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# The Constitutional Theories of Thomas Paine

By John J. Meng

The latter half of the eighteenth century was a period of tremendous social, political, and economic fermentation. Much of our contemporary civilization was shaped by the forces released during those five decades. Frenchmen, Englishmen, and Germans of great ability and deserved renown had written and were writing of the rights of man and of the citizen. More than ever before in the history of the modern world thought was being given to the lot of the common people. In America, and later in France, Thomas Paine epitomized this liberal intellectual trend in words that have been adopted as classic expressions of the inherent value of the human personality.

Unfortunately, the phenomenal growth of industrial capitalism during the nineteenth and twentieth centuries caused the new bourgeois ruling classes to lose sight of the basic human values stressed so emphatically by the eighteenth-century intellectuals. The rebirth of civilized social consciousness in the last part of the nineteenth and the first part of the twentieth centuries, however, has developed a renewed interest in the writings of these intellectual prophets of a better world for the common man.

Thomas Paine did not wait until the French Revolution to preach the value of liberty and freedom within the framework of organized society. *Common Sense*, written in 1775, provided an ideological apology for the American Revolution. *The American Crisis*, published in periodic instalments during the colonial insurrection, served to keep American attention focused upon the liberal character of the war that was being waged against the rule of Great Britain. On every occasion that offered, Paine was ready to preach his doctrine of human freedom.

One such opportunity offered itself towards the end of 1778. A lively debate upon the advisability of amending or rewriting the state constitution of 1776 was going on in Pennsylvania. That document, drawn up in response to a suggestion made by the Continental Congress, manifested the general distrust of existing political institutions that was to be found in almost all the state constitutions adopted at the same period. It established a government that was neither parlia-

mentary nor monarchical. The executive was not responsible to the Assembly, for the terms of the executive officials did not run concurrently with those of members of the legislature, nor was the executive subject to removal by adverse vote of the Assembly. Nevertheless, the executive was not independent, since it possessed no legislative powers of its own. Government could function satisfactorily under such a system only by constant political compromise between the two branches in charge of general law-making and administration.<sup>1</sup>

Before long this frame of government was severely attacked on various grounds by diverse groups within the state. Prominent among these factions were the propertied classes and those whose sympathies in the struggle for American independence were allied with the British rather than with the Continental Congress. Insistent demands for constitutional reform led the Assembly in November, 1778, to order that a popular referendum be held in April, 1779 to pass upon the question whether a convention should be called to revise the constitution.<sup>2</sup>

Among those who supported the existing constitutional order was Paine. His inflammatory writings in 1775 and 1776 had contributed largely to the assumption of power by those patriot "Associations" that had displaced the colonial government and had been responsible for the writing of the first Pennsylvania constitution.<sup>3</sup> On December 1, immediately after the Assembly act of November 28, 1778 which called for a popular decision on the question of constitutional reform, Paine inaugurated a series of articles in the *Pennsylvania Packet* designed to prove that the existing constitution served the best interests of the state and that it should therefore not be altered.

Entitled "A Serious Address to the People of Pennsylvania on the present situation of their affairs," this series incorporated a full-length discussion of Paine's constitutional theories. The first letter was not signed, and at the end carried only the promise of being continued in a later issue. That promise was fulfilled, and three more long letters

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<sup>1</sup> The text of the Constitution is printed in *Pennsylvania Archives*, Series 3, X, 767-783.

<sup>2</sup> An act of the General Assembly, dated November 28, provided for a vote on the first Tuesday of April, 1779. The act was printed in the *Pennsylvania Packet* of December 1, and the *Pennsylvania Evening Post* of December 2 1778.

<sup>3</sup> Some pertinent brief comments on the Pennsylvania "Associators" and the Philadelphia Constitutional Society, of which Paine was a prominent member, may be found in Eugene Perry Link, *Democratic-Republican Societies, 1790-1800* (New York, 1942), 26-29.

were printed in the *Packet* on December 5, 10, 12, 1778. Paine has but recently been identified as their author,<sup>4</sup> although the origin of the letters may have been generally recognized at the time. None of them is signed, and the reason is obvious from the context of the documents. The series was not concluded; the fourth installment promised a continuation that never appeared. Paine in the meantime had become involved in an acrimonious personal controversy with Silas Deane and in the polemical dispute that accompanied it.<sup>5</sup> This left him no time to finish the series of articles on the Constitution of Pennsylvania.

Paine's remarks, of course, were patterned to influence his Pennsylvania audience of 1778. Many segments of the four installments of his argument were of a significance purely localized in both time and place. By far the largest part of his opinions, however, constituted a more or less systematic delineation of his philosophy of government in general, and of his ideas concerning the relationship between individual freedom on the one hand and organized authority on the other.

*Common Sense* devoted considerable attention to the British Constitution. Paine's attitude in that publication was essentially destructive. He aimed to convince Americans of the evils of British rule and of the necessity of complete independence for the North American colonies. His effusions of 1778 on the Pennsylvania Constitution were formulated with an entirely different objective in view. This time he was interested in preserving a constitutional order of which he approved, and his attitude was accordingly constructive rather than destructive. These letters were actually the first public recording of Paine's positive ideas on the question of good government, its aims, and its procedures. Later on in life, notably in *The Rights of Man*, he expressed at length organized opinions on this subject. The letters of 1778, however, give us the earliest detailed insight into the political philosophy which ani-

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<sup>4</sup> See John J. Meng, *Despatches and Instructions of Conrad Alexandre Gérard, 1778-1780 . . .* (Baltimore, 1939), 395-396. The letters are not included in any edition of Paine's reprinted works, nor have they been separately republished. Other letters referred to in this article are appearing in the *Records of the American Catholic Historical Society of Philadelphia*, LVII, March, 1946, ff.

