

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

DINNER TABLE ACTION, *et al.*,

Plaintiffs,

v.

WILLIAM J. SCHNEIDER, *et al.*,

Defendants.

Docket No. 1:24-cv-00430-KFW

DECLARATION OF JACK N. RAKOVE

Background

1. I am the William Robertson Coe Professor of History and American Studies, and Professor of Political Science and (by courtesy) Law, Emeritus at Stanford University, where I taught from 1980 to 2020. I earned an A.B. in History from Haverford College in 1968 and a Ph.D. in History from Harvard University in 1975. I am the author of eight books on the American Revolution and Constitution, including *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (1979); *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996), which received the Pulitzer Prize in History and two other book prizes; *Revolutionaries: A New History of the Invention of America* (2010), which was a finalist for the George Washington Prize; and *A Politician Thinking: The Creative Mind of James Madison* (2017). I have edited another seven books, including *The Cambridge Companion to The Federalist*. I have written over eighty scholarly articles and chapters, and numerous other short essays and op-eds.

2. I have also been the principal author of five *amicus curiae* historians' briefs submitted to the United States Supreme Court in these cases: *Vieth v. Jubelirer* (2003-2004), which dealt with partisan gerrymandering in Pennsylvania; *Hamdan v. Rumsfeld* (2005); *D.C. v. Heller* (2008); *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015); and *Moore v. Harper* (2022). I also participated in drafting an *amicus curiae* brief on the meaning of the two Emoluments Clauses of the Constitution in *C.R.E.W. v. Trump* (2017) and other briefs relating to Second Amendment litigation. In 1983-1988, I was a consultant to Goodwin, Procter & Hoar and an expert witness in *Oneida Indian Nation v. State of New York*.

3. For this litigation, I have been asked to discuss how issues of governmental corruption were viewed during the Founding era of the American republic, with reference to prevailing political ideas and debates and constitutional and legal provisions that were conceived to deter or limit the impact of corruption on public life. This report is, in effect, a discussion of the concept of political corruption, which has different meanings and connotations in different periods and societies.

Introduction

4. How did the Founding generation of the American republic, and more specifically, the framers and ratifiers of the Federal Constitution, think about the problem of political corruption? There is obviously no question that they understood overt forms of bribery to be blatant forms of corruption. The Impeachment Clause of the Constitution identifies bribery as one of three categories of offenses that warrant removal from office. The Foreign Emoluments Clause, which was much in the news during the first presidential term of Donald Trump, was written with well-established historical knowledge of the formerly secret Treaty of Dover of 1670, when Louis XIV had effectively bribed Charles II of England to pursue a pro-French foreign policy and privately

commit himself to support the Church of Rome. Some framers of the Constitution believed that the wartime French embassy to the United States had bribed at least one member of the Continental Congress—John Sullivan of New Hampshire—to support French policy. Back in the 1760s, Virginia politics had been wracked by charges of financial corruption directed against John Robinson, the speaker of the lower house of the Virginia legislature.

5. But was the Founding generation’s understanding of corruption limited to bribery alone? The short answer is that while bribery was, by definition, the most obvious form of corruption, it was only one example of the ways in which a political system could be corrupted. As one of the numerous political *concepts* that the American colonists had inherited from European and British writers, the concept of corruption covered a whole array of phenomena. One could use it, as Nicollò Machiavelli did, to describe the civic erosion of an entire political culture. It could also describe a set of relationships between institutions that had befouled the true principles of constitutional government, as eighteenth-century British opposition writers used it to lambaste the Crown’s influence over the House of Commons. History provided numerous examples of what corruption had meant in the past, but that did not eliminate the appearance of other forms of corruption in the present or future.

The concept of political corruption

6. The practice of corruption is the subject of countless books. Like obscenity, we know corruption when we see it, and cases are easily multiplied. The distinguished American jurist, John T. Noonan, Jr., for example, has written a massive history of *Bribes* that spans several millennia, moving from ancient Egypt to the ABSCAM scandal of the late 1970s and early 1980s.¹ Specific episodes of corruption have their particular histories. The history of the Yazoo land scandal of the

¹ John T. Noonan, Jr., *Bribes* (New York, 1984).

late 1790s or the presidencies of Ulysses S. Grant and Warren G. Harding easily generate probing accounts of greedy politics and public malfeasance.

7. Yet a comprehensive history of the *concept* of political corruption has yet to be written. As a political phenomenon, corruption has an intellectual history of its own. The concept of corruption is not reducible to a simple definition or a mere compendium of acts of bribery, embezzlement, or patronage. One could write a history of the concept of corruption that could go as far back as Thucydides' *History of the Peloponnesian War* and Aristotle's *Politics*.² The problem of the *corruzione* of a state was a main topic in the political thinking of Niccolò Machiavelli, whom scholars often treat as the first modern student of politics. His chapters on this subject in the *Discourses on Livy* proved fundamental to the development of early modern republican thinking in the sixteenth century. Machiavelli's ideas about republicanism were soon transmitted to English readers in the Tudor and Stuart eras of the sixteenth and seventeenth centuries.³ A concern with the corruption of an independent and legally supreme Parliament by the Crown then became a major theme in eighteenth-century British opposition thinking. The Scottish philosopher-historian David Hume wrote an influential essay on this subject, and that essay, along with comparable work by other English opposition writers, had a major impact on America's revolutionary founders, notably including James Madison and Alexander Hamilton. Their ideas about separation of powers, checks and balances, and the idea of an extended federal republic were profoundly influenced by their inherited perceptions of the corruption of the eighteenth-century British constitution.

² J. Peter Euben, "Corruption," in Terence Ball, James Farr, and Russell L. Hanson, eds., *Political Innovation and Conceptual Change* (Cambridge, UK, 1989), 223-230.

³ Felix Raab, *The English Face of Machiavelli: A Changing Interpretation, 1500-1700* (London and Toronto, 1964, 2010).

