORY: SELECTED ESSAYS (Random House Publishing, 2011).

104. DURANT, *supra* note 52, at 695.

son of Britain's first Prime Minister, called D'Holbach "the maître d'hotel of philosophy."[105]

D'Holbach viewed monarchs as inevitably exploiting the majority:[106]

> On the face of this globe we see only unjust sovereigns, enervated by luxury, corrupted by flattery. Depraved by licentiousness, made wicked by impurity, devoid of talents, without morals . . . and incapable of exerting an energy for the benefit of the states they govern. They are consequently but little occupied with the welfare of their people, and indifferent to their duties, of which, indeed, they are often ignorant. Stimulated by the desire . . . to feed their insatiable ambition, they engage in useless, depopulating wars, and never occupy their minds with those objects which are the most important to the happiness of their nation.[107]

Jean Jacques Rousseau agreed. His *Du Contrat Social; ou Principes du Droit Politique* made history's most famous argument against monarchy. Rousseau argued with all of his force against the divine right of kings, maintaining that power must rest with the people. He "insisted that there were inevitable tendencies for a king either to be or to become narrow and malicious, to want to keep his people backward, for his appointees to be inferior men, and for the hereditary principle to bring to the throne infants and imbeciles."[108] Rousseau

> looked to discredit absolute monarchy in particular, and did so successfully for many readers. They [the *philosophes*] also began to cast arguments and ideas in terms of equality of persons in general . . . . Common people were beginning to insist that they mattered too, that their existences deserved some respect, that they deserved a voice in their lot and governance.[109]

In this way, Rousseau and D'Holbach went further than Voltaire and the earlier generation of *philosophes*. Rousseau perhaps lacked the clarity, or at least eloquence, of Voltaire. But his writings reached the middle and lower classes at astonishing levels. As with all historical movements, the *philosophes* were both causing the tide of history and being carried by it. Revolutionary ideas were sweeping through Europe; change was occurring at a breathtaking rate. In *Le Nozze de*

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105. *Id*. at 695.
106. *Id*. at 708.
107. *Id.* (quoting PAUL HENRY THIRY (The Baron D'Holbach), I SYSTÈME DE LA NATURE OU DES LOIX DU MONDE PHYSIQUE ET DU MONDE MORAL, chap. XIV).
108. Gordon H. McNeill, *Rousseau and Monarchy*, 10 J. ARK. ACAD. OF SCI. 13, 16 (1957), https://scholarworks.uark.edu/cgi/viewcontent.cgi?article=3234&context=jaas.
109. Schroeppel, *supra* note 100, at 32.

Figaro of 1786, that greatest achievement of classical music, Mozart had to disguise his revolutionary themes behind the Opera Comique libretto of Lorenzo De Ponte to escape the censors of Vienna. By 1803, Beethoven needed to hide nothing; his title page to the great Eroica Symphony was dedicated to pre-Emperor Napoleon, then seen as the liberator of Europe. Well known to history, Beethoven tore up the dedication after December 2, 1804 when Napoleon crowned himself Emperor.

Louis XVI was the first to go in 1793. Frances II of the Holy Roman Empire abdicated in 1806 after defeat at the hands of Napoleon at the Battle of Austerlitz. Napoleon himself was deposed for the second and final time in 1815. After the Restoration, the returned Bourbon Charles X abdicated in 1830. Though the final rupture of the old houses would not be complete until World War I, it was the *philosophes* who undermined the intellectual foundations of a millennium of the rules of kings and queens and set the wheels in motion.

Thus had the *philosophes* destroyed the ancient pillars of the past. We must now turn to their relationship with the new country across the sea.

B. The Influence on the Declaration

The influence of the Age of Enlightenment on the Founders was profound. Durant writes without hyperbole: "[T]he writings of Voltaire, Rousseau, Diderot, Raynal, and a hundred others had prepared the French mind to support colonial as well as intellectual liberation, and many American leaders—Washington, Franklin, Jefferson—were sons of the French Enlightenment."[110] Sons of the French Enlightenment: there is no better way to describe them. In 1759, John Adams began reading works of the great Enlightenment figures, specifically admonishing himself to read more Montesquieu.[111] James Madison "devoured" Enlightenment writings at Princeton under the brilliant tutelage of Professor John Witherspoon.[112] "[T]he works of Locke and Montesquieu, Vatell and Burlamaqui, even Rousseau and Voltaire, were more or less basic equipment for anyone intellectually concerned with public questions."[113]

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110. Will Durant & Ariel Durant, Rousseau and Revolution 867 (Simon & Schuster, 1967).

111. Fawn Brodie, Thomas Jefferson: An Intimate History 98 (W.W. Norton & Co., Inc., 1974).

112. Stanley Elkins & Eric McKitrick, The Age of Federalism (1993), *reprinted in* Vincent Blasi, Freedom of Speech in the History of Ideas 18, 24 (West Academic Publishing, 2015).

113. *Id*. at 23.

When the Declaration of Independence was translated into French, France rejoiced, recognizing its influence on the new country.[114] Jefferson was a Francophile in all ways, from the intellectual movements to food and wine to the architecture. Jefferson based Monticello itself on the design of the Louvre, its wings jutting out towards the visitor, at once intimidating and welcoming. This relationship between Jefferson and France defined the new country.