<sup>5</sup> The story of the Paine-Deane controversy has been reviewed frequently, particularly by the admirers of Thomas Paine. His letters to Deane, widely published in the journals of the time, may be found in practically every edition of the author's works. The entire affair was closely involved with Franco-American relations, and touched upon many public concerns usually ignored by writers on the subject. Documentation for this aspect of the controversy may be found in Meng, *op. cit.*, 95-97, 395n., 429-430, 442n., 467-468, 470-472, 474, 500, 505n., 548n.

mated Thomas Paine during the period of the American Revolution. A faint echo of them is to be found in two short commentaries which he wrote in 1805, a few years before his death, on a proposal to rewrite the Pennsylvania constitution which had, in 1790, superseded the 1776 document.<sup>6</sup> The 1805 observations were neither as interesting nor as important for an understanding of his basic philosophy as were those of 1778. In the former the author dealt at greater length with operational details and left his general principles to be inferred from the context of his remarks, and from his previous publications.

Writing in 1778, Paine asserted that the goal of good government is freedom and security for citizens of all classes. Advancing then to the question "What are the requisites of a good constitution?" he arrived at what appears to be an odd conclusion—that the first requisite of a good constitution is novelty. "All forms [of government] have failed in producing freedom and security," he wrote. Hence any constitution which is to provide freedom and security for all "*must be a novelty*, and that which is *not a novelty*, must be defective." In this connection he called attention to the unique situation in America, where "We are a people upon experiments, and tho' under one continental government, have the happy opportunity of trying variety in order to discover the best." Diversification among the basic laws of the different states would demonstrate which of various constitutions was not suitable as a permanent model. Increase of population under each constitution would determine its goodness, for the state which had the best-liked government would soon become not only the largest, but also the richest of the American governmental units, since "Population is the mother of wealth."<sup>7</sup>

Throughout his life, and in almost all his writings on political subjects, Paine reiterated what might be called the fundamental principle of his democratic faith: that equality of rights is the basic essential of a smoothly-functioning social order. He attacked the British monarchy in *Common Sense* on the grounds of both reason and history, and pointed out the original equality of all men in the "order of creation."<sup>8</sup>

6 "Constitutions, Governments, and Charters," June 21, 1805; "Constitutional Reform. To the Citizens of Pennsylvania on the Proposal for Calling a Convention," August, 1805, in William M. Van der Weyde (ed.), *The Life and Works of Thomas Paine* (10 v., New Rochelle, 1925), X, 235-272.

7 *The Pennsylvania Packet, or the General Advertiser*, December 1, 1778. Italics Paine's.

8 "Of Monarchy and Hereditary Succession," in Van der Weyde, II, 107.

Again, in the same publication, he lauded the republican method of rule because it preserves social peace and harmony. "Where there are no distinctions," he wrote, "there can be no superiority; perfect equality affords no temptation."<sup>9</sup> *The Rights of Man* abounds with direct and implied repetitions of the same principle. It is not surprising, therefore, that in listing the requisites of a good constitution, Paine should include as an initial necessity provisions guaranteeing equality of rights to all citizens. An aristocracy of wealth, he pointed out, ends in poverty for the rich. A constitution that grants greater rights to the rich than it does to the poor will cause the latter to emigrate, and "where there are none left to labour, and but few to consume," the rich will become poor themselves. Land and property are not in themselves riches; they become so only where they are possessed within the framework of a smoothly functioning economy. "An aristocratical government in any of the states of America would soon become a democratical one. The poor would quit it, and of course the aristocracy would expire in a democracy of owners." The state itself would be impoverished and defenseless, a temptation to covetous neighbors, and an easy prey to invasion. The strength, the riches, and the defense of a state depend upon the size and character of its population. One of the greatest evils that can confront organized society is a lack of workers, for without the laboring man the security of the entire organization is severely threatened. It therefore follows that the organic laws of organized society should be favorable to the poor man, the laborer upon whom the security of the whole depends.

Paine asserted the falsity of the argument that those constitutions are evil which favor the poor man without providing specific corresponding advantages for the rich man. According to him, the best government for the rich man is the government whose laws provide freedom and opportunity for the poor. Under such a government the landed interests will thrive and be secure, for consumers, tenants, and laborers will be numerous and satisfied. The rich man may confidently expect his riches to increase; the poor man may aspire to improve his station in life. Both will be happy and the state will prosper. Paine here advanced an idea that finds frequent echoes in our modern world, but has not always been embodied in our laws. The basic problems of social life he looked upon not as problems which are the peculiar con-

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9 "Thoughts on the Present State of American Affairs," in Van der Weyde, II, 143.

cern either of the rich or of the poor, but as problems in which both are equally involved. To use his own words: "I am clearly convinced that the true interest of one is the real interest of both."<sup>10</sup>

Mere equality of rights, however, he did not deem sufficient to effect the social harmony requisite to the proper functioning of government. Paine insisted that the rights of rich and of poor, of landowners and of merchants, of laborers and of tradesmen, must not only be equal, but that in their equality they must also be liberal. So the novel, equal constitution must also be a free constitution if it is to be a good constitution. Paine denied all validity to the objection that a constitution may be so liberal, so free in its terms, that license may result. Unlimited freedom would develop into license in practice, but freedom limited by an equality of constitutional rights could not do so. Constitutional equality makes freedom safe. Paine writes: "That Constitution which would exclude the poor would be a *mean one*, and that which would exclude the rich would be a *proud one*. The former would be a private pilfering, and the latter a bold injustice; . . . in either case it is a theft."<sup>11</sup>

A just constitution, guaranteeing equality of freedom and of rights, protects the citizen. No possible alteration of individual circumstances can change his basic status as a human being with rights that organized society must respect. Under such a constitution social harmony would of necessity exist since, where each man's rights are respected, no individual could find cause to attack the system that protects and enforces those rights. While holding this view, Paine did not overlook the practical problems involved in implementing legally-asserted rights, to which problem he reverted after some further remarks on freedom.

