"Reviving the spirit of enterprise:the Role of the Federal labs" in the January Physics Today is an excellent discussion of the issues confronting Federal laboratories. As mentioned, the Department of Commerce is working hard to transfer new technologies from the labs into the economy where they can benefit those who invest in them-- the American taxpayer!

It is important to comment on these efforts in light of Mr. Goodwin's editorial comment that sharing royalties with Federal inventors is "controversial."

John Locke, the British philosopher who laid the groundwork for Western constitutional government, held as a basic principal of freedom that "a man has a right to what he hath mixed his labor with." That this idea also extends to intellectual creativity is expressly stated in our Constitution where Congress is given the right to reserve to inventors the exclusive right to their inventions. Thus, the countries where this intellectual protection was most fully developed, Great Britain and the United States, were also the greatest beneficiaries of the Industrial Revolution which is still the basis of Western prosperity.

Most recently Congress reaffirmed the right of public sector inventors to directly benefit when inventions made under Federal R&D are commercialized. Public Law 96-517, enacted in 1980, requires universities in exchange for patent ownership, to reward their inventors with a share of royalties. In fact, this requirement was made with full university support in order to provide an incentive for joint university/industry R&D. At the same time Congress recognized that the needs of the nonprofit sector did not apply to the private sector. Thus, royalty sharing requirements were not made on small businesses also covered under P.L. 96-517.

The distinction between public and private institutional incentives is an important one. The goal of business is to make a profit through the delivery of new products to the market. Incentive systems to motivate industry employees are key elements fueling the entrepreneurial revolution spreading through the country. It is clear that Federal law should not dictate incentive systems for all the different types and sizes of businesses in this country. Failure to reward productive private inventors has its own penalty-- they simply leave and work for a competitor!

This sort of culture does not exist in public institutions such as laboratories. University and laboratory inventors are hired to expand the frontiers of knowledge. Commercializing subsequent discoveries takes a lot of work and dedication. Royalty sharing is the incentive to undertake this extra work for the hope of extra rewards. Rewards are predicated on success-- not guaranteed!

Dismissing a proven incentive system such as royalty sharing as

"controversial" would be a tragic mistake. Existing bureaucratic award systems have proven to be dismal failures and are regarded as bad jokes in the research community. Royalty sharing does not depend on whether or not your boss or a board likes you, your share is determined by the success of the invention in the marketplace.

Rather than following the ideas of Locke, Federal laboratories operate more like a system designed by Karl (or maybe Groucho) Marx. There are no meaningful incentives for inventors who work harder, or whose research is important to the economy. Both the productive and unproductive work under the same wage scale. The resulting failures were the basis for your article. Unless inventors are brought into the system we will continue to waste some of the best R&D performed in the world.

By involving our Federal laboratories-- and Federal inventors-- in our economy we will unleash a source of new technologies unmatched in the world. The Administration is determined that this chance will not be wasted.

"Reviving the spirit of enterprise:the Role of the Federal labs" in the January Physics Today is an excellent discussion of the issues confronting Federal laboratories. As mentioned, the Department of Commerce is working hard to transfer new technologies from the labs into the economy where they can benefit those who invest in them-- the American taxpayer!

It is important to comment on these efforts in light of Mr. Goodwin's editorial comment that sharing royalties with Federal inventors is "controversial."

John Locke, the British philosopher who laid the groundwork for Western constitutional government, held as a basic principal of freedom that "a man has a right to what he hath mixed his labor with." That this idea also extends to intellectual creativity is expressly stated in our Constitution where Congress is given the right to reserve to inventors the exclusive right to their inventions. Thus, the countries where this intellectual protection was most fully developed, Great Britain and the United States, were also the greatest beneficiaries of the Industrial Revolution which is still the basis of Western prosperity.

Most recently Congress reaffirmed the right of public sector inventors to directly benefit when inventions made under Federal R&D are commercialized. Public Law 96-517, enacted in 1980, requires universities in exchange for patent ownership, to reward their inventors with a share of royalties. In fact, this requirement was made with full university support in order to provide an incentive for joint university/industry R&D. At the same time Congress recognized that the needs of the nonprofit sector did not apply to the private sector. Thus, royalty sharing requirements were not made on small businesses also covered under P.L. 96-517.

The distinction between public and private institutional incentives is an important one. The goal of business is to make a profit through the delivery of new products to the market. Incentive systems to motivate industry employees are key elements fueling the entrepreneurial revolution spreading through the country. It is clear that Federal law should not dictate incentive systems for all the different types and sizes of businesses in this country. Failure to reward productive private inventors has its own penalty-- they simply leave and work for a competitor!

This sort of culture does not exist in public institutions such as laboratories. University and laboratory inventors are hired to expand the frontiers of knowledge. Commercializing subsequent discoveries takes a lot of work and dedication. Royalty sharing is the incentive to undertake this extra work for the hope of extra rewards. Rewards are predicated on success-- not guaranteed!

Dismissing a proven incentive system such as royalty sharing as

"controversial" would be a tragic mistake. Existing bureaucratic award systems have proven to be dismal failures and are regarded as bad jokes in the research community. Royalty sharing does not depend on whether or not your boss or a board likes you, your share is determined by the success of the invention in the marketplace.

Rather than following the ideas of Locke, Federal laboratories operate more like a system designed by Karl (or maybe Groucho) Marx. There are no meaningful incentives for inventors who work harder, or whose research is important to the economy. Both the productive and unproductive work under the same wage scale. The resulting failures were the basis for your article. Unless inventors are brought into the system we will continue to waste some of the best R&D performed in the world.

By involving our Federal laboratories-- and Federal inventors-- in our economy we will unleash a source of new technologies unmatched in the world. The Administration is determined that this chance will not be wasted.

Paul A. Blanchard and Frank B. McDonald's article "Reviewing the Spirit of Enterprise: Role of the Federal Labs," is a timely, well done, useful chronology and discussion of current issues confronting Federal laboratories. I am grateful for the authors' acknowledgement of the Department of Commerce's contribution to the OSTP working group's recommendations on strengthening technology transfer from the Federal laboratories to the private sector. I believe it is important, however, to amplify on part of these recommendations in light of Irwin Goodwin's editorial note describing the guarantee of at least 15% of any royalty to government inventor(s) on any development licensed by the laboratory for commercial use as being "controversial."

While the specifics of this recommendation are clearly open to discussion and modification, the following analysis of the principles involved should help to conclude that the recommendation is more "necessary" than "controversial."

1) John Locke, the British philosopher who masterfully built the consensus for western constitutional government established as one of its principles that "a man has a right to what he hath mixed his labor with." (1) Certainly there can be no argument against extending that right to a person's own ideas and inventions.

2) The United States Constitution builds on Locke's thesis by giving Congress the power to reserve to inventors the exclusive right to their inventions as an

encouragement to the progress of science and useful arts. (2)

3) Public Laws 96-517 and 98-620, which guarantee universities and small businesses the right to inventions made by their inventors in the performance of Federally funded research, qualified university ownership and made it consistent with the constitutional mandate by requiring that royalties be shared with their inventors. (3) This was done with university urging as they feared these returns would be funneled away for other purposes, thereby destroying the inventors' incentive to participate.

4) The explosion of industry-university collaboration accompanied by the transfer of technology triggered in part by P. L. 96-517 (4) suggested the need to establish similar incentives for technology transfer in the Federal laboratories since they, like universities, are isolated from the private sector with no compelling need to bridge the gap.

5) The university-industry collaborative experience has not indicated either a desire or an ability of industry to bias unversities away from basic research to any great extent. In fact, the relationship has no doubt given universities new frontiers to explore which would not have been otherwise addressed.

6) Public Laws 96-517 and 98-620 do not require royalty-sharing between a small business and its inventors since

the goal of such business is to make a profit through the delivery of new products, processes and services to the marketplace. This goal seemed to assure a need to share the fruits of commercialization with its inventors through whatever incentive system is deemed most appropriate, or face the prospect of losing key people to competitors. New incentive systems to motivate industry employees are one of the key elements fueling the entrepreneurial revolution spreading through the country. It is clear that Federal law should not interfere with this kind of industrial flexibility. However, this sort of flexibility cannot be developed in nonprofit or public institutions as their goals are not primarily aimed at delivering new products, processes or services to the marketplace unless laws permit them to do so.

The need to address the incentives that are necessary to motivate Federally employed inventors to participate in the innovative process is one of the important issues of our day. Dismissing royalty-sharing which is an established policy in unversities as being "controversial" and thereby relying on ~~or presuming that~~ government boards that randomly and insufficiently, if ever, reward inventors does not respond to the problem.

Moreover, the Administration's commitment to strengthening third world intellectual property laws through negotiation is best centered on how they and their inventors can benefit. A failure to address the interests of Federally employed inventors

is a dismissal of our heritage and could make our motives suspect in the context of these negotiations.

Foreign Competition

Let me try to put that ~~matter~~ question in context.

When a federally-funded creating organization does not establish a proprietary position in its ideas, the organization is really putting those ideas into the public domain. In the public domain they are freely available not only to American but to foreign industry.

The Japanese especially understand this past policy and continue to exploit it beyond any reasonable expectations. They results, scour the public domain for our basic research — bring it back to Japan — add some value to it. thus creating their own proprietary position — and then export the products covered worldwide

Using this technique the Japanese can predict that they will take the lead in all technologies by the end of the decade.

Insert

Our change in policy has had a very visible effect on Japanese R+D policy — recognizing we are moving to close down ~~NOpay~~ access to our publicly funded research ideas and facilities by giving ownership of technology to our creating organizations they have increased funding their own universities basic research facilities and are actively ~~are~~ trying to buy access into ours

But our federal laboratories still dealing in a public domain culture and the Japanese are clearly taking advantage of that — as places like N.I.H.

There are 1000 foreign ~~investigators~~ at ~~N.I.H.~~ and 700 U.S investigators at N.I.H. Of 1000 foreign investigators 400 are from foreign industry. 100 of these are from Japan and 50 from Germany. Only 10-15 of the U.S. investigators are from the U.S. industry. Only 3 U.S. industry investigators are in Japanese Lab

These dramatic statistics are not going unnoticed at N.I.H.

Dr. Wyngaarden the N.I.H director began advising U.S. industry last fall that the P.L. 99-502 creates a whole new environment for U.S. industry investigators at N.I.H.

1st the Act permits N.I.H. to accept U.S. investigators with industry funds to pay for them.

2nd given a delegation to manage technology - N.I.H. can now agree in advance to license industry sponsors under ideas developed jointly at N.I.H. with U.S. industry investigators.