8. One cannot reconstruct the Founding generation’s view of corruption, then, simply by examining how the word was defined in eighteenth-century dictionaries. The word *corruption* does not appear in the Revolutionary-era constitutions that were written first at the state and then at the national levels of government. The closest one gets is the presence of the word *bribery* in the impeachment clause of Article II, Sect. 4 and the references to *emoluments* in Article I, Section 9, and Article II, Section 1. Corruption is much more a concept than a mere word, and to grasp its original meaning at the time the Constitution was adopted, one has to ask how the Founding generation thought about the diverse ways in which their polity or government might be corrupted. In a sense, one has to be able to write an intellectual history of how the Founding generation thought about politics in the broadest sense of the term.

Machiavelli’s significance

9. At first glance, Machiavelli seems an odd figure to place at the start of a report asking how the Founding generation thought about political corruption. We know Machiavelli primarily as the author of *The Prince*, that landmark manual of statecraft that asked how a prince could secure his rule in a new city he had not previously governed. Manuals for princes were a standard element of medieval and early modern political theory, universally couched in terms of Christian morality. Machiavelli broke decisively with that moral tradition. He famously asked whether it is better to be feared or loved, and came down decisively on the side of fear. To his many critics, Machiavelli is cast as a “teacher of evil.” When we characterize some political actor or action Machiavellian, it is this calculating, cynical, and even brutal perspective that we have in mind.

10. Yet the Machiavelli who wrote *The Prince* was also working more or less concurrently on his *Discourses on the First Ten Books of Titus Livy*. The *Discourses* is a foundational text of early modern republican thinking, and concepts and arguments that Machiavelli used there resonated

throughout the sixteenth, seventeenth, and eighteenth centuries, with important results in both England and revolutionary America. The problem of corruption was a controlling theme in Machiavelli's thinking. Corruption, as he thought about it, had little to do with prosaic acts of bribery or nepotism or non-bid contracts. It involved forces more essential and corrosive: the emergence of a degraded way of life that would prevent a community from leading a political life (*vivere politico*) or a civil life (*vivere civile*) or from living in *uno stato libero*, a "free state." (This term reappears in the preamble to the Second Amendment of the U.S. Constitution, and one could indeed draw a straight line from Machiavelli's concerns with having a militia of Florentine citizens to the language of that Amendment.) For Machiavelli, the concept of corruption offered an essential way of describing the health—or better, diagnosing the diseases—of a body politic. In his era, and later, the idea that a state had a constitution did not mean, as it later would, that it had a written charter of government; it was rather a metaphor for the organic strength of the body politic, and therefore for the lasting welfare of the whole society.⁴

11. Machiavelli devoted three chapters to the problem of corruption in Book I of the *Discourses*.⁵ In Chapter 16, in a preliminary way, he announced that "a people which has become completely corrupted"—which had lost all the attributes of living in liberty—"cannot live free even for a brief time, not even a moment." For that reason, Machiavelli declared that he would limit his "concern [to] those peoples where corruption has not spread too widely and there remains more of the good than the tainted." The prime historical example of this, Machiavelli observed in concluding Chapter 16, was the Roman people after their expulsion of the Tarquin kings and their

⁴ There are numerous analyses of Machiavelli's political ideas and, more specifically, his view of corruption. In this report, I rely on J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republic Tradition* (Princeton, 1975), 183-218, and a recent book by Fabio Raimondi, *Constituting Freedom: Machiavelli and Freedom*, trans. Matthew Armistead (New York, 2018), 1-31. Also very helpful is Quentin Skinner, *Machiavelli: A Very Short Introduction* (Oxford, UK, 1981), 54-87.

⁵ In this and the next paragraph I have used the translation by Julia Conaway Bondanella and Peter Bondanella, *Niccolò Machiavelli: Discourses on Livy* (New York, 1997), 62-71.

creation of the republic in 509 b.c.e. In Chapter 17, Machiavelli then argued that “it was Rome’s greatest good fortune that its kings quickly became corrupt, so that they were driven out, and long before their corruption had passed into the heart of the city.” From this situation Machiavelli concluded “that where the material is not corrupt, disturbances and other disorders can do no harm, and where the material is corrupt, carefully enacted laws do no good,” unless they are imposed by an individual—a prince or lawgiver—“in such a way that the material becomes good.” When Machiavelli speaks of “material” (as in “*la materia dove la è corrotta*”) he is describing the formative qualities and characteristics of a city’s citizens and subjects.

12. Machiavelli described the great problem he was raising in the opening sentence of Chapter 18: “to consider whether or not it is possible to maintain a free government [*lo stato libero*] in a corrupt city if one already exists; or whether or not, if one does not already exist, it can be established there.” This was, Machiavelli immediately conceded, a truly difficult problem, and he made the challenge even greater by assuming that “the city in question is extremely corrupt.” In his accounting, the forms of corrupting *la materia* of the people were many and diverse, and the paths to reform few and difficult. But the end goal for Machiavelli remains the same: to enable a people to lead a political life (*vivere politico*) or a civil life (*vivere civile*) where laws are obeyed; inequalities minimized; all citizens, even the most meritorious, remain subject to the laws when they commit unjust acts; and where ordinary people could participate in public life and be required to defend their republic against its enemies (rather than relying on the mercenary armies that Machiavelli utterly distrusted). In such a republic, the people would have legal devices available to monitor and prosecute the misdeeds of the elite. The great example on which Machiavelli drew was the Roman tribunate, which was elected by the plebeians, and which had the authority to bring legal charges against patricians.

13. All of these practices and institutions instantiated and exemplified “the new modes and orders [*modi ed ordini nuovi*]”⁶ that Machiavelli proposed instituting in cities that were not yet too corrupt, where a civil and political life reconstituted on republican principles could still be restored. Machiavelli derived these “new modes and orders” either from the Roman history that he had studied or from his own rich experience. The great attraction of Roman history lay in the centuries-long process whereby the Roman republic had been able to expand and to create a vast empire across Italy and then the Mediterranean. The most important consequence of implementing these new modes and orders would be to create or revive a deep sense of civic *virtú*. Among all the other key words that characterized his thought—*corruzione*, *stato*, *fortuna*, and *materia*—*virtú* was arguably the one that remained most essential to Machiavelli’s republican commitments.