Freedom, according to Paine, is the keynote of social harmony. Toleration cannot take the place of freedom. Religious toleration which grants liberty of conscience to every man is a species of tyrannic arrogance, for it grants as a favor what should be each man's inalienable right. A free constitution does no more than confirm and protect the rights of individuals, it does not create them.

Religious disputes, he continued, ceased in America as soon as religious freedom was universally and equally established. Paine, in his

<sup>10</sup> Paine's arguments concerning the necessity for an equality of constitutional rights appeared in *Pennsylvania Packet*, December 1, 1778.

<sup>11</sup> *Pennsylvania Packet*, December 1, 1778. Italics Paine's.

optimism, believed such freedom an already-accomplished fact. Civil disputes likewise cease when civil rights are universally and equally guaranteed and respected. Where civil and political discussion exists, it does so because somewhere in the body politic there is an inequality of rights.<sup>12</sup>

Inborn equality of individual rights, protected by a free and equal constitution does not guarantee equality of merit or of ability among the citizens of a state. Paine might have added that neither does it guarantee impartial law enforcement nor proper respect for the rights of others on the part of all citizens. Such an observation was, however, implicit in what he wrote next. A careful choice, he asserted, must be made in selecting state officials. Both the extremely rich, and the extremely poor may make inefficient rulers. The rich man frequently draws his opinions on public matters from books and academic speculation; the poor man just as frequently forms his opinions on the basis of tradition and emotion. Neither method is sufficiently practical to insure good government. The practical man, the one "most likely to steer right," is the one needed in the governance of the state. The business man should know more than others about the problems of raising and spending governmental revenues. The special qualifications of the lawyer should be called upon to aid in the drafting of legislation. Government should enlist the services of all groups best fitted by experience and knowledge to contribute to the welfare of the state.<sup>13</sup>

Where equality of rights and maximum freedom exist side by side, both guaranteed by wise constitutional provisions, civic order and political security have a healthy atmosphere in which to develop. Paine recognized this fact, and wrote that under such a system, opportunities for the abuse of power in "times of unguarded ease and quiet" are non-existent. All of this points to the wisdom of maintaining in operation a carefully devised plan of constitutional guarantees for, as Paine points out, "it is far wiser and pleasanter" to prevent the existence of opportunities for the abuse of power than it is to combat such abuses when they occur.<sup>14</sup>

Novelty, equality, and freedom were, in Paine's opinion, the basic attributes of a good constitution. Novelty, because all previous forms

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<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

had failed to guarantee social equilibrium; equality, because without it social harmony cannot be realized; and freedom, because it is the necessary accompaniment of stable social development.

Having described the requisites of a good constitution, and having concluded that such a basic law must be fundamentally free and equal in its terms, he proceeded to point out the political necessity of implementing freedom within the harmoniously-organized state. This was an eminently logical approach to the practical problem of government. If we accept the premise that freedom is necessary to social equilibrium in the body politic, we are forced to conclude that it is a positive good, to be actively sought for and preserved. Extensive experience has taught mankind that in the search for freedom certain difficulties arise. The essence of orderly government is adequate authority. If freedom is essential to social harmony, authority is no less essential to stable government. Frequently enough the two—freedom and authority—appear to be in direct conflict, one with the other. This, of course, is the basic problem of all democratic government. Too great an emphasis upon authority, and freedom disappears; too great an emphasis upon freedom, and authority disappears, its place taken by license or by anarchy. In either case individual liberties are lost. All-powerful government, refusing to recognize individual rights, leaves no room for personal freedom; license and anarchy mean, in practice, the rule of the few strong men and loss of freedom for all others. Paine implicitly recognized this reasoning and went to the crux of the problem when he undertook to inquire into the nature of freedom.

“It is the nature of freedom to be free,” he wrote. Freedom cannot be kept under “bolts, bars and checks.” Freedom cannot be legislated, “she only requires to be cherished, not to be caged. To be beloved is to her to be protected.” Freedom cannot be made the special possession of any one class, “her residence is in the undistinguished multitude of rich and poor”; belonging to neither she “is the patroness of all.” Liberty “connects herself with man as God made him, not as fortune altered him, and continues with him while he continues to be just and civil.”

Thus Paine viewed liberty in the abstract, and doing so warned against the danger of trying to “enact” liberty. The modern world has

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14 *Id.*, December 10, 1778.

come to realize more fully perhaps than did the men of Thomas Paine's generation the futility of attempting to preserve individual freedom through the multiplication of rules and regulations. Few sections of Paine's voluminous writings possess the timeliness of a paragraph that he wrote in 1778 concerning the practical results of restrictions placed upon liberty. Eighteenth-century phraseology alone identifies it as not referring to current problems. "As America is the only country in the world that has learned how to treat religion," he wrote,

so the same wisdom will show how to treat freedom. Never violate her and she will never desert. 'Tis her last residence, and when she quits America she quits the world. Consider her as the rich man's friend and the poor man's comforter; as that which enlivens the prosperity of the one and sweetens the hard fate of the other. And remember, that in all countries where freedom of the poor has been taken away, in whole or in part, that the freedom of the rich lost its defence. The circle has ever continued to contract, till lessening to a point it became absolute. Freedom must have all or none, and she must have them equally. As a matter of political interest only, I would the freedom of the poor out of policy to the rich. *There* is the point at which the invasion first enters, the pass which all without distinction ought to defend and, *that* being well defended and made secure, all within is at rest. First goes the poor, next the tradesman, then the men of middle fortune, then those of liberal fortunes, till at last some one without any fortune at all starts up, and laying hold of the popular discontents, tyrannizes over the whole under pretense of relieving them.<sup>15</sup>