3rd With the prospect of royalty return to N.I.H, industry can be better assured that inventions will be identified & patented.

Dr. Wyngaarden's initiative under the Act clearly intended to correct the imbalance between foreign & U.S. investigators at NIH. I would further note that Dr. Wyngaarden has the authority under P.L. 99-502 to deny entry into N.I.H. of foreign investigators whose countries do not provide reciprocal treatment to U.S. investigators. Further, the Act leads to the need to require foreign investigators to report inventions made while at N.I.H. for equitable disposition — This is not now done under any stated policy

we hope other fed. Labs will follow N.I.H's example.

The ownership of products of the mind as a civil liberty or a Natural Right.

Locke derived the view that a man has property in the things necessary to the preservation of that life so long as those things are rightfully his "(that is taken from the commonwealth at a point when the specific acquisition harmed or deprived No one else) (emphasis added) A man has a right in himself and thus in his own labor; in how he has a right to what he hath mixed his labor with" or a right to his property.

A corollary of this is Locke's formulation of the labor theory of value almost incidental to his argument: the value and the price of commodities in any society reflect the labor that has gone into them. — (Is this consistent with Marx discussion on Value of labor?)

The function and end of government are the preservation of life, liberty, and property

His economic laws were (1) that the intrinsic value of any piece of goods is not necessarily reflected in its price. (2) that its market value depends upon the proportion of supply and demand. (3) that price is determined by the amount of money relative to the supply and demand for a piece of goods.

civil liberties in its broadest usage is applicable to all those many claims of right that involve an actual or potential legal nexus between the individual and government.

Rights against government are sometimes divided into three types: political rights (those bearing on the political process, such as the right to vote or to engage in political controversy), economic rights (such as entrepreneurial freedom or the right to practice a profession) and private rights (which is a catch-all term meant to cover all rights that are neither political nor economic).

If government undertakes to assure positive rights — for example the right to an adequately paid job — it must assume broad authority to control the economic order, and a government thus endowed with powers may use them to encroach not only on economic liberty but on liberty in general.

There is an old and still controversial question whether other rights can survive in a state where economic rights have been thus denoted.

The general principle is that government should inhibit freedom only as much as it has to in order to serve important community needs, and various attempts have been made to formulate a rule or a test that would implement this premise.

As might be expected, economic abundance in a given society seems to enhance the likelihood that civil freedom will be tolerated: broadly speaking, the more highly developed the country, the less the chance of arbitrary, authoritarian government.

The 17th & 18th centuries liked to talk about such rights as "natural" and by that adjective to suggest that they inhere in human nature, and hence are unalienable. Nowadays the term "human" rights (or civil liberties?) is preferred, because comparative historical observation has shown that these rights are subject to differentiation in time & place and that their real significance must be seen in terms of a minimum sufficient to protect the individual's constitutional zone.

This right (a right to a constitution) was part of a congeries of rights that Locke held to be natural and universal and epitomized in the formula of the rights of life, liberty, and property. Property was, of course, dear to the rising bourgeoisie; but in Locke's understanding, it still was very broadly construed to mean virtually the entire personal sphere of what is one's own.

International Encyclopedia of the Social Sciences

in 1695, *The Reasonableness of Christianity* (*ibid.*, vol. 7, pp. 1–158); various defenses of the *Essay*; economic tracts; and paraphrases of Paul's Epistles. Much of the immediate stimulus to this work was topical: his study of education grew out of private letters to his friend Edward Clarke; the economic tracts all sprang from fiscal and commercial problems of the government; the later writings on toleration were called forth by attacks on his ideas and on William's efforts to solve the problem of dissent in England. Characteristically, however, even his topical writings contain elements of "philosophy," generalizations not required by the work's immediate polemical purpose.

Major contributions

Locke has often seemed a singularly disconnected thinker, an asystematic philosopher with occasional brilliant insights. Since the acquisition by the Bodleian Library of many Locke manuscripts from the Lovelace Collection, the development of Locke's interests and of his thinking can be more accurately traced than before; further, the ways in which his ideas, apparently so disparate, hang together has become clearer from study of the manuscripts. His earliest work was on natural law, which led him ultimately into his serious work on two branches of that large subject, political theory and human understanding. Though these two interests branched widely apart from one another and seemed far removed from his initial concern with the "covering" aspect of natural law, his friends expected, in vain, that he would eventually write a treatise about natural law, after he had completed his *Essay*. His early natural-law essays were written between 1660 and 1664 and deal with both the epistemological problem of knowing in natural law and with the natural law as a binding moral and social force; the essays show clear signs of Locke's later full-scale attack upon innateness and *consensus gentium*, as well as his incipient psychological sensationalism. As for moral natural law, Locke assumed it as a *donnée* from God, binding upon man's reason; this view remains rudimentary both in the *Second Treatise* ([1690*a*] 1960, pp. 283–446) and in Locke's other writings. In his manuscript treatises on the civil magistrate and on toleration, dating from the early years of the Restoration, Locke moved from a restrictive position to a more tolerant one, at first insisting on public order as a primary value and then stressing the irenic power of the civil magistrate, particularly in the regulation of religious practices. From these early work[illegible] philosophical investigations emerged. Th[illegible] will be treated under several headings, with st[illegible] laid upon those elements of his thought most significant for the development of the social sciences: political theory, religious ideas, economic ideas, epistemology, psychology, educational theory.

Political thought. Locke's major contributions to political thought are in his *Second Treatise*, a document notoriously lacking in system, partly because of its remnant character, partly because of its connection with contemporary events, partly because of Locke's failure to rewrite it substantially for publication in 1689, ten years after its completion. Within its own time the work contained "dangerous" doctrines, some anathematized by decree in 1683, when Locke fled his country. By the time of its publication, however, it expressed the parliamentarian ideals of mixed government and separation of powers established in England by the political settlement reached after William's invasion. The origins of the tract seem to have been in the Exclusion crisis; it was designed to justify constitutional change, for which Locke undertook to investigate the origins and structure of civil (political) society. His polemical aim was to diminish popular acceptance of the patriarchalism which gave authority to much of the contemporary argument for absolutism; to do so, he postulated an original, direct relation of every man to God rather than to or through any political intermediary. Each man was in some sense God's "property": bypassing the notion of Adam as a model ruler of the social group, Locke postulated a state of nature regulated by laws derived from God, a state of nature in which men were equal and free before the Lord and each other. Paradoxically, the rule of law (in this case, the rule of the law of nature) was requisite for freedom; without such natural law man's "freedom" would have been anarchy. In this sense Locke's conception approached the anarchic state of nature postulated by Hobbes, although his insistence upon fundamental natural law saved him from Hobbes's pessimism about the lawlessness of basic human nature. From this natural condition, Locke inferred both a "law of reason," by which individuals reach and assent to social consensus, and the practical laws requisite to permit, even to insure, personal freedom [*see* NATURAL LAW]. Originally, in the state of nature, executive power of the natural law was vested in every individual; subsequently—whether suddenly or gradually is not made clear—men consented to live in a common society regulated by the communal executive power of the law of nature. Locke divided this communal power into three—the legislative, executive, and federative powers—with judicial decision a general power of the political commonwealth.

To effect the passage from the state of nature

to "civil society," Locke developed his important variation on the idea of property, which in turn graded into his theory of labor. From the natural-law postulate that a man has property in his own life, Locke derived the view that a man has property in the things necessary to the preservation of that life, so long as those things are rightfully his (that is, taken from the commonwealth at a point when the specific acquisition harmed or deprived no one else). A man has a right in himself and thus in his own labor; in turn, he has a right to what "he hath mixed his labor with," or a right to his property. A corollary of this is Locke's formulation of the labor theory of value, almost incidental to his argument: the value and the price of commodities in any society reflect the labor that has gone into them.

There are two sorts of relations between men, the first a natural social contract, entered into by the exercise of rational considerations of self-preservation, the second defined by rights in property. The function and end of government are the preservation of life, liberty, and property. One corollary of this formulation is that political rights derive from property and that the propertyless are either without political rights or are slaves. Such a conception of the commonwealth permits emphasis both on the common interest and on private holdings, which in Locke's essay (in line with seventeenth-century usage and notions of value) generally means land.

Without in any sense denying the importance and validity of a familial organization of society, Locke demonstrated that the power over children and dependents vested in the father (who shares it with the mother, interestingly enough) is simply a form of trusteeship: the guardian–father has certain obligations toward his children, especially to educate them; when the children reach full exercise of their reason, they are free "from subjection to the will and command of the father." The family was, for Locke, important in his theory of the origins of civil society, the conjunction of male and female being both a symbol of a wider assent and obligation and a primary stage in the voluntary community of mankind. Thus, even in families, arbitrary government is "impossible"; in commonwealths the necessary consent of each individual to enter into the bond of civil society (the social contract) eventuates in election, the choice of representatives charged to exercise legislative power. Legislative power is supreme in Locke's mixed government of separate legislative, executive, and federative powers. His assumption is that a man with political rights (by reason of his property in himself) enters into political life, inheriting with his property his obligations to the government that represents him. In turn, the government may not touch property (i.e., levy taxes) without his consent through his representative. One implication of this formulation is a doctrine of resistance, or revolution, as expressed in the last chapter of the *Second Treatise*, the chapter which, above all others, made Locke objectionable to the government before 1688 and valuable to the government thereafter. Unlike the Protestant resistance-theorists of the sixteenth century, Locke did not base his revolutionary theory upon sanctions of conscience or religion; unlike the English parliamentarians of the 1640s, he did not base it on precedents in English law; unlike Algernon Sidney, he did not base it on a metaphysical and metapsychological natural right to liberty; rather, he advocated a restrained and considered revolution for the restoration of proper balance in the body politic. [*See* SOCIAL CONTRACT.]

Locke's theory of government emphasizes process, both the hypothetical process of human development from a state of nature to civil society and the processes of self-government. He therefore limited the number of specifiable elements in the proper commonwealth and was careful to leave ample room for adjustments to changing social needs. He was, in short, indicating a successful process of representative majority rule rather than setting up an exclusive structure for one. Hence, there are large areas of his thought which seem blank, either because he was unconcerned with total consistency or because he was concerned with leaving social alternatives open, especially in "matters of indifference."