14. Just like *corruzione*, the concept of political *virtú* also has a complicated meaning. In *The Prince*, for example, *virtú* embodied the talents that enabled the lone ruler of a community to master all the vicissitudes and contingencies of *fortuna*. In effect, *virtú* and *fortuna* were linked as opposites. *Fortuna*, the chaotic world of human affairs, created the unstable and dangerous political world that the prince had to master; *virtú* identified the talents that the prince needed to wield in order to command it. But in *The Discourses*, Machiavelli’s notion of *virtú* takes a different form. Now it involves all those relations—the “new modes and orders”—that collectively enable the citizens of a polity to maintain their republic. *Virtú* connotes a set of civic obligations and attitudes that a people must possess to create a stable republic, one that will resist both the turmoil of *fortuna* and the various sources of *corruzione*.

⁶ Machiavelli used this famous phrase in the opening sentence of his preface to the autograph manuscript of *The Discourses*, asserting that the difficulties of explaining how to establish a republic are no less dangerous than the task of exploring “unknown lands and seas.” Some translators prefer to say “new methods and institutions,” but in my view, *institutions* in contemporary English has too specific a meaning to capture the range of practices Machiavelli had in mind.

15. Foremost among the latter is the underlying ambition of the upper classes and aristocracy (sometimes known as the *grandi* [the great] or the *ottimati* [optimates]). As the historian John Najemy observes, “the unifying theme of the *Discourses* is the precariousness of republics and their vulnerability to the ambition of the noble and elite classes. The motor driving the history of republics, their forms of government, and their capacity for survival, defense, and expansion is the perpetual antagonism between the nobles and the people.” In opposition to other writers, who viewed the antagonism between the patricians and plebeians with contempt, Machiavelli boldly and radically argued that the active struggles between the *grandi* and the *populo* made possible by the creation of the tribunate was the real source of Rome’s stability. Where the nobility wanted to dominate the people and would happily use corrupt means to attain their ends, the people only wanted to be left alone to govern their own lives and to rely upon the legal system to secure their liberty.⁷

16. Machiavelli’s fear of corruption, it can thus be said in conclusion, takes the form of a deep and persisting worry that the wealthy who want to dominate the rest of the population will always look for devices that will enable them to exploit their resources and influence for politically sinister purposes, to the weakening of the free state the republic is conceived to be. The proper answer to this corruption is the preservation of popular *virtú*, which will be especially enhanced both by the people’s participation in the militia and by the existence of means to impose justice on the elite. Unlike other writers who perpetually worried about the danger of turmoil, in any form, Machiavelli believed that the active prosecution of civic crimes, even when directed against a society’s elite or

⁷ John M. Najemy, “Society, Class, and State in Machiavelli’s *Discourses on Liberty*,” in Najemy, ed., *The Cambridge Companion to Machiavelli* (Cambridge, UK, 2010), 102-104. For a much more extended treatment of these issues, see John P. McCormick, *Machiavellian Democracy* (New York, 2011).

its past heroes (who had gone astray), was one of the “orders” that would maintain the collective *virtú* of the population.

Corruption in Anglo-American Political Culture

17. The theme of *virtú*, now translated in pale form into English as virtue,⁸ had a prominent place in American republican thinking. “If there is a form of government then, whose principle and foundation is virtue,” asked John Adams in his revolutionary pamphlet, *Thoughts on Government* (1776), “will not every sober man acknowledge it better calculated to promote the general happiness than any other form?”⁹ Like Machiavelli in the early 1500s, the American revolutionaries believed that the fate of the republican governments they were now forming depended on the people’s possession of civic virtue, which they defined primarily as a willingness to subordinate private interest to public good. Republican government required a culture where “each man must somehow be persuaded to submerge his personal wants into the greater good of the whole.”¹⁰ Montesquieu had taught that each of the three forms of government (monarchy, aristocracy, republic) had a defining moral characteristic: virtue was the true signifier of republicanism.

18. On the question of political corruption, however, the American revolutionaries accepted a different and much more politically focused definition that was the direct product of British history since the Glorious Revolution of 1688, when the Dutch *stadtholder* William of Orange and his wife, Mary, replaced her father, James II, on the throne. This notion of corruption was not

⁸ The colloquial use of virtue in contemporary English does not really capture the robust political character of Machiavelli’s *virtú*. In their translation of *The Discourses* (p. 361) the Bondanellas, for example, list “ability, skill, merit, ingenuity, strength, [and] sometimes even virtue” as defining synonyms for *virtú*.

⁹ Philip Kurland and Ralph Lerner, eds., *The Founders’ Constitution* (Chicago, 1987), I, 108.

¹⁰ Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, N.C., 1969), 65-70 (quotation at 68).

concerned with the decay of the manners and mores of the whole body politic, as Machiavelli's concept had been. It was addressed more specifically to the workings of political institutions.

19. The main constitutional result of the Glorious Revolution, as confirmed by the Declaration of Rights of 1689, was to affirm the legal and constitutional supremacy of Parliament. The Stuart monarchs had previously voiced claims to absolutist authority, and they had periodically attempted to rule either without allowing Parliament to meet at all or by prolonging a single Parliament without holding fresh elections to the House of Commons. After 1689, that disdain for parliamentary consent to acts of government was no longer possible. A Triennial Act adopted in 1694 required that Parliament meet every three years, but equally important, the practice of granting "annual supplies" (appropriations for funding government) and the annual adoption of a Mutiny Act (which evolved into a general statute organizing military activities) made Parliament a standing institution of government.¹¹

20. So far, so good: England (or, after the adoption of the Act of Union with Scotland in 1707, the United Kingdom of Great Britain) had become a constitutional monarchy unlike the absolutist monarchies of France, Spain, and Russia. Its "mixed" constitution combined the estates of royalty, aristocracy, and common subjects in one sovereign Parliament, known as the King-in-Parliament. This "boasted" or "vaunted" British constitution became the envy of enlightened Europe. Its virtues were celebrated in a famous section of the Baron of Montesquieu's *The Spirit of the Laws*, arguably the greatest work of eighteenth-century political science, which noted that there was only one nation whose constitution made the preservation of liberty its chief end: Britain.