Freedom, according to Paine, is "personal property," the possession of each man by a right that is not man-made. It is neither created nor destroyed by legal enactments. It may be forfeited by the criminal who refuses to respect the liberty of others, but he who fulfills his duties to society deserves always to enjoy the rights inherently his, of which liberty stands among the foremost. Implicit in all that Thomas Paine wrote on this subject is a recognition of the correlative nature of rights and duties. The right of individual liberty implies always the imperative duty of respect for the liberties of others. Writing in 1795, Paine became satisfactorily explicit on the subject: "When we speak of right," said he, "we ought always to unite with it the idea of duties: rights become duties by reciprocity. The right which I enjoy becomes my duty to guarantee it to another, and he to me; and those who violate the duty justly incur a forfeiture of the right."<sup>16</sup>

<sup>15</sup> Paine's remarks upon the nature of freedom appeared in the *Pennsylvania Packet*, December 1, 1778. Italics Paine's.

<sup>16</sup> "Dissertation on First Principles of Government," in Van der Weyde, V, 225.

This was indeed a concept clearly understood by American political philosophers of the eighteenth century. Americans of a later day have tended to emphasize rights and to de-emphasize or ignore those duties which the exercise of every right entails. Clear political thinking imposes the realization that harmony within a free society stems always from the careful balancing of rights and duties. Rights and duties faithfully observed as between the citizen and the government, between the citizen and his fellow citizens, form the only solid basis upon which orderly and successful democracy can be founded. Emphasis upon rights, disregard of duties, whether on the part of the state or of the individual, results in strains and stresses destructive of freedom and stability. Paine and others of his generation recognized that any individual might voluntarily waive by contract the exercise of the right of personal freedom, but to them this did not constitute a destruction of the right itself, which remained unexercised but still fully existent. "The instant they resume their original character of a man and encounter the world in their own persons, they repossess the full share of freedom appertaining to the character."<sup>17</sup>

Distinctions of constitutional rights and duties appear all the more harmful when the evil consequences of such distinctions are investigated. Paine pointed out that before the adoption of the Pennsylvania constitution of 1776 no man was entitled to vote until he could swear or affirm himself worth fifty pounds of currency. The result was that "every man with a chest of tools, a bed and a few household utensils, a few articles for sale in a window, or almost anything else he could call or even think his own, supported himself within the pale of an oath, and made no hesitation of taking it." He even suggested that in order to satisfy the more delicate type of conscience, the requisite fifty pounds of currency had been temporarily borrowed, retained during the taking of the oath, and then returned immediately thereafter to its original owner. This was disgraceful conduct to be sure, yet a greater disgrace lay in the fact that freedom was allowed to depend upon such a trifling thing as fifty pounds of currency. As Paine put it, the possession of fifty pounds "makes scarce any, or no difference, in the value of the man to the community." Property alone cannot defend a country against an invader, "houses and lands cannot fight, sheep and oxen cannot be taught the musket." The defense of the common heritage is the personal duty of every citizen. If that duty is to be performed adequately,

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<sup>17</sup> *Pennsylvania Packet*, December 1, 1778.

and with love for and devotion to the state, the citizenry must be united in the protection of a common interest. "That which equally unites all must be something equally the property of all—an equal share of freedom, independent of the varieties of wealth, and which wealth or the want of it can neither give nor take away." It is beneath the honor and dignity of the American people to tell men of their rights of freedom, liberty, and independence when their services are needed, and then, when their service is over, to deprive them of those rights because of their poverty.<sup>18</sup>

Paine, with considerable accuracy, viewed the attack upon the Pennsylvania Constitution of 1776 as being primarily a movement led by the moneyed interests of the state. These interests objected to the broad suffrage provisions and to various other democratic clauses of the law as being responsible for inefficiency in government and undue license in the conduct of public affairs. Paine shrewdly asked these objectors whether, by claiming that the constitution was too free they meant that they themselves enjoyed too much freedom. The answer was obvious of course. Freedom as understood by the propertied classes was something to be distributed according to a man's social position and financial independence. Voting privileges were best granted to those who, by reason of superior social or financial standing, might be expected to exercise the suffrage more wisely. Paine pointed out that "rights are permanent things, fortune is not so," that freedom and fortune are as distinct as rest and motion, and that to make freedom depend upon fortune is to make of freedom "the shadow on a wheel—a shade of passage—an unfixable nothing."

Once more this led Paine back to his constant theme—the equality of rights. The necessity of rights being equally apportioned to all within the state was for him so axiomatic that it need not be proven. "He who should offer to prove the being of a God," Paine wrote, "would deserve to be turned out of company for insulting his Maker. Therefore, what I have or may yet offer on the equality of rights is not by way of proof but illustration."<sup>19</sup>

If, therefore, rights are to be apportioned equally, they must either be granted in full to both rich and poor, or they must be withheld

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18 *Id.*, December 5, 1778.

19 *Id.*, December 1, 1778.

equally from both groups. It is impossible to argue with truth that the poor should not be granted full civil and political freedom on the ground that the lower social classes are too ignorant to exercise this freedom with discretion and intelligence. It may be equally dangerous to grant freedom to the rich, for by virtue of superior wealth they may exercise their freedom to establish economic control over the state in such a manner that the independence of other social groups may disappear. Such reasoning, if adopted, would lead inevitably to the conclusion that freedom can safely be granted only to those groups that lie between the two extremes of rich and poor. This is a patent absurdity, for it would be practically impossible to select this middle group with any degree of accuracy. Arbitrary upper and lower limits of fortune as determinants of civil and political freedom would never receive general approbation, for at both extremes would be many who could claim unfair discrimination. Such tests of freedom could lead only to social disunity and conflicts. Constant fluctuations of economic fortune would moreover create a permanent state of flux in the social order that would be destructive of stable government. The impossibility of imposing successfully any such narrow conception of liberty indicates more emphatically than anything else the danger of limiting freedom in any way, and the necessity of leaving it at large. "Let the rich man enjoy his riches," writes Paine, "and the poor man comfort himself in poverty. But the floor of freedom is as level as water. . . . It is this broad base, this universal foundation, that gives security to all and every part of society."