Views on religion. His toleration theory, taken in conjunction with his religious views, demonstrates his appreciation of practical approaches. Thus, his *Letter Concerning Toleration* of 1689, Locke dealt with Christian toleration, "the chief characteristical mark of the true church." Since every man appears orthodox to himself, no one in his right or his wrong mind will accept as just the persecution of himself; furthermore, since in any case persecution cannot touch a man's inmost conviction, regardless of what he may say under stress, there is no practical merit in persecution. Locke politicized the problem of religious pluralism, assigning to the civil magistrate the protection of various rights (here defined as "life, liberty, and indolency of body") of members of a commonwealth. The care of souls was no more committed by God to the civil magistrate than the care of one man's conscience was committed to any other member of society. The magistrate's power consists only in civil force, which is irrelevant to any church (defined as "a voluntary society of men").

From the privileges of toleration, Locke excluded some—he excluded atheists from the benefits of the law, because they refuse to acknowledge its source—but he included idolators, men simply given to erroneous worship. Toleration is to be withheld from religious groups who deny it to others, a view supported by Locke's experiences in France, where persecution of Huguenots reached extremes between 1679 and 1685. Whenever religious assemblies endanger the public peace, then the civil magistrate, on civil grounds, may intervene against them; even then, however, he is not to interfere with their belief, which remains in the category of "things indifferent" and is therefore irrelevant to questions of public order. Although in this work Locke did not justify resistance, rebellion, or revolution for religion's sake, he made it plain that oppression of any kind naturally impels men toward sedition.

In *The Reasonableness of Christianity* Locke defended the Christian revelation against atheism and against natural religion without revelation, demonstrating by scriptural and historical authority the fact of Christ's messiahship. The tract defends the necessity of revelation against the idea of a sufficient natural religion, but at the same time it treats Christ's teachings as the fulfillment and explanation of the moral law of nature. Man's reason cannot by itself discover the full moral law of nature, but it can confirm it. Nowhere in the tract did Locke sanction a particular form of worship, but instead he endorsed a general scriptural Christianity to which, as it were, all Christians could subscribe. (For this, he was roundly attacked as being a deist.) In ways connected with his toleration theory and his epistemology, he adduced the uncertainties of man's perceptions and knowledge to support his minimal articles of faith, drawn from scriptural revelation and corroborated by the action of reason. [*See* CHRISTIANITY.]

Economic ideas. Locke's economic interests, stimulated during his early association with Shaftesbury, emerged long after in 1691 in *Some Considerations of the Consequences of the Lowering of Interest, and Raising the Value of Money* (*The Works . . .*, vol. 5, pp. 1–130) and in 1695 in *Further Considerations . . .* (*ibid.*, vol. 5, pp. 131–206). In these works, he advocated maintaining the interest rate and not devaluing the currency, on grounds of natural law. His economic laws were (1) that the intrinsic value of any piece of goods is not necessarily reflected in its price; (2) that its market value depends upon the proportion of supply and demand (which he called "quantity" and "vent"); (3) that price is determined by the amount of money relative to the supply and demand for a piece of goods. These laws permit prices to be set with some flexibility, according to varying conditions, and they rely upon a controlling notion in Locke's thought, that of self-regulation toward equilibrium. When it came to practice, as in the cases of the poor and of Irish manufactures, Locke advocated government intervention in economic affairs.

Psychology. The aim of Locke's *Essay* (1690*b*) was to determine the limits of human knowledge, so that men might address themselves to problems within their power to solve. He set out to describe the process of human understanding, to inquire into probable knowledge, and to determine the nature of ideas. He concluded, very simply, that ideas have two sources, sensation and reflection upon ideas produced by sensation. It turns out, however, in the course of the book, that knowledge can also be intuitional and demonstrative, though in the discussion intuition tends to be assimilated to sensation and demonstration to reflection. Ideas may be either simple or complex: simple ideas are the result of sensation and reflection and are compounded of simple parts which can be found by analysis. Locke attributed reality to the external world and relied upon intuition to explain the relation between an idea and its referent in the external world. Knowledge derived by intuition (such as that of revelation) is "certain"; certain knowledge can also be derived from demonstration but less reliably than from intuition, since errors in reason and in memory may distort the result of demonstration. Locke's ontological proof of God's existence, much like Descartes's, is an example of the fusion of demonstration with intuition: that is, one's own existence is intuited, and from one's own existence God's can be demonstrated. He relied upon the skeptical provisionalism inherent in empirical investigations, both in his recognition of the role probability plays in human understanding and assessment of life and in his recognition of the idiosyncratic formation of each man's personal set of ideas. As in so much of his work, Locke took a middle position in the *Essay*, incorporating elements of skepticism and elements of idealism, combining what we now call behaviorism with gestalt principles. His empiricism embraced both the particular and the consensual: in the ongoing search for true knowledge individual men are required to check their ideas against those of the group, and the group does so against those of any given individual. [*See* GESTALT THEORY; THINKING.]

Locke's psychological principles are a by-product

of his effort to describe human understanding. His major hypothesis, that the mind is not equipped with innate ideas or principles but is at its formation a "white paper" (his translation of *tabula rasa*), was reached in part through his own empirical observation of children. He concluded that there are only two ways of human understanding, by sensation and by reflection on ideas derived from sensation. His whole notion of "understanding" is developmental; throughout the *Essay* he cited examples from his observation of the successive stages of men's lives. From his observation of children, he demonstrated that their understanding derives from their experience of the external and social world. Approximating modern notions of "control," Locke cited a great deal of evidence from his observation of human beings who were exceptional in that they lacked some "normal" element of apprehension or reflection—children, not yet developed to full powers; idiots; men born blind (including the famous philosophical example of a man who by an operation got his sight); men suffering from amnesia because their heads had been kicked by horses. In spite of their deficiencies, all such people entertained ideas that seemed to them as authentic as those "clear and distinct" ideas that are the hallmark of proper understanding. Madness, drunkenness, and dreaming interested Locke: the Cartesian criterion for human existence, consciousness, seemed to him too narrow to account for the existence of faultily conscious minds. His solution to the problem of identity turned on assumptions now associated with gestalt psychology: on the continuous existence of an organized body whose parts (including its intellectual store) shift over time in relation to one another. So "the night man" and "the day man," the drunken man and the sober man, the madman and the sane man may coexist in the same person, even though their control over consciousness may be intermittent or interrupted. To this notion may be connected Locke's idea of what are nowadays called "roles," the multiple relations, psychological and social (father, brother, son, son-in-law, servant, master, older, younger, etc.), possible and even inevitable in every man's experience. Memory (retention), the operation of which was never altogether accounted for in the Lockean philosophy or psychology, plays a major part in maintaining continuous personal identity. One of Locke's major psychological insights, that arbitrary mental connections are "stamped" on men's minds by the chance conjunctions of their experience, appears in the famous chapter on the association of ideas, an afterthought in his organization. There he demonstrated, by a kind of negative example, the supremacy of experience over rational powers: a man taught to dance in a room containing a trunk could never dance in the absence of a similar trunk; a man nearly axed in a doorway by a berserk village idiot could never go through a door without glancing behind him. So by experience, governing intellectual and emotional constellations are induced in individual minds. This doctrine and that of the *tabula rasa* underlie Locke's precepts for education. [*See* DEVELOPMENTAL PSYCHOLOGY; LEARNING; ROLE; SENSES.]

In the sense that he postulated ideas as originating in sensation, Locke's psychology is certainly mechanistic. His general concern, however, to establish the same organic interrelationship for the contents of the mind as for the members of the body or the state, tempers his mechanism with organic and developmental notions. Although he conceived of the body as made up of elements in a mechanistic organization, he saw that mechanism as having considerable feedback into its own individual, even idiosyncratic, development. Feedback is in turn not automatic, in his view, since the mind's judgment, the faculty which selects and arranges ideas in relation to one another, is also constantly at work during consciousness.

Locke's social conception of language may serve as a partial model for his ideas of how men understand as well as of how society functions: Although the designation of words is established by consensus, each man may alter it privately for himself alone, according to his individual associations of words and experience. Furthermore, though encountered as datum in each man's life, language is not rigid but is subject to modification over time by the social needs of the group using it.

Pedagogy. Locke's ideas of education follow from his psychology. The child inevitably grows into the man and should grow into as healthy a man as possible. Since each child is strongly individuated, no fixed regime works for all children, but Locke laid down general rules of education, chiefly applicable (as he wrote) to gentry sons whose duty was to undertake public service. Boys were to be educated at home, carefully fed, clothed, and taught to build and preserve good health. The father was to "imprint" obedience on his son but with such care and tact as to turn the child–subject naturally into his friend. Rewards and punishments were to be systematic but moderate (Locke outlawed beating, as making a child slavish). The father, tutor, and governor, charged with educating the child, were to be his moral exemplars; therefore, it was necessary for parents both to regulate them-

selves and to choose their surrogates with care. Though children must learn self-denial, some cravings may be gratified, especially since "craving" is so closely allied to "curiosity," nature's instrument to correct ignorance. So the child must be allowed to learn whenever ready and can often be cozened into learning by means of games and toys. Children's questions must always be answered truthfully, and conversation with them must be free of condescension. Instruction in the nature of reality —including the idea of God, excluding the idea of goblins—was to be undertaken early.

As for learning itself, Locke's program was practical: reading, writing, French, then Latin (for use, chiefly); geography, arithmetic, astronomy, geometry, chronology, history, ethics, civil law, rhetoric and logic, natural philosophy; then Greek and Latin as cultural subjects and, last of all, method. For learning by rote Locke had no use; he also advocated learning such practical subjects as trade and accountancy as well as recreations such as music, dancing, gardening, joinery—all useful to young men of property. Finally, the young man should travel, first at home and later abroad, before settling down to matrimony and his social and political obligations at the age of one and twenty.

Locke's originality and influence

In its day Locke's thought seemed strikingly "new," cast in a new language for any literate man to read; it had, naturally, many sources and analogues in ancient and contemporary thought. His skepticism and empiricism came from deep within the medical tradition; his attitude, and even the words he used, recall Sextus Empiricus and, more often, Montaigne, another essayist concerned with knowing, education, understanding, nescience, and probability. Locke had, too, a recognizably British stoicism, a preference for directness and plainness in morality and rhetoric; he often cited Seneca and the stoical writings of Cicero. His toleration theory derived from a long line of Protestant writers going back to Servetus and Erastus and exemplified by his Arminian friends; there are affinities between his view of church–state relations and the thought of Chillingworth, Falkland, and John Owen. His citations of natural law are to Hooker and Grotius, whose books he certainly knew, though he seems to have referred to them more out of piety and the need for authorities than from any desire to analyze their thought in relation to his own. Although he was a notable revisionist of the Cartesian epistemology and psychology, Locke's doctrine of ideas owes something to Descartes, his psychological theory of sensationalism shares elements of Cartesian mechanism, and his ontological proof of God's existence is brief and efficient partly because Descartes's similar proof was so thoroughly argued. Locke's nominalism had many sources: Greek empiricism, the Scotist tradition in scholasticism, and chiefly Francis Bacon and his followers in contemporary England.