21. But in the years after the Hanoverian dynasty took the throne in 1714, the practice of British politics evolved in significant ways. Beginning with Sir Robert Walpole, this period marked the

¹¹ For a great survey of this subject, see J. H. Plumb, *The Origins of Political Stability; England, 1675-1725* (Boston, 1967).

beginning of the growth of ministerial government, in which effective control of the executive (the Crown) passed to whichever leader commanded majority support in the House of Commons (as well as the personal favor of the King). British politics became coalitional politics, as leaders gathered coterie of followers and negotiated to form stable coalitions. Other mechanisms worked to make politics more manageable. A Septennial Act extended the period between parliamentary elections from three years to seven. The existence of “pocket” and “rotten” boroughs—parliamentary constituencies respectively either controlled by some dominant government interest or that contain few, easily influenced voters—made it easier for ministries to manage elections. The national electorate contracted, so that an estimated ten thousand voters in a nation of eight million determined who served in the Commons.¹²

22. Perhaps most important, the Crown found reliable techniques to build a steady phalanx of supporters in Parliament. Offices, pensions, sinecures, and other sources of patronage and influence guaranteed the loyalty of backbenchers. If individual ministers occasionally lost the support of the majority of the Commons, requiring new coalitions to form, the Crown was never in the minority. The King retained the right to veto legislation, but its use was abandoned after 1707 because there was never any need to deploy it.

23. This was the form of corruption, by patronage and other forms of influence, that opposition political writers began denouncing in the 1720s and 1730s, and which the American colonists in

¹² There are numerous historical accounts of the creation of the Georgian constitution that evolved between the Glorious Revolution of 1688 and the American decision for independence eight decades later. Plumb, *Origins of Political Stability*, cited in the note above, offers a sophisticated account of how the radical politics of the late seventeenth century was tempered as the Crown passed from the Stuarts to the Hanoverian dynasty that came to power in 1714. J. R. Pole, *Political Representation in England and the Origins of the American Republic* (Berkeley, Los Angeles, and London, 1965) is valuable because it explains how dynamic factors in colonial and revolutionary American politics both derived but also departed from English precedents and practices. But for American readers, the most important and influential sources are two seminal books by Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA, 1967, 1992, 2017), especially 33-93 and 161-74, and *The Origins of American Politics* (New York, 1968), chapters I and II. The arguments presented in paragraphs 21-28 of this memorandum largely synthesize the main arguments of these works.

turn absorbed through newspapers and pamphlets. It was a distinctively British form of *corruzione*, in Machiavellian terms, because it violated the true principles of the Glorious Revolution. The idea of parliamentary supremacy rested on the belief that the true duty of the legislature was to check the misuse of the executive power held by the King and his ministers. The concrete exercise of power was the natural work of the Crown; the protection of liberty was the chief responsibility of Parliament. It could fulfill that task only if it preserved the legislative privileges that secured its deliberative independence; only if it accurately represented the feelings and interests of its constituents; and only if its members remained free from the different forms of corrupt influence the Crown could bestow.

24. Drawing upon ideas that went as far back as the 1670s, British politics was often described in terms of a division between “Court” and “Country” parties, the former favoring the policies of the King and his ruling ministers, the latter worrying about all the insidious uses of patronage and influence that were enabling the Crown to sap the independence of a theoretically supreme Parliament. These were not political parties in the modern sense of the term, but rather perspectives that were repeatedly, even tediously, echoed in public debate, yet which also retained a deep hold on contemporary views of how the British constitution was actually working. It was in this sense that the philosopher-historian David Hume referred to “the principles of the *court* and *country* parties, which are the genuine divisions in the BRITISH government.”¹³ Adherents of the country perspective repeatedly argued for excluding “placemen” from Parliament, and for requiring members of the House of Commons to serve relatively short terms.¹⁴ A House of Commons whose members were habituated to government offices and pensions was constitutionally corrupted. On

¹³ David Hume, “The Parties of Great Britain,” in Eugene F. Miller, ed., *David Hume: Essays Moral, Political, and Literary*, rev. ed. (Indianapolis, 1985, 1987), 71.

¹⁴ Pocock, *Machiavellian Moment*, 406-410.

the other side of the question, advocates of the Court party believed, as party-men always do, that patronage makes government more efficient and decisive; it is something the constitution needs to make it work.

25. Hume addressed this issue incisively in his short essay “Of the Independency of Parliament.” The “paradox” of the British constitution, Hume argued, was that although “The share of power, allotted by our constitution to the house of commons, is so great, that it absolutely commands all the powers of government,” it nevertheless refused to wield that power to its full extent, but was content to remain “confined with the proper limits” of the constitution. The motivation for that restraint lay in the personal “interest of the majority of its members. The crown has so many offices at its disposal, that, when assisted by the honest and disinterested part of the house,” it always had the support it needed to preserve monarchical power within the balanced constitution. “We may call [this] influence by the invidious appellations of *corruption* and *dependence*,” Hume wrote; “but some degree and some kind of it are inseparable from the very nature of the constitution, and necessary to the preservation of our mixed government”—and with it the liberty it was boasted to preserve.¹⁵

26. As forms of corruption go, these ideas of using patronage and pensions to produce reliable legislative majorities hardly seem the most odious threat the liberty of the people might face. As Hume argued, there was a net positive good to the Court party’s position: it preserved the balanced constitution of King, Lords, and Commons that Montesquieu and other eighteenth-century observers so admired, and which distinguished Britain from all other regimes. But from the vantage point of English opposition writers and their American colonial readers, the danger remained real nonetheless. A Commons staffed by placemen and party-men would be unable to

¹⁵ Hume, “Of the Independency of Parliament,” in Miller, ed., *Essays Moral, Political, and Literary*, 44-45.

check all the forms of aggrandizement and personal enrichment that the King’s ministers would assiduously pursue. Perhaps the constitutional settlement of 1688 and its immediate aftermath could be preserved if there was a “king above party,” as Henry St. John, the Viscount Bolingbroke, argued—a monarch who would not be the captive of his ministers, but who would instead embody the entire national (or even imperial) interest. But that was not the working reality of British government during the reigns of the first three Georges.