The rich man who advocates special privileges for his own class, the individual who, because he is wealthy, proposes to regulate freedom by fortune, gives little thought to the future. Wealth is a most impermanent possession. It may desert him before his death, catapulting him into those same lower groups against whom he would discriminate. Although his riches may last out his life, the situation of his children may not be so fortunate. Wealth, when divided among numerous heirs loses the influence it exercises when united under the control of a single individual. "The impossibility of knowing into whose hands a distinction of rights may fall should make men afraid to establish them lest, in the revolutions of fortune common to a trading country, they should get into the hands of those who were intended to be excluded, and severely exercised over those who were designed to inherit them."

Very little thought should be necessary to teach men the value of the motto "Leave freedom free."<sup>20</sup>

Granting that equality and freedom are fundamental attributes of a good constitution, and that perhaps, in the eighteenth century "novelty" might also have been properly considered a necessity, these qualities do not of themselves assure efficient and workable government. The constitution that is built upon them must also take into account the various functions that government performs, and must make provisions for the proper and stable exercise of those functions within the spirit of the basic principles of equality and freedom.

Few men of Paine's generation possessed his outstanding ability to apply the broad generalizations of the political philosopher to the detailed intricacies of practical government. For him theories possessed value only insofar as they were susceptible of application to everyday life. His writings gave meaning and depth to the concept of individual liberty and freedom. They translated into the expressive vernacular of the period the unspoken but deeply-felt longings of the tradesman, the farmer, the mechanic, and the laborer for a more free economy in which they might develop their individual talents with a maximum of independence.

"There are two ways of governing mankind," wrote Paine, "first, by keeping them ignorant; secondly, by keeping them wise."<sup>21</sup> Europe represented for him an example of the former method, America of the latter. Old-world governments in the eighteenth century were varied in practice, but in theory at least, they still adhered to the principle of Divine-right monarchy. Their institutions and forms were largely modeled upon the precedents of bygone ages. Their resistance to change in a period when their anachronistic character had become clearly apparent was due more to the inertia of the citizens of states than to the intrinsic merits of the governments themselves. The "absurdities" of monarchical regimes were tolerated by the people subject to them because those very absurdities had acquired permanence through usage and familiarity. Men in the group possess a natural reluctance to alter or abolish social forms and institutions that are ancient and familiar, even though they may recognize their outmoded character.

Paine was convinced, as were many other political philosophers of

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<sup>20</sup> *Id.*, December 5, 1778.

<sup>21</sup> *Ibid.*

the period in which he lived, that were new governments to be established in Europe, they would not be monarchical in form. They based their reasoning upon the intellectual development of the times. The eighteenth century has been called the "Age of Reason," for it was a period when thinkers were subjecting traditionally-accepted modes of thought and action to the tests of rational investigation. Skepticism in religion and revolutionary thought in politics were evidences of this new intellectual attitude. Human reason became the sole determinant of social values. Faith, revelation, and tradition lost validity as governing rules of conduct in proportion as the idea was accepted that man could attain truth by the use of the faculty of reason alone. Those concepts which could not be arrived at by rational processes became "superstitions." This rationalism of the eighteenth century was destined to be profoundly modified by events of the nineteenth century, when men discovered that pure reason did not develop the utopian civilization it had postulated. But in the period when Thomas Paine lived and wrote, rationalism was the religion of the intellectuals, and Paine was one of its outstanding disciples.

It was consequently altogether natural for Paine to conclude that the decline of superstition, the great increase and general diffusion of knowledge, and frequent equalities of merit in individuals would insure the collapse of monarchical governments. "Kings will go out of fashion." He recognized the difficulties of overcoming the passive opposition to change which all human society manifests, but he was optimistic about the effectiveness of education and the basic reasonableness of the new intellectual disciplines. Analyzing the institution of monarchy on a reasonable basis, he concluded that proved equalities as among individuals within a society would, in time, "render it impossible to decorate any one man with the idolatrous honors which are expected to be paid to him under the name of a crowned head." Human reason rebels at the thought of kneeling to kiss the hand of a man "wrapped up in flannels with the gout, and calling a boy of one and twenty the father of his people." These things might continue to be done under the force of habit and the restraints of ingrained tradition, but they could no longer be instituted as new customs. "We see, know, and feel that those things are debasing absurdities, and could not be made to swallow them or adopt them."