As Steven Schroeppell writes:

> One may, without great difficulty, trace the origins of the majority of Jefferson's political tenets and beliefs to some of the great writers of the Enlightenment who were indeed remarkable theorizers and innovators, such as Jean-Jacques Rousseau, John Locke, Francis Bacon, Montesquieu, Isaac Newton, René Descartes, Voltaire, and Thomas Hobbes – works by each may be found in Jefferson's preserved personal library.[115]

The sources of the principles that lie at the core of Jefferson's system of political beliefs are readily identifiable. However, it was more complex than one simply influencing the other. The ideas of French liberty flowed through the mind of Jefferson and the others, and then flowed back to France. In early August of 1784, Thomas Jefferson arrived with his daughter Patsy in Paris.[116] Jefferson, along with Benjamin Franklin and John Adams, had been appointed Ministers Plenipotentiary to negotiate treaties with various European nations. The elder Franklin had been in Paris for several years, earning a colorful reputation.[117] Franklin greeted the arrival of Jefferson with delight, as he greatly admired the shining intellect and courteous manners of the Virginian.[118]

John Adams arrived in Paris a week after Jefferson.[119] The three dined together and made the beginnings of a social circle. This circle quickly expanded to include those with whom Jefferson had great philosophical connections. Within a short while, Jefferson was appointed to succeed Benjamin Franklin as Minister to France, and Adams left for London, having just been appointed Ambassador to the Court of St. James. Jefferson quickly filled the vacuum with *philosophes*. Soon his dinner table regularly included the Duc de La

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114. Durant, *supra* note 107, at 868.

115. Schroeppel, *supra* note 100, at 49-50.

116. DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN 3 (Little, Brown and Company, 1951).

117. *Id*. at 6.

118. *Id*. at 3.

119. *Id*. at 4.

Rochefoucauld, the Marquis de Cordecet, and of special interest, the Marquis de Lafayette.[120]

Lafayette was the primary author of the *Déclaration des droits de l'homme et du citoyen* of 1789. Jefferson had significant influence through Lafayette on this document,[121] and his expansive view of the word "Liberty" may be seen in Article IV of the *Déclaration*: "Liberty consists of doing anything which does not harm others: thus, the exercise of the natural rights of each man has only those borders which assure other members of the society the fruition of these same rights."[122] This was how Thomas Jefferson saw liberty.

V. CONCLUSION

This was also how Jefferson saw a liberty interest when he wrote the Declaration of Independence. Of course, it almost did not happen. There was some thought that John Adams should draft the Declaration of Independence. Adams, however, with a modesty that served the cause and history with singular import, told Thomas Jefferson that he indeed should be the one to author the Declaration of Independence. Though historical accounts vary, when Jefferson asked why, Adams said in reply that, "Reason first, you are a Virginian, and a Virginian ought to appear at the head of this business. Reason second, I am obnoxious, suspected, and unpopular. You are very much otherwise. Reason third, you can write ten times better than I can."[123]

But happen it did. We need not guess at what Jefferson meant by liberty. It was the theme of his life, in theory if not in personal practice.

Of these rights, perhaps Jefferson's greatest focus was on that of liberty—the right to lead the life, as best one can manage, that one chooses to lead, without being fettered by unjust external control or interference. Jefferson characterized it thus: "rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others."[124]

This is a far distance from the English concept of a liberty interest of merely not being locked in the Tower of London. This view is also not inconsistent with strands of constitutional jurisprudence that

120. *Id*.
121. Schroeppel, *supra* note 100, at iv.
122. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN para. 4 (1789).
123. *Drafting the Declaration of Independence*, CONSTITUTIONFACTS.COM, https://www.constitutionfacts.com/us-declaration-of-independence/drafting-the-declaration/ (last visited Aug. 19, 2020).
124. Schroeppel, *supra* note 100, at 43 (quoting letter from Thomas Jefferson to Isaac H. Tiffany (April 4, 1819)).

adopt a broader view of a liberty interest than did Justices Thomas, Scalia, and Alito *supra*.[125] Dissenting in *Poe v. Ullman*,[126] Justice Harlan noted this truth: "The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees . . . . This 'liberty' is not a series of isolated points . . . but a rational continuum . . . ."[127] Justice O'Connor perhaps described it best in *Planned Parenthood v. Casey*:[128]

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[129]

It is axiomatic that the spirit of the law should instruct the letter of the law. The import of considering the Constitution in tandem with the Declaration of Independence, as Abraham Lincoln would have us do, has never been more important. The French spirit of liberty must instruct the English letter of liberty. The future of Substantive Due Process is at stake. The future of rights, from contraception to abortion to engaging in what consensual sexual activity one wishes, is at stake.

It has been stated that the "Declaration looks backward, as the last word in the American argument with Britain, and forward, as a statement of the principles of American experiments in government."[130] Yet perhaps it is not an argument; perhaps we need not choose sides. Our mutual inheritance from England and France has defined and enriched our history. Perhaps English influence limited the excesses of the French revolution from coming to America; perhaps the expansive French view of liberty allows the English Common Law to find its best voice. Though the liberty interest of the Magna Carta may have been the original intent, the liberty of the *philosophes* has and should continue to instruct that original intent. As Americans, we value the right to define our own meaning of the universe, free from the compulsion of the state, perhaps more than any other

125. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2632-35 (2015) (Thomas, J., dissenting) (for Justice Thomas's view on liberty); McDonald v. City of Chicago, 561 U.S. 742, 768-69 (2010) (for Justice Scalia's view on liberty); District of Columbia v. Heller, 554 U.S. 570, 598 (2008) (for Justice Alito's view on liberty).

126. 367 U.S. 497 (1961)

127. Poe v. Ullman, 367 U.S. 497, 523 (Harlan, J., dissenting).

128. 505 U.S. 833 (1992).

129. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

130. R.B. BERNSTEIN, THOMAS JEFFERSON 33 (Oxford University Press, 2003).

aspect of our citizenship. Perhaps this is the true legacy; that the English Common Law as instructed by the spirit of the French Enlightenment created America. We owe our thanks to both of these proud countries. May we continue to be worthy of it.