However connected to other strands in the history of thought, Locke was characteristically original in pattern and device. His empirically argued rejection of innate ideas and principles, for example, in the first book of the *Essay* ran counter to traditional epistemologies ancient and modern. Among his contemporaries, both Cartesians and Cambridge Platonists, as well as most divines, postulated innateness as the basis of human knowing, relying on both Platonic and Stoical authorities. In psychology and epistemology a major contribution was his concept of the association of ideas, an involuntary experiential formation in the thought of individual men caused by the linkage of their simultaneous experiences. In economic thought his is the first full argument for the labor theory of value; his notions of property, revolution, and the social contract, though deriving from natural-law theory and resistance theory, are combined in a new interrelation and based upon assumptions of the rule of law that are neither narrowly legalistic nor generally metaphysical.

Across the range of Locke's topics of investigation his preoccupations are clear: his constant interest in the relation of thought to behavior, his concern for the balance of individual right and social obligation, his provisional attitudes to solutions, his distrust of dogmatism, his emphasis on equilibrium and self-stabilization. The last emphasis governs his notion of "power," according to which, even though a man is limited in his finite existence by certain conditional restraints, he is nonetheless free to exercise his mind and even his will. Notions of stabilization and equilibrium operate in his epistemology too, where individual understanding is, among other things, conceived as a constant altering of the balance and relationship between different experiences and ideas. Connected with this, one of Locke's personal behavior patterns makes some sense: from the 1650s until the 1690s Locke, wherever he was, joined or organized discussion groups in which ideas could be cooperatively investigated and idiosyncrasies modulated into a permissive consensus.

Locke's influence can hardly be overestimated; nor can it be accurately measured. His idealism, his concentration upon the autonomy of inward life found an extreme, though corrective, disciple in

Berkeley; his skepticism, in Hume. At first his *Essay* was fiercely attacked. Later, except for such idealists as Leibniz and his own pupil, the third earl of Shaftesbury, for most educated people the book seemed to provide as comprehensive a description and explanation of the mind's workings as Newton's of the workings of the cosmos. Locke's influence on deist thought, perceptible in his lifetime and deplored by him, was considerable both in England and in France; his notions of private education were often cited by eighteenth-century English gentlemen at home and in the colonies; his psychological principles were gradually absorbed into accepted belief and can be traced particularly in the work of eighteenth-century novelists (e.g., Richardson, Sterne, and Diderot). Voltaire's enthusiasm for Locke's ideas had considerable effect in popularizing them in prerevolutionary France. As for political thought, the American and French revolutions have been laid at his door: unquestionably his work was widely read in both countries by men concerned for their political rights, but how deeply they read it remains an open question. His epistemology inaugurated a "new way of ideas," his psychology certainly bore fruit in nineteenth- and twentieth-century psychological theory. Locke's works turn up in many auction lists of eighteenth-century private libraries and are found in the libraries of ancient educational institutions in England and America: Trinity College, Dublin, incorporated the doctrines of the *Essay* into its basic curriculum at an early stage, and Locke's influence at colonial Harvard has also been attested.

ROSALIE L. COLIE

[*See also* CIVIL DISOBEDIENCE; CONSENSUS; CONSERVATISM; CONSTITUTIONS AND CONSTITUTIONALISM; LEGITIMACY; NATURAL LAW; POLITICAL THEORY; SOCIAL CONTRACT; *and the biographies of* BACON; BURKE; HARTLEY; HOBBES; HUME.]

WORKS BY LOCKE

(1690*a*) 1960 *Two Treatises of Government.* Edited by Peter Laslett. Cambridge Univ. Press.

(1690*b*) 1959 *An Essay Concerning Human Understanding.* 2 vols. Edited by Alexander C. Fraser. New York: Dover.

Essays on the Law of Nature. Edited by Wolfgang von Leyden. Oxford: Clarendon, 1954. → Contains the Latin text with a translation.

The Works of John Locke. 10 vols. Aalen (Germany): Scientia Verlag, 1963. → A reprint of the 1823 edition.

SUPPLEMENTARY BIBLIOGRAPHY

AARON, RICHARD I. (1937) 1955 *John Locke.* 2d ed. Oxford: Clarendon.

BOURNE, HENRY R. FOX 1876 *The Life of John Locke.* 2 vols. London: King; New York: Harper.

CHRISTOPHERSEN, HANS O. 1930 *A Bibliographical Introduction to the Study of John Locke.* Norske-videnskaps-akademi i Oslo, Historisk-filosofisk Klasse, Skrifter, 1930: no. 8. Oslo: Dybwad.

CRANSTON, MAURICE W. 1957 *John Locke: A Biography.* New York: Macmillan.

DEWHURST, KENNETH 1963 *John Locke (1632–1704), Physician and Philosopher: A Medical Biography.* London: Wellcome Historical Medical Library.

GIBSON, JAMES (1917) 1960 *Locke's Theory of Knowledge and Its Historical Relations.* Cambridge Univ. Press.

GIVNER, DAVID A. 1962 Scientific Preconceptions in Locke's Philosophy of Language. *Journal of the History of Ideas* 23:340–354.

KING, PETER (1829) 1884 *Life and Letters of John Locke, With Extracts From His Journals and Common-place Books.* London: Bell.

LARKIN, PASCHAL 1930 *Property in the Eighteenth Century: With Special Reference to England and Locke.* London and New York: Longmans.

LOCKE, JOHN 1965 *The Library of John Locke.* Edited by John Harrison and Peter Laslett. Oxford Univ. Press.

MACPHERSON, CRAWFORD B. 1962 *The Political Theory of Possessive Individualism: Hobbes to Locke.* Oxford: Clarendon.

MANDELBAUM, MAURICE 1964 *Philosophy, Science, and Sense Perception: Historical and Critical Studies.* Baltimore: Johns Hopkins Press. → See especially Chapters 1 and 2 on John Locke.

OXFORD UNIVERSITY, BODLEIAN LIBRARY 1959 *A Summary Catalogue of the Lovelace Collection of the Papers of John Locke in the Bodleian Library,* by P. Long. Oxford Bibliographical Society, Publications, New Series, Vol. 8. Oxford Univ. Press.

POLIN, RAYMOND 1960 *La politique morale de John Locke.* Paris: Presses Universitaires de France.

SIMON, WALTER M. 1951 John Locke, Philosophy, and Political Theory. *American Political Science Review* 45:386–399.

TUVESON, ERNEST L. 1955 Locke and the Dissolution of the Ego. *Modern Philology* 52:159–174.

VIANO, CARLO A. 1960 *John Locke: Dal razionalismo all' illuminismo.* Turin (Italy): Einaudi.

YOLTON, JOHN W. 1956 *John Locke and the Way of Ideas.* Oxford Univ. Press.

LOGIC

See REASONING AND LOGIC.

LOGICAL POSITIVISM

See POSITIVISM.

LOMBROSO, CESARE

Born of Jewish parents in Verona, Cesare Lombroso (1835–1909), the Italian criminologist, was educated by the Jesuits; he received a degree in medicine from the University of Pavia in 1858 and a degree in surgery from the University of Genoa

SCHWARTZ, THEODORE 1962 The Paliau Movement in the Admiralty Islands, 1946–1954. Volume 49, part 2 in American Museum of Natural History, New York, *Anthropological Papers*. New York: The Museum.

SMITH, MARIAN 1959 Towards a Classification of Cult Movements. *Man: A Record of Anthropological Science* 59:8–12.

SUNDKLER, BENGT G. M. (1948) 1961 *Bantu Prophets in South Africa*. 2d ed. Published for the International African Institute. Oxford Univ. Press.

THRUPP, SYLVIA L. (editor) 1962 *Millennial Dreams in Action: Essays in Comparative Study*. Comparative Studies in Society and History, Supplement No. 2. The Hague: Mouton.

WALLACE, ANTHONY F. C. 1956 Revitalization Movements. *American Anthropologist* New Series 58:264–281.

WILLIAMS, FRANCIS EDGAR 1923 *The Vailala Madness and the Destruction of Native Ceremonies in the Gulf Division*. Territory of Papua Anthropology Report, No. 4. Port Moresby (New Guinea): Baker.

WORSLEY, PETER 1957 *The Trumpet Shall Sound: A Study of "Cargo" Cults in Melanesia*. London: MacGibbon & Kee.

NATURAL LAW

Natural law, which was for many centuries the basis of the predominant Western political thought, is rejected in our time by almost all students of society who are not Roman Catholics. It is rejected chiefly on two different grounds. Each of these grounds corresponds to one of the two schools of thought which are predominant today in the West, positivism and historicism. According to positivism, genuine knowledge is scientific knowledge; scientific knowledge can never validate value judgments; and all statements asserting natural law are value judgments. According to historicism, science (i.e., modern science) is but one historical, contingent form of man's understanding of the world; all such forms depend on a specific *Weltanschauung*; in every *Weltanschauung* the "categories" of theoretical understanding and the basic "values" are inseparable. Hence the separation of factual judgments from value judgments is in principle untenable; since every notion of good and right belongs to a specific *Weltanschauung*, there cannot be a natural law binding man as man. Given the preponderance of positivism and historicism, natural law is today primarily a historical subject.

By "natural law" is meant a law that determines what is right and wrong and that has power or is valid by nature, inherently, hence everywhere and always. Natural law is a "higher law," but not every higher law is natural. The famous verses in Sophocles' *Antigone* (449–460) in which the heroine appeals from the man-made law to a higher law do not necessarily point to a natural law; they may point to a law established by the gods, or what in later parlance is called a positive divine law. The notion of natural law presupposes the notion of nature, and the notion of nature is not coeval with human thought; hence there is no natural law teaching, for instance, in the Old Testament. Nature was discovered by the Greeks in contradistinction to art (the knowledge guiding the making of artifacts) and, above all, to *nomos* (law, custom, convention, agreement, authoritative opinion). In the light of the original meaning of "nature," the notion of "natural law" (*νόμος τῆς φύσεος*) is a contradiction in terms rather than a matter of course.