Kings, in an age of reason, he wrote, are comparable to the "wooden gods and conjurors wands" of an age of idolatry and superstition. As

knowledge is circulated, as the minds of the people become cleared of "ignorance and rubbish," monarchical government will become less secure. A typical American estimate of British government under George III was provided by Paine when he wrote of the people of England:

They are not sufficiently ignorant to be governed superstitiously, nor yet wise enough to be governed rationally, so that being compleat in neither, and equally defective in both, are for ever discontented and hard to be governed at all. They live in a useless twilight of political knowledge and ignorance, in which they have dawn enough to discover the darkness by, and liberty enough to feel they are not free; constantly slumbering, without any ability to sleep, and waking, without any inclination to rise.<sup>22</sup>

The example of English government was, for Paine, typical of European government in general. As far as the common people were concerned, government was a mystery, and they were encouraged in that idea, for as long as the processes of government remained unknown to them, ruling them through ignorance was possible. In America, on the contrary, the aim of civil government was to make men as wise as possible, "so that their knowledge being compleat, they may be rationally governed." The constitutions of all the American states were devised with that end in view. Disputes about particular constitutional clauses and forms did not alter this basic truth, nor result in evil consequences. Instead, the free and open discussion of most constitutional questions was in itself convincing evidence of confidence in rational human nature. Good consequences only can stem from disputes if "conducted with temper and supported by proper and just argument." Social order and governmental stability result naturally when citizens of a state bring to the solution of their common problems intelligence and well-informed judgment. It is criminally optimistic, on the other hand, to place dependence upon the man whose consent to a measure is obtained "by an imposition of ignorance." Such a man agrees always with the person who last spoke to him, and surrenders immediately to the next who presents him a plausible argument, however specious it may be. Kept in ignorance, he possesses no reasonable criteria of judgment, and no basis upon which to form logical conclusions. Sound and stable government requires for its existence an educated citizenry able

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<sup>22</sup> *Ibid.* This was neither the first nor the last time that Paine inveighed against the British Crown and all its pomps. Divine-right monarchy as exemplified in Britain remained throughout his life the object of his detestation and abhorrence.

to apply an informed intelligence to the problems of group living, and willing to accept the opinion of the majority as the guiding rule of social conduct.<sup>23</sup>

Paine continued the orderly development of his ideas on proper constitutional government with a consideration of the principles which he felt should determine the distribution of powers under such a regime. His unwavering adherence to the theory of the "equality of rights" committed him to that doctrine of popular sovereignty which the Declaration of Independence had phrased so magnificently two years before. In apportioning the powers of popular government, it is necessary first to guarantee the security of the base upon which the whole rests—popular participation. For this reason Paine turned his attention first to the matter of the suffrage and elections.

A broad suffrage and free elections constitute insurance against corruption and the baser practices of party politics. An electorate too numerous to be reached by corrupt appeals to cupidity or personal aggrandizement, an electorate composed of men of all conditions from rich to poor, will be as honest an electorate as can be obtained. So went his argument. "Variety prevents combination, and the number excludes corruption." It follows, therefore, that any distinction of rights which lessens the number or variety of electors has a tendency to make government the slave of special groups or interests. Once the state has fallen under the control of special interest groups, there is no predicting the extent to which the common welfare will be subordinated to the individual advancement of the dominant minority.<sup>24</sup>

Government, said Paine in effect, should be popularly controlled, its forms and its policies dictated by majority will, its citizens educated and alert to the problems confronting the society of which they are a part. One of the greatest of these problems concerns the extent of the executive authority. The free citizen in a free land should be ever wary to prevent the concentration of governmental power in the hands of any of those controlling the destinies of the state.

"It is the fault of all the governments in the world, that they GOVERN TOO MUCH," Paine wrote. This, he claimed, they are able to do by assuming or acquiring in other ways the authority to appoint all

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

civil and military officers. With complete control over the civil personnel of government, a minority group of officials can dictate decisions in matters of policy affecting the entire population. Control of the military arm enables them to enforce these decisions. Thus, while the appearance of popular responsibility may remain, its substance may be lacking.

No government, nor any official of government, he continued, should be granted discretionary powers beyond those absolutely necessary for the proper exercise of the functions for which he is made responsible. The honesty and virtue of the individual governing official has no bearing on the matter. Such an official may be trustworthy to the last degree, his honesty in office, his unwillingness to misuse his delegated powers, may be unquestioned, yet the problem of proper control of government goes beyond all this. The authority of government is a formal grant of power to a social institution, not to a particular individual. This or that official may die, resign, or be removed from office, but the authority of the office remains—a permanent share of control over the destinies of the state. A free people should always remember that virtue, honesty, and ability are not hereditary. To grant discretionary powers of unnecessary breadth to an excellent governing official is to court future disaster. The man to whom such powers are given may never dream of misusing them, but the same assurance cannot be felt with regard to the long line of successors who will follow him in office. It is specious to argue that powers may be granted to one official and withdrawn from his successor, since it is much easier to give power than it is to take it away. In the normal course of events, governmental authority, once granted, becomes the permanent possession of the ruling officials. The danger of extraordinary grants of power is particularly great during periods of national emergency.

Paine penned these ideas during the most critical years of the American Revolution, at a time when almost all the ports of the thirteen states were occupied by the enemy, and when the need for strong executive leadership seemed to be a paramount necessity. Yet, patriot that he was, he warned his fellow-citizens against the threat of undue executive control over the destinies of the nation. Americans were fighting for freedom and civil rights. While they did so, they might be expected to guard their privileges with enthusiasm and devotion, yet, "a return to commerce and to the peaceable stations of civil life will, in a few years, abate the ardor and activity of the warmest defender of civil

rights. When the enemy is gone, the visible necessity will expire, and the wind cease to blow that kindled and yet keeps up the flame." But the powers of government would remain, to be used or misused with greater impunity than before, and under less surveillance from the devotees of freedom.<sup>25</sup>