27. For opposition, country-party style writers—like John Trenchard and Thomas Gordon, the co-authors of the influential *Cato’s Letters*—the best cure to the forms of corruption that Parliament was now illustrating lay in governing the composition of the House of Commons. There were two basic methods to minimize legislative corruption, *Cato* argued in two essays published in January 1721:

these deputies must be either so numerous, that there can be no means of corrupting the majority; or so often changed, that there shall be no time to do it so as to answer any end by doing it. Without one of these regulations, or both, I lay it down as a certain maxim in politicks, that it is impossible to preserve a free government long.¹⁶

28. There were long periods in English history when these ends had not been obtained. In a hilarious sentence, *Cato* described the temptations that had corrupted past parliaments.¹⁷ But the deeper considerations that would prevent the corruption of legislatures lay in narrowing the

¹⁶ “How free Governments are to be framed so as to last, and how they differ from such as are arbitrary,” January 13, 1721, in Ronald Hamowy, ed., *Cato’s Letters: Or, essays on Liberty, Civil and Religious, and Other Important Subjects* (Indianapolis, 1995), I, 421, echoing a similar passage in “All Government proved to be instituted by Men, and only to intend the general Good of Men,” January 6, 1721, *ibid.*, 418.

¹⁷ For the record, here is *Cato’s* text on the multiple sources of corrupt “disservice” in the Commons: “What with the promises and expectations given to others, who by court-influence, and often by court-money, carried their elections: What by artful caresses, and the familiar and deceitful addresses of great men to weak men: What with luxurious dinners, and rivers of Burgundy, Champaign, and Tokay, thrown down the throats of gluttons; and what with pensions, and other personal gratifications, bestowed where wind and smoke would not pass for current coin: What with party watch-words and imaginary terrors, spread amongst the drunken ‘squires, and the deluded and enthusiastick bigots, of dreadful designs in embryo, to blow up the Church and the Protestant interest; and sometimes with the dread of mighty invasions just ready to break upon us from the man in the moon: I say, by all these corrupt arts, the representatives of the English people, in former reigns, have been brought to betray the people, and to join with their oppressors.” *Ibid.*, 422.

distance between legislators and subjects through “the frequent fresh elections of the people’s deputies,” or “what the writers in politicks call rotation of magistracy.” Such rules would have two main benefits. First, legislators new to office would “remember what they themselves suffered, with their fellow-subjects, from the abuse of power, and how much they blamed it.” In effect, lawmakers who came and went would recall their status as subjects and legislate with the understanding that they would be bound by the same measures they were enacting. Second, because their terms would be short, they would avoid the vices of long-term incumbents, “seeing themselves in magnifying glasses, grow, in conceit, a different species from their fellow-subjects; and so by too sudden degrees become insolent, rapacious and tyrannical.”¹⁸

29. The concern with corruption in eighteenth-century Anglo-American political discourse was primarily institutional in nature. It was a conception of corruption that was much more narrowly drawn than Machiavelli’s notions of *corruzione*. Although Machiavelli sometimes focused on specific officials and agencies of government, when he spoke about cities being either irredeemably corrupt or not corrupt enough to lose the possibility of civic reformation, he was contemplating the health of the whole body politic—the *virtú* of its rulers and subjects alike. The opposition writers who influenced eighteenth-century Americans did have some comparable concerns. They worried, for example, about the complicated ways in which the manly *virtú* idealized in Machiavelli’s militiaman was being effeminized—that is the best term for it—by the softening habits of commerce, the taste for luxury, and the flourishing of mechanisms of private and public credit that made Britain the Atlantic world’s wealthiest and most commercial empire.¹⁹ But the dominant story remained political and constitutional. The concern with corruption was

¹⁸ *Ibid.*, 423.

¹⁹ This complex relationship is explored in Pocock, *Machiavellian Moment*, chapter XIV: “The Eighteenth-Century Debate: Virtue, Passion and Commerce,” 462-505.

first and foremost a matter of allowing Parliament to play the role that the political turmoil of the seventeenth century had ultimately assigned to it. A Commons controlled by patronage and influence, representing too many pocket and rotten boroughs, serving seven-year terms insulated from the wishes of their constituents, was inherently corrupt. And its corruption would enable power to devolve upon other institutions and enable the real holders of power to strip subjects of their liberty.

American perceptions

30. For a wide array of reasons, American colonists were deeply attracted to this image of a corrupted Parliament, and this perception influenced not only their movement toward independence in the decade after the Stamp Act crisis of 1765-66 but also the substance of the new constitutions they began adopting in 1776.