The primary question is less concerned with natural law than with natural right, i.e., what is by nature right or just. Is all right conventional (of human origin), or is there some right which is natural (*φύσεί δικαῖον*)? This question was raised on the assumption that there are things which are by nature good (health, strength, intelligence, courage, etc.). Conventionalism (the view that all right is conventional) derived its support in the first place from the variety of notions of justice, a variety incompatible with the supposed uniformity of a right that is natural. Yet the conventionalists could not deny that justice possesses a core that is universally recognized, so much so that injustice must have recourse to lies or to "myths" in order to become publicly defensible.

The precise issue then concerned the status of that right which is universally recognized: is that right merely the condition of the living together of a particular society (i.e., of a society constituted by covenant or agreement, with that right deriving its validity from the preceding covenant), or is there a justice among men as men which does not derive from any human arrangement? In other words, is justice based only on calculation of the advantage of living together, or is it choiceworthy for its own sake and therefore "by nature"? The two possible answers were given prior to Socrates. For our knowledge of the thought of the pre-Socratic philosophers, however, we depend entirely on fragments of their writings and on reports by later thinkers.

Plato

Socrates' disciple Plato is the first philosopher whose writings proper have come down to us [*see* PLATO]. While Plato cannot be said to have set forth a teaching of natural law (cf. *Gorgias* 483E and *Timaeus* 83E), there can be no doubt that he opposed conventionalism; he asserts that there is a natural right, i.e., something which is by nature

just. The naturally just or right is the "idea" of justice (*Republic* 501B; also see 500C, D; 484C, D), justice itself, justice pure and simple. "Justice" is defined as doing one's own business or, rather, doing one's own business "in a certain manner," i.e., "well" (433A, B; 443D). A man (or, rather, his soul) or a city is just if each of its parts does its work well and thus the whole is healthy; a soul or a city is just if it is healthy or in good order (cf. 444D, E). The soul is in good order if each of its three parts (reason, spiritedness, desire) has acquired its specific virtue or perfection, and as a consequence of this the individual is well ordered toward his fellow men and especially his fellow citizens. The individual is well ordered toward his fellow citizens if he assigns to each what is intrinsically good for him and, hence, what is intrinsically good for the city as a whole. From this it follows that only the wise man or the philosopher can be truly just.

There is a natural order of the virtues and the other good things; this natural order is the standard for legislation (*Laws* 631B, D). One may therefore say that the natural right in Plato's sense is in the first place the natural order of the virtues as the natural perfections of the human soul (cf. *Laws* 765E–766A), as well as the natural order of the other things that are by nature good. But assigning to each what is good for him by nature is impossible in any society. Such assigning requires that the men who know what is by nature good for each and all, the philosophers, be the absolute rulers and that absolute communism (communism regarding property, women, and children) be established among those citizens who give the commonwealth its character; it also requires equality of the sexes. This order is the political order according to nature, as distinguished from and opposed to the conventional order (*Republic* 456B, C; cf. 428E). Thus natural right in Plato's sense also determines the best regime, in which those who are best by nature and training, the wise men, rule the unwise with absolute power, assigning to each of them what is by nature just, i.e., what is by nature good for him. The actualization of the best regime proves indeed to be impossible or at least extremely improbable; only a diluted version of that political order which strictly corresponds to natural right can in reason be expected.

The establishment of the best regime is obstructed in the last analysis by the body, the only thing that is by nature private (*Laws* 739C; *Republic* 464D), or wholly incapable of being common. Accordingly, sheer bodily (brachial) force must be recognized as having a natural title to rule, a title indeed inferior to that deriving from wisdom but not destroyed by it (*Laws* 690A, C). Political society requires the dilution of the perfect and exact right, of natural right proper: of the right in accordance with which the wise would assign to everyone what he deserves according to his virtue and therefore would assign unequal things to unequal people. The principle governing the dilution is consent, i.e., the democratic principle of simple equality, according to which every citizen possesses the same title to rule as every other (*Laws* 756E–758A). Consent requires freedom under law. Freedom here means both the participation in political rule of those unwise men who are capable of acquiring common or political virtue, and their possessing private property. Law can never be more than an approximation to the verdicts of wisdom, yet it is sufficient to delineate the requirements of common or political virtue, as well as the rules of property, marriage, and the like.

Aristotle

It is in accordance with the general character of Aristotle's philosophy that his teaching regarding natural right is much closer to the ordinary understanding of justice than is Plato's [*see* ARISTOTLE]. In his *Rhetoric* he speaks of "the law according to nature" as the unchangeable law common to all men, but it is not entirely certain that he takes that law to be more than something generally admitted and hence useful in forensic rhetoric. At least two of his three examples of natural law do not agree with what he himself regarded as naturally right (*Rhetoric* 1373b4–18). In the *Nicomachean Ethics* (1134b18–1135a5) he speaks not, indeed, of natural law but of natural right. Natural right is that right which has everywhere the same power and does not owe its validity to human enactment. Aristotle does not give a single explicit example; but he seems to imply that such things as helping fellow citizens who are victims of misfortune resulting from the performance of a civic duty, and worshiping the gods by sacrifices, belong to natural right. If this interpretation is correct, natural right is that right which must be recognized by any political society if it is to last and which for this reason is everywhere in force. Natural right thus understood delineates the minimum conditions of political life, so much so that sound positive right occupies a higher rank than natural right. Natural right in this sense is indifferent to the difference among regimes, whereas positive right is relative to the type of regime—positive right is democratic, oligarchic, etc. (cf. *Politics* 1280a8–22). "Yet," Aristotle concludes his laconic state-

ment on natural right, "one regime alone is by nature the best everywhere." This regime, "the most divine regime," is a certain kind of kingship, the only regime that does not require any positive right (*Politics* 1284a4–15; 1288a15–29). The flooring and the ceiling, the minimum condition and the maximum possibility of political society, are natural and do not in any way depend on (positive) law.

Aristotle does not explicitly link his teaching regarding natural right with his teaching regarding commutative and distributive justice, but the principles of commutative and distributive justice cannot possibly belong to merely positive right. Commutative justice is the kind of justice which obtains in all kinds of exchange of goods and services (it therefore includes such principles as the just price and the fair wage) as well as in punishment; distributive justice has its place above all in the assignment of political honors or offices. Natural right understood in terms of commutative and distributive justice is not identical with natural right as delineating the minimum conditions of political life: the bad regimes habitually counteract the principles of distributive justice and last nevertheless. Aristotle is no longer under a compulsion to demand the dilution of natural right. He teaches that all natural right is changeable; he does not make the distinction made by Thomas Aquinas between the unchangeable principles and the changeable conclusions. This would seem to mean that sometimes, in extreme or emergency situations, it is just to deviate even from the most general principles of natural right.

Stoicism

Natural law becomes a philosophic theme for the first time in Stoicism. It there becomes the theme not primarily of moral or political philosophy but of physics (the science of the universe). The natural (or divine or eternal) law is identified with God, the highest god (fire, ether, or air), or his reason, i.e., with the ordering principle that pervades and thus governs the whole by molding eternal matter. Rational beings can know that law and knowingly comply with it insofar as it applies to their conduct. In this application natural law directs man toward his perfection, the perfection of a rational and social animal; it is "the guide of life and the teacher of the duties" (Cicero, *On the Nature of the Gods* I, 40); it is the dictate of reason regarding human life. Thus the virtuous life as choiceworthy for its own sake comes to be understood as compliance with natural law—with a law, and hence as a life of obedience.

Inversely, the content of natural law is the whole of virtue. The virtuous life as the Stoics understood it is, however, not identical with the life of moral virtue (as distinguished from the life of contemplation), for one of the four cardinal virtues is wisdom that is above all theoretical wisdom; the virtuous man is the wise man or the philosopher. One is tempted to say that the Stoics treat the study of philosophy as if it were a moral virtue, i.e., as something which could be demanded from most men. Justice, another of the four virtues, consists primarily in doing what is by nature right. The foundation of right is man's natural inclination to love his fellow men, not merely his fellow citizens: there is a natural society comprising all men (as well as all gods). The inclination toward the universal society is perfectly compatible with the equally natural inclination toward political society, which is of necessity a particular society. The unchangeable and universally valid natural law—a part of which determines natural right, i.e., that with which justice, in contradistinction to wisdom, courage, and temperance, is concerned—is the ground of all positive law; positive laws contradicting natural law are not valid.

It is sometimes asserted that the Stoics differ from Plato and Aristotle by being egalitarians. Differing from Aristotle (but not from Plato), they denied that there are slaves by nature; but this does not prove that according to them all men are by nature equal in the decisive respect, i.e., as regards the possibility of becoming wise or virtuous (Cicero, *On the Ends of the Good and Bad Things* IV, 56). The peculiarity of the Stoics, in contradistinction to Plato and Aristotle, that explains why the Stoics were the first philosophers to assert unambiguously the existence of natural law would seem to be the fact that they teach in a much less ambiguous way than Plato, to say nothing of Aristotle, the existence of a divine providence that supplies divine sanctions for the compliance or noncompliance with the requirements of virtue. (Cf. Cicero, *Laws* II, 15–17; *Republic* III, 33–34.)

The Stoic natural law teaching is the basic stratum of the natural law tradition. It affected Roman law to some extent. With important modifications it became an ingredient of the Christian doctrine.

Christian teaching

The Christian natural law teaching reached its theoretical perfection in the work of Thomas Aquinas [*see* AQUINAS]. It goes without saying that in the Christian version, Stoic corporealism ("materialism") is abandoned. While natural law retains

its status as rational, it is treated within the context of Christian (revealed) theology. The precise context within which Thomas treats natural law is that of the principles of human action; these principles are intrinsic (the virtues or vices) or extrinsic; the extrinsic principle moving men toward the good is God, who instructs men by law and assists them by his grace. Natural law is clearly distinguished from the eternal law—God himself or the principle of his governance of all creatures—on the one hand, and the divine law, i.e., the positive law contained in the Bible, on the other. The eternal law is the ground of the natural law, and natural law must be supplemented by the divine law if man is to reach eternal felicity and if no evil is to remain unpunished. All creatures participate in the eternal law insofar as they possess, by virtue of divine providence, inclinations toward their proper acts and ends. Rational beings participate in divine providence in a more excellent manner because they can exercise some providence for themselves; they can know the ends toward which they are by nature inclined as good and direct themselves toward them. Man is by nature inclined toward a variety of ends which possess a natural order; they ascend from self-preservation and procreation via life in society toward knowledge of God. Natural law directs men's action toward those ends by commands and prohibitions.