A legislature was a different matter altogether. Paine dismissed it with scant attention, since he seemed to feel that the possibility of legislative misuse of power was not great. With what amounted almost to naivete he argued that, since the legislator is engaged in making laws for the government of all the people, himself included, he has but one set of interests—those of the entire state. Whatever is conducive to the welfare of the body politic must govern his deliberations and his actions. It follows from this line of reasoning that the only place where great care needs to be exercised with regard to a legislature is in the method utilized for the selection of its members. That, in itself, is a fairly simple problem, and can be provided for in a constitution by the common device of a majority vote. As long as the principles of equality and freedom are applied in the method of legislative choice, the common interest of the whole community will be served.<sup>26</sup> The reduction of the legislative problem to such simple terms is startling to modern political theorists who are much more fully aware of the possibilities for the legislative abuse of power than Paine seems to have been. There were two good reasons for his dismissal of this significant subject in so summary a fashion. The same letter in which he expressed the opinions recorded above contained also an indication that he intended to revert to the matter of legislative organization in a later communication. This later missive was evidently never written. More important as a reason for Paine's unusual confidence in the integrity of legislatures was probably the circumstances with which he found himself surrounded. For many years the elected colonial assemblies had championed the rights of the people against the appointed executive and judicial officials of the British Crown. The Pennsylvania constitution, whose alteration Paine was opposing in these letters, mirrored the popular distrust of the executive and judicial powers, as did practically all of the independent constitutions of the new American states. When Paine did concern himself with the problem of legislative organization, he was

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<sup>25</sup> These observations on the executive power were printed in the *Pennsylvania Packet*, December 10, 1778.

<sup>26</sup> *Pennsylvania Packet*, December 10, 1778.

much more interested in the question of bicameralism versus unicameralism than he was in any techniques designed to prevent the abuse of power.<sup>27</sup>

The executive is not the only branch of government over which Paine felt that constant popular supervision should be exercised. He considered the integrity of the judiciary almost as important to the preservation of the liberties of the people. Judges must deal with disputes of all sorts touching intimately upon the rights of the common man as an individual and affecting the freedom and liberty of society in the aggregate. Questions of property and taxation, of civil and political rights form the grist upon which the mills of justice feed. Individuals appear before a court as parties having interests opposed to each other; sometimes one individual against another, sometimes the state. It then becomes the magistrate's office to determine between two sets of conflicting interests. Logic demands that every precaution be taken to insure the impartial administration of justice. Magistrates who owe allegiance to political parties or attempt to administer justice under the consciousness of preconceived loyalties cannot be expected to aid in safeguarding the basic principles of equality and freedom.

Since mankind is subject to an "incurable weakness," wrote Paine, "which, under the idea of something like gratitude, frequently inclines to favoritism," care must be taken in any good constitution to prevent the operation of this human defect upon the magistrate. An honest judge must be freed of all official dependence upon any political party, therefore special constitutional safeguards should be set up to absolve him from any personal or governmental obligations. The Pennsylvania constitution that Paine was discussing did this by dividing the power of judicial appointment between the electorate and the executive, and by vesting the removal authority in the Assembly. Judges appointed under that system were therefore not obligated to any one group for their tenure of office. Paine liked this system. He wrote:

All the separate interests that can be supposed to appear before him . . . as parties are happily blended together to produce him. He looks around and knows no client. He comes upon the stage of office without seeing the hand that put him there. Government and the people appear to him, as they ever ought to do, as one incorporated body.<sup>28</sup>

<sup>27</sup> See his letter on "Constitutional Reform," August, 1805, in Van der Weyde, X, 243-272.

<sup>28</sup> Paine's comments on the judiciary appeared in the *Pennsylvania Packet*, December 12, 1778.

He favored the popular selection of judges for the lower courts, yet recognized the advisability of appointing the members of higher courts representing larger areas. Specifically, Paine opposed a proposal for revision of the state constitution which would have provided that local magistrates be appointed rather than selected by the executive from among a number of individuals popularly nominated in each judicial district.

The local judgeship is a civil office, "an office of decision, arbitration, or compromise between neighbors differing with each other, and between the claims of the state upon the individual, and the individual upon the state." The local court exists largely for the purpose of providing measures which will prevent the development of frivolous and vexatious lawsuits by settling minor disputes in first instance. It is designed "to secure property from invasion, and freedom from oppression, to give relief without the terror of expense, and to administer justice from a goodness of heart." The office of local magistrate is therefore not one that requires a high degree of specialized accomplishments and training, "it is not the office of a professor of natural philosophy, or of mathematics, or of languages, or of any branch of the arts or sciences."

This does not mean that the judge in the court of first instance need have no particular qualifications for his office. His work demands that he possess an unusual combination of character and ability, yet his abilities need not be those of the lecture hall nor even of the law office. Paine outlines them as follows:

He ought to be neither proud, passionate, or given to drink; easy of access, and serenely affable in his deportment. Patient enough to hear a tale of wretchedness, and wise enough to discover intention from fact. He ought to understand the laws, not for practice like a lawyer, but for advice like a friend, or for decision like a judge, and to be neither subtle in his refinements nor obscure in his definitions. He ought to be a man of application as well as knowledge, and of sound rather than of fine sense. He is to be a useful rather than a shining man, and to consider himself more like a physician to recover than the surgeon to cut off. He ought to have fortitude enough to be neither fascinated by splendor, nor womanishly affected by a melancholy tale, and is always to remember that he is to decide on cases, not on persons. . . . Three parts [of this character are] made up from the good man, and the rest from the wise one.<sup>29</sup>

All these qualities, rare though they may be in combination, are

<sup>29</sup> *Pennsylvania Packet*, December 12, 1778.

easily enough recognized when found. No special competence is required to estimate the presence or lack of any of them. The ordinary voter is as well able to appreciate them as is any highly-trained government official. There is consequently no reasonable basis for allowing the executive branch of government to appoint local magistrates. On the other hand there are weighty reasons why these local judges should not be appointed. Permit them to be wholly dependent upon the executive for their tenure of office, and they will become government men, thereby extending and increasing the degree of minority control over the freedom of the individual. If it is wise for a free citizenry to withhold from the executive branch of government all powers save those necessary to the proper performance of executive functions, it is equally wise for the same citizenry to retain a reasonable control over the judiciary.