31. In the decades following the Glorious Revolution, Americans repeatedly argued that the legislative privileges that Parliament had secured in 1688 also set the dominant precedents that should define the proper rights of their own provincial assemblies. Those privileges included the right to initiate legislation, to meet regularly, and to enjoy freedom of speech within their legislative chambers. It also meant that colonial acts of legislation, responsive to Americans' own perceptions of their needs and interests, should not be subject to the twin evils of being suspended or vetoed. The American colonists happily imagined their provincial legislatures, housed in small but handsome buildings, evolving into miniature parliaments. Although this comparison seemed preposterous to many imperial officials, who treated the colonists as backwater provincials, Americans found their claims for near-equality wholly convincing.²⁰

²⁰ The classic studies include Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* (New Haven, 1943), and Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal*

32. Their ability to achieve this result, however, faced several persisting obstacles. First, royal governors were firmly instructed not to treat the colonial assemblies as miniature parliaments. Second, and arguably more important, governors retained aspects of the royal prerogative—powers deemed inherent to the Crown—which had effectively lapsed in Britain. They had the authority, for example, to *veto* or *suspend* legislation (the latter meaning, delaying its enforcement pending further review by the Privy Council). They could also *prorogue* or *dissolve* legislative assemblies (meaning, postponing their meeting until the lawmakers seemed more amenable to imperial preferences, or terminating the existence of one troublesome legislature and calling for the election of another, hopefully more compliant body). Where English judges now enjoyed the tenure during good behavior provided by the Act of Settlement of 1701, which had led to the Hanoverian succession, colonial judges still served at the pleasure of the Crown, making them subject to immediate dismissal.²¹

33. These disparities between English precedent and colonial practice made Americans highly receptive to opposition writings. Because Parliament played no formal role in colonial governance—other than regulating imperial trade through the Navigation Acts—the responsibility for regulating colonial affairs devolved on various ministries in London. In effect the colonists saw themselves as objects or victims of the same cabals of ministerial power-seekers whom English opposition writers (like Trenchard and Gordon) held responsible for the erosion of parliamentary independence and supremacy. As the distinguished historian Bernard Bailyn argued, more than a half-century ago,

The opposition vision of English politics, conveyed through these popular opposition writers, was determinative of the political understanding of eighteenth-century Americans Threats to free government, it was believed, lurked

Colonies, 1689-1776 (Chapel Hill, 1963). Numerous monographs make the same case for the political history of individual colonies.

²¹ Bailyn, *Origins of American Politics*, 59-70.

everywhere, but nowhere more dangerously than in the designs of ministers in office to aggrandize power by the corrupt use of influence, and by this means ultimately to destroy the balance of the constitution. Corruption, especially in the form of the manipulation and bribery of the Commons by the gift of places, pensions, and sinecures, was as universal a cry in the colonies as it was in England, and with it the same sense of despair at the state of the rest of the world, the same belief that tyranny, already dominant over most of the earth, was spreading its menace and was threatening even that greatest bastion of liberty, England itself.²²

34. Many Americans (certainly Thomas Jefferson and James Madison) had read and understood John Locke; but it was this less famous group of opposition writers who shaped American political thinking much more directly.

35. Yet between Britain and its American colonies two other critical differences remained. First, the techniques of influence that worked so well in Georgian Britain were not readily available to imperial governors in America, simply because they lacked the same resources that Crown ministers “at home” freely wielded. David Hume’s analysis of the real sources of political influence in eighteenth-century Britain did not apply to America. In Bailyn’s vivid language, “The armory of political weapons so essential to the successful operation of the government of [Sir Robert] Walpole and the [Duke of] Newcastle was reduced in the colonies to a mere quiverful of frail and flawed arrows.”²³ Royal governors were themselves only creatures, not manipulators, of eighteenth-century patronage. Lacking offices to bestow on colonial notables, they repeatedly had to reach some kind of working bargain with the provincial assemblies that generally disappointed their superiors in London.

36. Second, and equally important, the use of rotten and pocket boroughs to manage politics did not work in the colonies, where freehold tenure enlarged the electorate and new communities regularly received the right of representation in their provincial legislatures.²⁴ Even before the

²² *Ibid.*, 56-57.

²³ *Ibid.*, 72.

²⁴ *Ibid.*, 70-105.

Stamp Act crisis of 1765-66 dramatized these points, the colonists sensed that there were profound differences between how political representation operated in Britain and how it worked in America. The idea that there were “rotten” aspects to the British constitution was not an eighteenth-century discovery. In his *Second Treatise of Government*, for example, John Locke (writing in the early 1680s) had alluded to the existence of parliamentary boroughs lacking any serious number of voters as a sign of rot. Americans expected every community in the land to have a seat in the legislative chamber, and they regarded their delegates, not as distant lawmakers whose first duty was to contemplate the general good of the whole society, but as attorneys for their townships and counties, representatives who could be instructed to follow the directions of their constituents. When the Stamp Act crisis made the question of representation a fundamental point of controversy between Britain and America, colonial writers like James Otis boasted of the superiority of the American insistence on the accountability of lawmakers to their constituents. When British writers asked why the Americans should have a voice in the House of Commons when such prosperous cities as Birmingham and Sheffield held no seats either, Otis simply scoffed in reply. “To what purpose is it to ring everlasting changes to the colonists on the cases of Manchester, Birmingham, and Sheffield, which return no members?” Otis wrote. “If those, now so considerable, places are not represented, they ought to be.”²⁵ Indeed, it was precisely because ideas like these were so powerful—and so potentially embarrassing in Britain—that spokesmen for Parliament’s authority over America largely abandoned the argument about representation and relied instead on a simple assertion of Parliament’s legal sovereignty over the entire empire.²⁶

37. This prevailing perception of the corruption of British politics through the ministerial domination of Parliament thus played a critical role in the American movement toward

²⁵ James Otis, *Considerations on Behalf of the Colonists* (London, 1765), 9.

²⁶ Bailyn, *Ideological Origins*, 198-229.

independence by providing a systematic and self-confirming explanation of why the British government was pursuing one measure after another inimical to American rights.²⁷ That issue does not concern us here. What does matter, however, is the impact this perception had on the new state constitutions that Americans began adopting in 1776. These documents, more than the Federal Constitution of 1787, illustrated the underlying political conceptions and commitments that shaped American constitutionalism in its first, creative phase.