Differently stated, as a rational being man is by nature inclined toward acting according to reason; acting according to reason is acting virtuously; natural law prescribes, therefore, the acts of virtue. Man by nature possesses knowledge of the first principles of natural law, which are universally valid or unchangeable. Owing to the contingent character of human actions, however, those conclusions from the principles which are somewhat remote possess neither the evidence nor the universality of the principles themselves; this fact alone would require that natural law be supplemented by human law. A human law that disagrees with natural law does not have the force of law (*Summa theologica* I, 2, 90 ff.). All moral precepts of the Old Testament (as distinguished from its ceremonial and judicial precepts) can be reduced to the Decalogue; they belong to the natural law. This is true in the strictest sense of the precepts of the Second Table of the Decalogue, i.e., the seven commandments which order men's relations among themselves (Exodus 20.12–17). The precepts in question are intelligible as self-evident even to the people and are at the same time valid without exception; compliance with them does not require the habit of virtue (*Summa theologica* I, 2, 100).

A sufficient sanction is supplied by divine punishment for transgressions of the natural law, but it is not entirely clear whether human reason can establish the fact of such punishment; Thomas surely rejects the Gnostic assertion that God does not punish and the assertion of certain Islamic Aristotelians that the only divine punishment is the loss of eternal felicity. He does say that sin is considered by the theologians chiefly insofar as it is an offense against God, whereas the moral philosophers consider sin chiefly insofar as it is opposed to reason. These thoughts could lead to the view of some later writers that natural law strictly understood is natural reason itself, i.e., natural law does not command and forbid but only "indicates"; natural law thus understood would be possible even if there were no God (cf. Suárez, *Tractatus de legibus ac de Deo legislatore* II, 6, sec. 3; Grotius, *De jure belli ac pacis*, Prolegomena, sec. 11; Hobbes, *Leviathan*, chapter 15–end; Locke, *Treatises of Civil Government* II, sec. 6; Leibniz, *Théodicée*, sec. 183).

Thomas treats natural right (as distinguished from natural law) in his discussion of justice as a special virtue (*Summa theologica* II, 2, 57). Therein he is confronted with the task of reconciling with the Aristotelian teaching the Roman law distinction between *ius naturale* and *ius gentium*, according to which natural right deals only with things common to all animals (like procreation and the raising of offspring), whereas the *ius gentium* is particularly human. The Roman law distinction might seem to reflect early conventionalist teaching (cf. Democritus, fr. 278). Thomas' reconciliation apparently paved the way for the conception of "the state of nature" as a status antedating human society. (Cf. Suárez, *Tractatus* II, 18, sec. 4.)

The Thomistic natural law teaching, which is the classic form of natural law teaching, was already contested in the Middle Ages on various grounds. According to Duns Scotus, only the commandment to love God—or, rather, the prohibition against hating God—belongs to natural law in the strictest sense. According to Marsilius of Padua, natural right as Aristotle meant it is that part of positive right which is recognized and observed everywhere (divine worship, honoring of parents, raising of offspring, etc.); it can only metaphorically be called natural right [*see* MARSILIUS OF PADUA]. The dictates of right reason regarding the things to be done (i.e., natural law in the Thomistic sense), on the other hand, are not as such universally valid because they are not universally known and observed.

Modern developments

Natural law acquired its greatest visible power in modern times: in both the American and the French revolutions, solemn state papers appealed to natural law. The change in effectiveness was connected with a substantive change; modern natural law differs essentially from premodern natural law. Premodern natural law continued to be powerful; but it was adapted to modern natural law, with varying degrees of awareness of what was involved in that adaptation. The most striking characteristics of modern natural law are these: (1) Natural law is treated independently, i.e., no longer in the context of theology or of positive law. Special chairs for natural law were established in some Protestant countries; treatises on natural law took on the form of codes of natural law. The independent treatment of natural law was made possible by the belief that natural law can be treated "geometrically," i.e., that the conclusions possess the same certainty as the principles. (2) Natural law became more and more natural public law; Hobbes's doctrine of sovereignty, Locke's doctrine of "no taxation without representation," and Rousseau's doctrine of the general will are not simply political but legal doctrines. They belong to natural public law; they do not declare what the best political order is, which by its nature is not realizable except under very favorable conditions, but they state the conditions of legitimacy which obtain regardless of place and time. (3) Natural law by itself is supposed to be at home in the state of nature, i.e., a state antedating civil society. (4) In the modern development "natural law" is replaced by "the rights of man"; the emphasis shifts from man's duties to his rights. (5) Whereas premodern natural law was on the whole "conservative," modern natural law is essentially "revolutionary." The radical difference between modern and premodern natural law appears most clearly if one studies the still-remembered great modern natural law teachers rather than the university professors who as a rule rest satisfied with compromises.

The principles informing modern natural law were established by two thinkers who were not themselves natural law teachers, Machiavelli and Descartes. According to Machiavelli, the traditional political doctrines take their bearings by how men should live and thus culminate in the description of imaginary commonwealths ("utopias"), which are useless in practice; one ought to start from how men do live. Descartes begins his revolution with the universal doubt, which leads to the discovery of the Ego and its "ideas" as the absolute basis of knowledge and to a mathematical–mechanical account of the universe as a mere object of man's knowledge and exploitation.

Modern natural law as originated by Hobbes did not start, as traditional natural law did, from the hierarchic order of man's natural ends, but rather from the lowest of those ends (self-preservation) that could be thought to be more effective than the higher ends [*see* HOBBES]. (A civil society ultimately based on nothing but the right of self-preservation would not be utopian.) Man is still asserted to be the rational animal, but his natural sociality is denied. Man is not by nature ordered toward society, but he orders himself toward it prompted by mere calculation. This view in itself is very old, but now it is animated by the concern for a natural-right basis of civil society. The desire for self-preservation has the character of a passion rather than of a natural inclination; the fact that it is the most powerful passion makes it the sufficient basis of all rights and duties. Natural law, which dictates men's duties, is derived from the natural right of self-preservation. The right is absolute, while all duties are conditional. Since men are equal with regard to the desire for self-preservation as well as with regard to the power of killing others, all men are by nature equal. There is no natural hierarchy of men, so that the sovereign to whom all must submit for the sake of peace and ultimately of the self-preservation of each is understood as a "person," i.e., as the representative or agent, of each; the primacy of the individual—of any individual—and of his natural right remain intact (cf. *Leviathan,* chapter 21).

The doctrine of Locke may be described as the peak of modern natural law [*see* LOCKE]. At first glance it appears to be a compromise between the traditional and the Hobbesian doctrines. Agreeing with Hobbes, Locke denies that the natural law is imprinted in the minds of men, that it can be known from the consent of mankind, and that it can be known from men's natural inclination. His deduction of natural law is generally admitted to be confusing—not to say confused—which does not prove, however, that Locke himself was confused. It seems to be safest to understand his doctrine as a profound modification of the Hobbesian doctrine.

It is certain that, unlike Hobbes, Locke sees the crucially important consequence of the natural right of self-preservation in the natural right of property, i.e., of acquiring property, a natural right that within civil society becomes the natural right of unlimited acquisition. Property is rightfully acquired primarily by labor; in civil society, however,

labor ceases to be the title to property while remaining the source of all value. Locke's natural law doctrine is the original form of capitalist theory.

Rousseau too starts from the Hobbesian premise [*see* ROUSSEAU]. Hobbes asserted that the natural right to judge the means of self-preservation is the necessary consequence of the right of self-preservation itself and belongs, as does the fundamental right, equally to all men, wise or foolish. But Rousseau demands that the natural right to judge the means of self-preservation be preserved as an institution within civil society. Every person subject to the laws must as a natural right have a say in the making of the laws by being a member of the sovereign, i.e., of the legislative assembly. The corrective to folly is to be found above all in the character of the laws in general, both in origin and in content: all subject to the laws determine what all must or may not do. The justice or rationality of the laws is thereby guaranteed in the only way compatible with the freedom and equality of all. In the society established in accordance with natural right, there is no longer a need or a possibility of appealing from positive law to natural right, because the members or rulers of that society are not supposed to be just men.

Rousseau further differed from Hobbes by realizing that if man is by nature asocial, he is by nature arational; questioning the traditional view that man is the rational animal, he found the peculiarity of man in his perfectibility or, more generally stated, his malleability. This led to the conclusions that the human race is what we wish to make it and that human nature cannot supply us with guidance as to how man and human society ought to be.

Kant drew the decisive conclusion from Rousseau's epoch-making innovations: the Ought cannot be derived from the Is, from human nature; the moral law is neither a natural law nor a derivative of natural law [*see* KANT]. The criterion of the moral law is its form alone, the form of rationality, i.e., the form of universality.

At about the same time that Kant, sympathizing with the French Revolution, radicalized the most radical form of modern natural right and thus transformed natural right and natural law into a law and a right which are rational but no longer natural, Burke, opposing the French Revolution and its theoretical basis, which is a certain version of modern natural right, returned to premodern natural law [*see* BURKE]. In doing so, he made thematic the conservatism which was implicit to some extent in premodern natural law. Therewith he profoundly modified the premodern teaching and prepared decisively the transition from the natural "rights of man" to the prescriptive "rights of Englishmen," from natural law to "the historical school."

LEO STRAUSS

[*See also* GENERAL WILL; NATURAL RIGHTS; SOCIAL CONTRACT. *Other relevant material may be found under* POLITICAL THEORY.]

BIBLIOGRAPHY

CARLYLE, ROBERT W.; and CARLYLE, A. J. (1903–1936) 1950 *A History of Mediaeval Political Theory in the West.* 6 vols. New York: Barnes & Noble; London: Blackwood.

COGLEY, JOHN (editor) 1963 *Natural Law and Modern Society.* New York: World.

GIERKE, OTTO VON (1880) 1939 *The Development of Political Theory.* Translated by Bernard Freyd. New York: Norton. → First published as *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien.*

GIERKE, OTTO VON (1881) 1958 *Political Theories of the Middle Age.* Cambridge Univ. Press. → First published as "Die publicistischen Lehren des Mittelalters," a section of Volume 3 of Gierke's *Das deutsche Genossenschaftsrecht.* Translated with a famous introduction by Frederic William Maitland.

GIERKE, OTTO VON (1913) 1934 *Natural Law and the Theory of Society: 1500 to 1800.* Translated with an Introduction by Ernest Barker. 2 vols. Cambridge Univ. Press. → A translation of five subsections of Volume 4 of *Das deutsche Genossenschaftsrecht,* first published in 1913. A paperback edition was published in 1957 by Beacon.

JAFFA, HARRY V. 1952 *Thomism and Aristotelianism.* Univ. of Chicago Press.