One of the principal arguments advanced in 1778 by those who opposed popular participation in the selection of Pennsylvania judges was that the magistrates so chosen were not the best qualified. The same argument has been utilized times without number in the history of our American states since that day. Paine provided the classic answer to the objection. He argued that under any method of election or appointment that might be devised, the same complaint could be raised. Human judgment frequently errs. Mistakes will occur whether or not a method of popular selection is used. In any case, it is not so much the method of selection that should be blamed for shortcomings in the judicial branch, but rather the indifference of the qualified voter who fails to exercise his suffrage when the opportunity is offered him. "If men . . . will neglect the exercise of their own rights, and persuade others into the same omission, they can have no just cause afterwards to quarrel with the consequences, but with themselves."

More than a century and a half of existence as a federal union has taught America many valuable lessons in the art of popular government. The fear of an appointive judiciary which seemed to possess Paine has been largely dissipated by experience. Our states today vary in their methods of selecting magistrates, yet by and large, those units which follow the Federal example of an appointed judiciary generally enjoy a higher reputation for honesty and ability than those which elect their judicial servants.

It may be, of course, that Paine was infected, like many of his contemporaries, with a distrust of the legal profession in general. Certain

it is that he held no very high opinion of lawyers. "Apologizing for the expression," he wrote, "it would be a blessing to mankind if God would never give genius without principle; and in like manner it would be a happiness to society if none but honest men were suffered to be lawyers. The wretch who will write on any subject for bread, or in any service for pay, and he who will plead in any case for a fee, stands equally in rank with the prostitute who lets out her person."<sup>30</sup>

Paine was not an unerring soothsayer. In a larger sense, however, the passage of time has vindicated his belief in the necessity of retaining popular control over government in general. The United States of America has held with remarkable steadfastness to this principle of popular sovereignty. She has done so at times when other nations have with desperation thrown the solution of their social problems upon the shoulders of the "man on horseback." Certainly one of the most convincing explanations for the vitality of free government in America is the devotion of the American people to the principle of popular education. As a nation we have long been committed to the belief that democracy can function properly only where it is the possession of a people intelligent enough to make it work, and tolerant enough to accept majority rule. The preferred method of governing mankind was, according to Paine "by keeping them wise." Wisdom and education are not synonymous, yet, other things being equal, collective wisdom is more likely to be manifested by a society devoted to the intelligent development of its mental capacities than it is by a people that restricts educational advantages to the chosen few.

Representative democracy was, in 1778, largely a matter for experimentation. Neither the United States nor any other country could point to a long record of successful accomplishment for that method of rule. In short, it had yet to be tried. Political theorists, like Paine and Jefferson, were loud in their praises of its advantages, but they were promoting what was still theory and not yet proved fact. It is therefore a matter for some surprise that they foresaw so clearly and preached so convincingly the doctrines upon which it must be established if it is to endure.

It would be impossible for Paine to argue today that "novelty" must be an attribute of a good constitution, for the premise upon which his conclusion was based is no longer valid. The world has seen a number

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<sup>30</sup> *Id.*, December 1, 1778.

of adequate representative, democratic constitutions. The world has also discovered that constitutional guarantees do not in and of themselves assure freedom and social harmony, but that they must be actively supported by a popular desire to "make them work." Paine seems to have realized this fact clearly, yet his observations as to the social harmony and political stability which would result from a free and equal constitution appear sometimes to be over-optimistic. What he seems not to have anticipated—what he could not anticipate—were the complexities of twentieth-century technological civilization. These complexities have transformed the basic problems of politics in a way that would no doubt have amazed him beyond measure. Various techniques for the control and dissemination of information, for example, have advanced to the point where majority opinion and action may be swayed with comparative ease by small groups organized for the promotion of self-interest alone. The most equal and freest democratic constitution is little more than a scrap of vellum where such procedures go unchecked.

Close analysis reveals that in the larger sense, Paine's principles are still sound. What modern civilization has done has been essentially to complicate their implementation. A constitution, we have come to realize, is more than an inert collection of handsomely engrossed paragraphs and phrases. If it is to live, it must breathe and change. Those constitutions which have failed to do so have ceased to be. Their high-sounding praises of liberty and equality are spread across the pages of history, but they do not live in the hearts of free citizens, nor are they practiced in the institutions of democratic states. Life's only constant is change. That which does not develop dies. What may have been freedom and equality in 1778 may be slavery and privilege in 1946. Yet that fact affects in no way the validity of Paine's basic principles. The mechanic of 1946 seeks freedom and equality, just as did the mechanic of 1778, although he speaks in terms that would have puzzled his ancestor. The concessions which liberal action won from employers of the eighteenth century would constitute oppression for workers of the twentieth century. Constitutions which have lived for any length of time have done so because they have been adapted to altered circumstances. That adaptation has become increasingly difficult, but it has taken place, and it must continue. In this connection the spirit is more important than the letter of the law. The constant adaptation of all "living" constitutions to the needs and demands of various periods has

called forth a great mass of parallel interpretations and understandings which interpret the "spirit" of the basic law in order that the "letter" may live.

Thomas Paine described the "spirit" of a democratic constitution, and his description remains accurate today. The wide and varied experience of America in the drafting, alteration, and implementation of constitutions has demonstrated the axiomatic connection between constitutional freedom and equality on the one hand, and social stability on the other. Equality before the law, equality of civil and political rights, freedom of the press, freedom of religion, freedom of assembly and of petition—all the cherished rights of a democratic America—are bound together inextricably by those two great ideals. Paine recognized them as the keynotes of free government for free men. In them he saw the promise of social harmony and economic stability. The intricacies of modern civilization have made their practical realization more difficult, yet the experience of the years has done little to weaken the force of his arguments and much to strengthen confidence in his advice.