38. In many respects, the constitution writers of 1776 looked backward in defining their underlying concerns. They were naturally more inclined to apply lessons derived from the past than to anticipate problems likely to arise in the future. As James Madison observed in 1785, while denouncing the lack of “*wisdom* and steadiness to legislation” revealed in the separate states, “The want of *fidelity* in administration of power having been the grievance felt under most Governments, and by the American States themselves under the British Government[;] It was natural for them to give too exclusive an attention to this primary attribute.”²⁸ For Madison and his contemporaries, the “administration of power” meant the workings of the executive—that is, the Crown and its officials. With hindsight and his own experience in Virginia’s fifth provincial convention, which drafted the commonwealth’s new constitution, Madison grasped that the constitution-writers of 1776 were the conceptual prisoners of history.

39. This retrospective attitude deeply informed the first state constitutions. The dominant animus of the first state constitutions was to reconcile the principle of legislative (or parliamentary) supremacy inherited from the Glorious Revolution of 1688 with the criticisms of British politics laid down by opposition writers like Trenchard and Gordon. The whole imperial controversy of

²⁷ Bailyn, *Ideological Origins*, 94-159; Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765-1776* (New York, 1972).

²⁸ James Madison to Caleb Wallace, August 23, 1785, in Jack N. Rakove, ed., *James Madison: Writings* (New York, 1999), 40.

1765-1776 had reminded the colonists that their practice of “actual” representation was superior to the arguments for “virtual” representation that the defenders of parliamentary supremacy over the colonies “in all cases whatsoever” had propounded.²⁹ The coming of independence only confirmed that position. To secure maximum support for “the cause,” the provincial conventions encouraged communities to send representatives to government, and they actively debated whether the franchise should be broadened (but not narrowed). Even more important, every state except South Carolina applied a rule of annual elections to the lower house of their legislature. As John Adams observed in his *Thoughts on Government*, in a widely repeated saying: all elections “should be annual, there not being in the whole circle of the sciences, a maxim more infallible than this, ‘Where annual elections end, there slavery begins.’”³⁰

40. This commitment to annual elections was arguably the single most important anti-corruption provision of the first state constitutions. It presumed that legislators would recognize that they would soon return to the body of the people, to be governed by the same laws they were framing, with no status higher than that of ordinary citizens; and that virtuous voters would understand the benefits of rotation in office. These views were fully consistent with *Cato’s* argument of 1721, which had assumed that routine turnover in office would minimize the dangers of corruption because it would make no sense to bestow pensions and positions on lawmakers who essentially held office as an avocation. This perception was also fully consistent with the principle articulated in several of the declarations of rights issued by the states as they were adopting their

²⁹ The theory of “virtual” representation argued that Americans who sent no members to the House of Commons were nevertheless legitimately represented in Parliament. The American claims for the superiority of their system of “actual” representation relied on the existence of a broad electorate and the allocation of legislative seats to every community (townships or counties). See Bailyn, *Ideological Origins*, 161-175.

³⁰ *Founders’ Constitution*, I, 109. Adams then added this further observation, drawing on a couplet from Epistle III of Alexander Pope’s famous poem, *An Essay on Man*: “These great men, in this respect, should be, once a year

‘Like bubbles on the sea of matter borne,
They rise, they break, and to that sea return.’”

first constitutions. As Article 5 of the Virginia Declaration of Rights stated, in order to ensure that members of the legislative and executive branches of government “may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections,” leaving the legislature free to determine whether these former officials should be made “eligible, or ineligible” for further service.³¹ This was (in modern legal analysis) a *standard* rather than a *rule*, a principle that officeholders and voters should honor rather than a mandate that had to be enforced. Term limits in fact were applied only to a few state governors and delegates to the Continental Congress.³² No legal barriers limited the number of terms that legislators could serve. Yet scholars who have done quantitative studies of legislative service have demonstrated that rates of turnover at both the national and state levels of government remained high well into the nineteenth century. Down to the 1890s, the mean term of service in the House of Representatives was three years, meaning that the vast majority of its members served one or two terms. Rotation in office was thus a working principle of American politics.

41. Lacking a monarch, Americans had no need to worry about the sycophantic behavior of courtiers and royal flatterers. But with the British opposition writers’ model of an office- and influence-wielding Crown firmly implanted in their political consciousness, American

³¹ Virginia Declaration of Rights, *Founders’ Constitution*, I, 6. Cf. the corresponding Article VIII of the Massachusetts Declaration of Rights of 1780: “In order to prevent those, who are vested with authority, from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments.” *Ibid.*, I, 12.

³² As it happens, James Madison was the first delegate who was term limited out of the Continental Congress following the ratification of the Articles of Confederation. Patrick Henry was term limited out of service as Virginia’s governor. But in both cases, the prohibition was limited to restricting service to three years out of six, so that Henry returned to the governorship in the mid-1780s and Madison returned to the Continental Congress in 1787.

constitutionalists wanted to insulate the legislature from manipulation. The idea of annual elections in a society where the pursuit of public office was more an avocation than a career thus seemed the most obvious way to accomplish this. Equally important, the first constitutions minimized the political capacity and influence of the executive. In most states, governors were annually elected by the legislature and (quoting John Adams) “stripped of most of those badges of domination called prerogatives.”³³ Executive power became just that: the duty to execute and administer policies enacted by the legislature.

42. The decade separating the adoption of the first state constitutions from the ratification of the Federal Constitution in 1787-88 modified these views in some important ways. The Revolutionary War placed enormous and unprecedented burdens on governance. While legislative assemblies met and adjourned, governors had to respond on a daily basis to the demands of war. Moreover, the idea that experience in office would be a boon to sound governance led some thinkers to challenge the hoary maxim about annual elections, with its expectations of high turnover. Considering this question in 1785, Madison noted that “For one part of the Legislature Annual Elections will I suppose be held indispensably though some of the ablest Statesmen & soundest Republicans in the U States are in favour of triennial.”³⁴ He counted himself in the latter group.