KELSEN, HANS (1928) 1961 Natural Law Doctrine and Legal Positivism. Pages 389–446, appendix, in Hans Kelsen, *A General Theory of Law and State.* New York: Russell. → First published in German.

MCILWAIN, CHARLES H. (1932) 1959 *The Growth of Political Thought in the West, From the Greeks to the End of the Middle Ages.* New York: Macmillan.

NUSSBAUM, ARTHUR (1947) 1954 *A Concise History of the Law of Nations.* Rev. ed. New York: Macmillan.

ROMMEN, HEINRICH A. (1936) 1947 *The Natural Law: A Study in Legal and Social History and Philosophy.* St. Louis, Mo., and London: Herder. → First published in German.

STRAUSS, LEO 1953 *Natural Right and History.* Univ. of Chicago Press.

NATURAL RESOURCES

See CONSERVATION; PLANNING, SOCIAL, *article on* RESOURCE PLANNING; WATER RESOURCES.

NATURAL RIGHTS

The doctrine of natural rights is properly to be understood as an aspect or feature of the modern doctrine of natural law. Natural rights (plural) are to be carefully distinguished from that natural right

(singular) which is a central conception of classical, premodern political philosophy. Both the premodern and modern teachings result in judgments that some things are naturally right, or right according to nature, and that these things are intrinsically right, or right independently of opinion.

In classical political philosophy "natural right" refers to the objective rightness of the right things, whether the virtue of a soul, the correctness of an action, or the excellence of a regime. Thus Aristotle says in *Politics* (1323a29–33) that no one would call a man happy who was completely lacking in courage, temperance, justice, or wisdom. A man who was easily frightened, unable to restrain any impulse toward food or drink, willing to ruin his friends for a trifle, and generally senseless could not possibly lead a good life. Even though chance may occasionally prevent good actions from having their normal consequences, so that sometimes cowards fare better than brave men, courage is still objectively better than cowardice. The virtues and actions that contribute to the good life, and the activities intrinsic to the good life, are naturally right.

"Natural rights," on the other hand, are the rights that all men possess, because of which they may be obligated to act, or to refrain from acting, in certain ways. According to the teaching developed primarily by Hobbes and Locke, there are many natural rights, but all of them are inferences from one original right, the right that each man has to preserve his life. All other natural rights, like the right to liberty and the right to property, are necessary inferences from the right of self-preservation, or are conceived as implicit in the exercise of that primary right. Similarly, the natural law founded upon natural rights consists of deductions made from the primary right and its implications. The sum of these deductions is the state of civil society. The doctrine of natural rights teaches primarily, then, that all obligation is derived from the right which every man has to preserve his own life. Conversely, it teaches that no man can be bound to regard as a duty whatever he regards as destructive to the security of his life. Thus slavery is wrong because no one can reasonably be asked to place his life at the mercy of another, and not, as in classical natural right, only when it constitutes a wrongful appropriation of one man's life and labor by another.

From this point of view, what is intrinsically right is no longer what is required by, or what partakes of, the good life; rather, it is what is subjectively regarded by the individual as necessary to his security. The individual, abstractly considered, becomes the subject of rights, apart from any particular qualities he may have. "All men are created equal" means, among other things, that the rights each individual possesses by nature are entirely independent of whether he is strong or weak, wise or foolish, virtuous or vicious. The premodern doctrine of natural right, holding that men are obligated by what is required for their perfection or happiness, regarded the less intelligent and less virtuous as being naturally obligated to obey the more intelligent and more virtuous. This natural obligation was independent of the many prudent compromises that various circumstances might dictate—some of them very democratic compromises —by which the consent and loyalty of the less excellent might be enlisted in the service of a regime. But classical natural right was inherently aristocratic in its tendency. The modern doctrine of natural rights makes every individual equally the source of legitimate authority. Moreover, it makes the people as a whole the judge of the legitimacy of the exercise of this authority. Thus, although the doctrine of natural rights may sanction other forms of government—including limited monarchy, as the Declaration of Independence indicates—it is inherently democratic in its tendency. Classical natural right is politically comprehensive, since there is virtually no aspect of human life which does not bear upon its quality. This is indicated by Aristotle's saying that what the law does not command, it forbids. The parallel modern maxim, exhibiting the far more limited scope of the modern state, holds that what the law does not forbid, it permits.

State and polis

The state erected upon the doctrine of natural rights tends in this way to be liberal or permissive. For the doctrine gives rise to the notion that there is a private sphere within which the activities of the individual, or at least those of his activities which do not affect the security of the equal rights of his fellow citizens, should be immune to public inquiry or public control. The activities of the state are thus directed toward providing security for life and for liberty—which are among the conditions of happiness—but not toward providing happiness itself. Each man is to be left free to seek this according to his own private opinion of what happiness is. It is for this reason that Jefferson names, not happiness, but the pursuit of happiness, as being among those rights for the sake of which man organizes civil society.

Nothing better indicates the difference between the earlier and later doctrines than their attitudes

toward religion. From the point of view of classical natural right, religion is one of the most important means by which men are directed toward virtue, and hence toward temporal no less than toward eternal felicity. Accordingly, religious institutions are among the most important political institutions. The point of view of the adherent of the modern natural rights school, on the other hand, was perfectly expressed by Jefferson when he wrote, "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."

The classical polis, or political community, may be defined as that community which includes all other communities but is itself included in none. It is the comprehensive form of human association, and its purposes ascend from the necessary conditions of human existence—the provision of material necessities and of security from all forms of violence—to the sufficient conditions. The latter include the formation of good character in the citizens, education in the liberal arts, and participation in politics and philosophy. These are the characteristic pursuits of gentlemen, and rule by gentlemen is the characteristic solution to the political problem, according to classical natural right. The polis is a partnership in justice, but justice is essentially inferior to friendship. Friendship, writes Aristotle, seems to hold political communities together more than does justice, and legislators seem to care for it more than for justice. For when men are friends, they have no need of justice, but when they are just, they still have need of friends. This implies, among other things, that the polis, as distinct from the modern state, is a very small society. Its size is such that there is virtually no one among the citizens who cannot be either a friend, or a friend of a friend, of every other citizen. For this reason the ultimate sanctions for justice are not the penalties that can be exacted in the law courts but ostracism, formal or informal, from that fellowship in which alone the good citizen feels he can lead the good life. That is at least implied in Socrates' apparent preference of death to exile, as expressed in Plato's *Crito*.

The modern state, erected upon the doctrine of natural rights, is in principle a large society, if not a mass society. The natural limits upon the size of the polis, within which classical natural right has its proper home, are determined by human ability to participate in a common good, by face-to-face relationships. The modern state, however, is founded upon the notion of a social contract and is held together by the power of a sovereign authority to enforce the terms and consequences of that contract. Since the more powerful the sovereign is, the better he is able to perform his functions, and since increase in the size of the state generally adds to the power of the sovereign, the state thus has an inherent tendency to an almost indefinite expansion.

Sovereignty

Sovereignty, as the term has been used since Hobbes, differs radically in meaning from the corresponding term in classical political philosophy, for the same reason that polis differs from "state." In a polis, whoever actually governs—whether the people, the rich, the nobility, or a tyrant—is the sovereign. In the United States of America, however, the governing officials are not the sovereign authority. The people of the United States is the sovereign, even though the people only acts through representatives. It is true that the logic of the notion of sovereignty would permit the people of the United States to transfer its authority to a hereditary monarch. Should it do so, however, the monarch would still represent the people, although the form of the representation would no longer be democratic or republican.

The modern concept of sovereignty can be deduced quite strictly from the proposition that all men are created equal. This proposition does not mean, as we have noted, that men are equal in virtue or intelligence, but that they are equal in certain rights. Each man has a natural right to preserve his life, and no man has a natural obligation to defer to any other man, in deciding what does, and what does not, tend to his own preservation. Government, accordingly, does not exist by nature. The state of nature is the state of men without government. In the state of nature, men's rights are perfect, and they have no duties. The ground of sovereignty is the complete right that every man has to everything in the state of nature, a right which is unlimited because, every man being equal in authority to every other man, there is no one who can prescribe any limits to anyone else. There are limits in the state of nature to what a man may rightly intend to do, since he may not naturally or reasonably intend his own destruction. But these are limits implicit in the inclination to self-preservation, not limits upon what may be done from that inclination.

For reasons sufficiently evident, life in the state of nature, as John Locke puts it, is full of inconveniences or, in the more pungent language of Thomas Hobbes, it is nasty, brutish, and short. The remedy for the state of nature is the state of civil

society, and we must consider carefully how men as equal as those in the state of nature can thus transform their condition. They can do so by consenting or agreeing, each with the other, that they will surrender the exercise of their unlimited right to be sole judges of what tends to their own preservation. This surrender must be equal by each, and it must be complete. No one in civil society can continue to exercise any part of the right he had in the state of nature to be his own master. This agreement, which is the social contract, is an agreement that is made by everyone with everyone. It transforms many isolated individuals into one people, a corporate entity. The agreement is unanimous, for the simple reason that whoever does not agree is not part of the people. Whoever stands outside the agreement is still in a state of nature with respect to the people created by the agreement.

The consequence of the social contract is that henceforward the whole power of the incorporate people shall defend the life of each one of them, instead of each one having to defend himself alone. In order for the whole to act thus, there must be a part which can represent the whole and which can decide for and command the whole. But what part is this? The answer or, more precisely, the initial answer, to this question is "the majority." The majority is the only part which can stand for the whole as soon as the social contract has been made. Unanimity is impossible except with respect to the contract itself. And this, we have seen, is an agreement to let a part stand for the whole. The rule of a minority is inadmissible, for this would imply some reservation by the ruling minority of some of the right each possessed in the state of nature but which all are supposed equally to surrender by entering civil society. Any such reservation would void their membership in the civil society. Hence the rule of the majority is the only rule which is not inconsistent with the original natural equality of all.

Thus the natural right each individual possessed alone, the unlimited right to everything he deemed necessary to his preservation, is transformed into a legal or conventional right possessed by the whole people acting by the majority. However, just as the surrender of the individual's right led to the right of the majority, so the majority may, according to its judgment, surrender its right to a minority. Many forms of government may be legitimate, according to the doctrine of natural rights, yet simple majoritarianism is the only form which is necessarily legitimate. Moreover, while legal or conventional sovereignty may devolve first to a majority, then to a minority, the natural right to life and liberty remains inalienable in the bosoms of individuals, whose consent to be governed is always conditional.