43. Two years later, the framers of the Constitution proved amenable to this claim. In their initial discussion of June 12, 1787, they voted (seven states to four) to give the lower house a term of three years. Nine days later, they reduced the term to two years. Some speakers still favored the “fixed habit” of annual elections, while Madison and Alexander Hamilton, soon to be the co-

³³ *Founders' Constitution*, I, 109. The second-generation constitutions of New York (1777) and Massachusetts (1780) allowed the people to elect the governor, triennially in New York, still annually in Massachusetts. Not surprisingly, George Clinton and John Hancock became revolutionary America's two most powerful governors.

³⁴ Madison to Wallace, August 23, 1785, *Madison: Writings*, 44.

authors of *The Federalist*, endorsed three years. Madison offered the most balanced account of the reasons for abandoning annual elections. There was, first, a general question of convenience, and the difficulty of enabling members coming from distant corners of the country to go back and forth between their homes and the capital. Secondly, members “from the most distant States” who wished to be reelected and who faced “a Rival candidate” at home would have to “travel backwards & forwards at least as often as the elections should be repeated.” Third, and arguably most important to Madison, “Much was to be said also on the time requisite for new members who would always form a large proportion [of the total membership], to acquire that knowledge of the affairs of the States in general without which their trust could not be usefully discharged.” As other speakers also noted, the United States was a much larger country than Britain, and it would take each member some time to be educated in the diversity of American affairs.³⁵ Madison believed that the ideal model of congressional deliberation was one in which each lawmaker—and especially the numerically preponderant newcomers—would learn the business of government only in the course of each Congress, which would meet over several sessions with intervals allowing representatives to visit their constituents at home.³⁶

44. The two-year term for members of the House of Representatives predictably became an object of discussion during the ratification debates of 1787-88. But it was arguably another Convention decision, limiting the initial size of the House to sixty-five members (if all thirteen states ratified) that seemed more controversial, when the British House of Commons had fully 558 members. The Anti-Federalist opponents of the Constitution argued that so small a number would

³⁵ Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven, 1911, 1937, 1966), I, 214-215, 360-362, 367-368. After this second debate of June 21, the two-year term remained non-controversial for the rest of the Convention.

³⁶ For a more sustained examination of Madison’s ideals of legislative deliberation, see Jack N. Rakove, *A Politician Thinking: The Creative Mind of James Madison* (Norman, Okla., 2017), 54-95.

make the House of Representatives vulnerable to “cabal,” and it also violated the British opposition writers’ belief that the greater size of a legislative body was also an antidote to its corruption. Madison responded to these arguments in *The Federalist* in multiple ways, not least by arguing that the quality of legislative deliberation would decline if a body grew too numerous. To his way of thinking, the best alternative to legislative corruption involved developing the legislative habits that would encourage representatives to act responsibly. If a body grew too numerous, he worried, that sense of political responsibility would decline, and the danger of corrupt or factious activity would increase.

45. There was one other source of corruption that the framers of the Constitution actively considered. This was the idea that key officials of the national government, in either the legislative or executive departments, could become the targets of bribes from foreign powers. The key word used to describe this danger was *emolument*—a word that seems mysteriously exotic today, but which was commonly used in the eighteenth century to describe a wide array of material payments and benefits. History provided a famous example of the misuse of foreign emoluments that every Framers knew quite well: the secret Treaty of Dover of 1670, in which Louis XIV of France turned Charles II into his ally in his war against Holland, in part by giving him a young French mistress, but also by providing Charles with the additional funds he badly needed. This Treaty was well known to eighteenth-century readers. At the Federal Convention, Gouverneur Morris of Pennsylvania, who is often regarded as a chief architect of the presidency, explicitly invoked it during the July 20, 1787 debate over impeachment:

Our Executive was not like a Magistrate having a life interest, much less like one having an hereditary interest in his office. He may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay, without being able to guard agst. it by displacing him. One would think the King of England well secured agst.

bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was bribed by Louis XIV.³⁷

46. This idea of overt bribery directed by foreign powers at the president or senators remained part of the ratification discussions of 1787-1788. The Anti-Federalist opponents of the Constitution were inventive advocates, and many of their arguments reflected the deep fear of the self-aggrandizing nature of political power that was embedded in American political thinking well before 1776. In a sense, the Anti-Federalists were deeply loyal to the revolutionary cause of 1776.³⁸ But from the vantage point of modern views of political corruption, two aspects of these debates remain especially salient.

47. Contrary to our contemporary understanding of the ambitions of politicians—and especially congressmen—the desire to secure re-election was not the driving motive of officeholders. At both the state and national levels of government, rates of legislative turnover remained remarkably high by twentieth- and twenty-first-century standards. Because that was the case, a modern study of the corrupting forces of political behavior remains extremely difficult to apply to the Founding era. Today, we assume as a matter of course that the desire of legislators to serve term after term after term explains the whole nexus of political ambition; it is what leads them to spend enormous amounts of time courting donors and, in the process, feeding a common perception of the underlying corruption of (to borrow a phrase from Madison) “the political system of the United States.” There were no real equivalents to this in the world of the Founders. They did not actively campaign for office, though occasionally they might give a public speech or write letters to trusted correspondents or even engage in a debate (as Madison and James Monroe once did during their rival efforts to be elected to the First Congress of 1789). There was little if anything

³⁷ Farrand, ed., *Records of the Federal Convention*, II, 68-69.

³⁸ Bailyn, *Ideological Origins*, 331-351.

they could obtain by spending money. Perhaps more important, few of them were active seekers of office or individuals who would have thought or said that politics was their career. Madison was one exception here, serving three-and-a-half uninterrupted years in the Continental Congress and four successive terms in the federal Congress after 1789. Other leading revolutionaries wound up following similar careers, but less from outright ambition than because the Revolution seemed to demand their service.

48. Yet the idea that they would inhabit a political universe in which the continuous solicitation of campaign-related funds had become a norm of daily behavior would have struck them as being wholly improbable and morally offensive. Privately, too, they would have regarded such an existence as a shameful mark of their own political corruption.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 20th day of February 2025 in Stanford, California.

/s/ Jack N. Rakove
Jack N. Rakove