Nature and convention

We have seen that sovereignty, as a construction from the unlimited right of every individual in the state of nature, is itself inherently unlimited. The government of the United States, however, is a limited government, prohibited from doing many things, such as passing *ex post facto* laws and bills of attainder, granting patents of nobility, or establishing a state church. Yet these limits are themselves impositions by the sovereign people of the United States. The people have laid down these boundaries to government, and the people may take them away. From the point of view of the concept of sovereignty, the sovereign may do anything not naturally impossible. But the absoluteness of sovereign power is legal and hypothetical, not natural. For example, the American people may establish a state church, but they ought not to. They ought not to do anything inconsistent with their intention in forming a civil society, which intention was to overcome the discord of wills in the state of nature. Religious disestablishment is now plainly more conducive to that end than is establishment. This distinction reproduces that of the state of nature, in which nothing the individual does can be unjust, because there is no authority which can prescribe to him. Yet he ought not to act in a manner contrary to his self-preservation; for example, he ought not to be unwilling to leave the state of nature when others are willing to join with him in the agreement which produces civil society. Thus, also, the American people may do anything they decide to do, because there is no sovereign to prescribe to them. Yet they ought not to do anything harmful, or omit anything beneficial, to their self-preservation.

The incorporation of naturally discrete individuals into one people creates an artificial person. For the many to regard the decision of a part as if it were a decision of a whole involves a second element of artifice or fiction: the first is that the many are one and the second is that the part is a whole. The doctrine of natural rights logically requires employment of this twofold fiction. And the polarity of this dual fiction is anchored in a twofold nature, a nature constituted by the undeniable concrete reality of the discrete individual, at the one end, and by the equally undeniable abstract reality of the human race, as a species, at the other. "All men are created equal" at once entails propositions about each individual and about the whole human species, of which he is a part. For this reason, the

logic which leads individuals out of the state of nature suggests that sovereigns—who remain in the state of nature with respect to each other—can also emerge from this state by forming a world state. Thus there is also an inherent tendency in the doctrine of natural rights toward the world state, or at least toward a world society inhabited by a comparatively few pacific sovereigns. We may observe that if the whole human race were to become incorporated into one people, then the fiction whereby the many are declared to be one would in one sense coincide with a natural reality. For the fictitious one people would then coincide with the abstract one human race. However, we may also observe that, were it to do so, the fiction that a part represented a whole would thereby become that much more fictitious.

Despite the necessity of the aforesaid fictions, individuals do not cease to be individuals in civil society. Their self-love, the foundation of their natural rights, continues to animate them. A man assaulted in the street may use violence to defend himself, in the absence of legal protection. Moreover, if the power of the sovereign should ever be perverted, so that it becomes the enemy of the people or of any part of the people, the right which has been "completely" surrendered may in fact be resumed. For the surrender was for a purpose—to secure the rights to life, liberty, and the pursuit of happiness—and whenever government becomes destructive of these ends, obedience may be withdrawn. The clear right of the people to alter or abolish governments is a constant incentive to good behavior by governments. The more a government convinces the people it is serving them well, the better they will obey it. The better they obey, the stronger the government, and the stronger the government, the better it can serve.

Unlimited sovereignty and limited government

The exercise of sovereignty is intended to be limited, moderated, and strengthened by the reason that makes sovereignty itself illimitable. For this same reason it must be indivisible. Although the political system of the United States embraces a twofold jurisdiction, of the governments of the states and of the government of the United States, this does not imply a division of sovereignty within the United States. John C. Calhoun remarked that sovereignty was like chastity, that it could not be surrendered in part. This acute witticism accurately reflects the fundamental theoretical construction presented here. As we have seen, equal individuals escape from the state of nature by equally agreeing to surrender to a sovereign the perfect freedom they possessed in that state. But just as, in the defined sense, the individual must surrender all his right to be his own master in order to gain the protection of civil society, so the members of a small civil society cannot become members of a larger civil society without making a similar surrender of sovereignty. For this reason Abraham Lincoln agreed with Calhoun that any division of sovereignty between states and nation was out of the question. But while Calhoun maintained that sovereignty had remained with the states, Lincoln insisted that it must repose in the nation, in the American people as a whole.

Certainly the Declaration of Independence, from which we have construed much of this account of natural rights teaching, supports Lincoln's position. For it speaks emphatically of "one people" dissolving the political bonds which had hitherto connected them with Great Britain. That people was then conducting a war to preserve themselves from what they believed to be the anarchic violence of the British sovereign. It would have been inconsistent with the purpose of that "one people" to have divided themselves into 13 peoples at the same moment that they united to resist oppression. To have done so would have meant that they had deliberately reproduced the dangers of the state of nature with respect to each other at the very moment when they had combined to escape those dangers with respect to the British crown. Therefore, in 1776 the states of the union can have been sovereign only insofar as they were united, and were and are sovereign only because the people of those states were and are parts of the one, indivisible, sovereign people of the United States. To suppose otherwise would be to suppose that the people of the United States had not been formed into one people according to the principles and logic of the doctrine of natural rights. Yet the Declaration of Independence begins with the most ringing affirmation of those principles the world has ever known.

HARRY V. JAFFA

[*See also* NATURAL LAW; SOCIAL CONTRACT; SOVEREIGNTY. *Related material may be found in* CONSTITUTIONAL LAW; HUMAN RIGHTS; *and* POLITICAL THEORY.]

BIBLIOGRAPHY

BECKER, CARL L. (1922) 1958 *The Declaration of Independence: A Study in the History of Political Ideas.* New York: Vintage.

HAWKE, DAVID 1964 *A Transaction of Free Men: The Birth and Course of the Declaration of Independence.* New York: Scribner.

JAFFA, HARRY V. 1959 *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln–Douglas Debates.* Garden City, N.Y.: Doubleday.

JAFFA, HARRY V. 1965 *Equality and Liberty: Theory and Practice in American Politics.* New York: Oxford Univ. Press.

JEFFERSON, THOMAS (1782) 1894 *Notes on the State of Virginia.* Edited by Paul L. Ford. Brooklyn, N.Y.: Historical Printing Club.

RITCHIE, DAVID G. 1895 *Natural Rights: A Criticism of Some Political and Ethical Conceptions.* New York: Macmillan.

STRAUSS, LEO 1953 *Natural Right and History.* Univ. of Chicago Press.

STRAUSS, LEO; and CROPSEY, JOSEPH (editors) 1963 *History of Political Philosophy.* Chicago: Rand McNally.

NAZISM

See NATIONAL SOCIALISM.

NEAR EASTERN SOCIETY

I
THE ISLAMIC COUNTRIES

The chief social characteristics of the Near East in the twentieth century have been the result of the accelerated tempo of modern technological advance. This effort to increase national power and improve living standards began long before the present century in some parts of this area but is only now beginning in others. At first, such changes came about largely through European or American intervention or example; more recently the initiative has been taken by indigenous rulers and governments. The resulting social structure is a web of traditional and new institutions and associations in which the old sometimes provide the foundation for the new, are sometimes simply bypassed and allowed to disappear, or persist significantly alongside the new patterns and even help to shape them.

Physical background

The cultural–geographical area under discussion has been variously called the Near East, the Middle East, southwest Asia, and the Islamic world; these names arose in different times and from different points of view. For our purposes, the Near East comprises the region from Egypt east to Afghanistan and from Turkey south to the Sudan, that is, the following countries: Egypt, Sudan, Jordan, Lebanon, Syria, Saudi Arabia and the remainder of the Arabian peninsula, Iraq, Turkey, Iran, and Afghanistan. (Israel, which shares many of the features of this region, is not included in this article.)

Although these countries share a common history and even today preserve a degree of cultural unity, they are far from being socially or geographically homogeneous. They contain a mixture of human physical types and colors—tall and short statures, broad and slender builds, dark and light skins. Their three main languages—Arabic, Persian, and Turkish—belong to different linguistic families. Their economy is largely agricultural, but there are great differences in the extent and importance of industrialization and of pastoralism. Their communities are chiefly rural, but there are, again, great differences in the intensity of urbanization. Income and education are low when compared to industrial regions, yet the range within the Near East is broad. Lebanon and Turkey thus have a per capita annual income of several hundred dollars and a literacy rate of about 50 per cent; there are some sections of the Arabian peninsula that have perhaps a fifth that income and a tenth that literacy rate. In this widely disparate region, the single most common cultural characteristic is religion, for despite even sizable minorities here and there, Islam is the religion of nine-tenths of the people in the Near East and is by far the predominant faith in every country except Lebanon, where Christians are almost as numerous as Muslims.

The Near East has a population of 130 million to 140 million and an area of nearly 4 million square miles. Most of this area is steppe and desert. Despite a general proximity to the sea, coastal mountain ranges prevent rainfall from reaching the interior, which remains arid, whereas the coasts receive a large amount of precipitation. Water is derived, in some areas, from the two large river complexes, the Nile and the Tigris–Euphrates. Known mineral resources are inadequate for heavy industry. Oil is abundant, but in vastly differing amounts; it is found mostly in the countries around the Persian Gulf. This uneven distribution of resources has resulted in uneven population density; wide areas are virtually uninhabited, while a small amount of land sustains most village and city life.

Three types of community

The social pattern of tribal, village, and urban communities corresponds to the geographical–economic division of the region.

Nomadic groups. The nomads and seminomads of desert and steppe have been important historically in the spread of Islam; in the development of idealized personal traits, such as bravery, pride, generosity, and cunning; and in certain economic functions, such as stockbreeding and the policing of routes of trade and travel. Their mode of exist-

constitutional logic drawn from John Marshall: that congressional power where it exists is plenary, and that plenary jurisdiction includes the power to give power away. Limits on delegation do exist, but they are political, not constitutional, in character (Roche [1952–1963] 1964, pp. 127–161).

JOHN P. ROCHE

[*Directly related are the entries* FEDERALISM; PRESIDENTIAL GOVERNMENT. *Other relevant material may be found in* CENTRALIZATION AND DECENTRALIZATION; DELEGATION OF POWERS.]

BIBLIOGRAPHY

AMERICAN ASSEMBLY 1955 *The Forty-eight States: Their Tasks as Policy Makers and Administrators.* New York: Columbia Univ., School of Business.

BOWIE, ROBERT R.; and FRIEDRICH, CARL J. (editors) 1954 *Studies in Federalism.* Boston: Little.

CALHOUN, JOHN C. (1851) 1953 *A Disquisition on Government, and Selections From the Discourse.* New York: Liberal Arts Press. → Published posthumously.

CARPENTER, WILLIAM S. 1928 Separation of Powers in the Eighteenth Century. *American Political Science Review* 22:32–44.

CORWIN, EDWARD S. 1934 *The Twilight of the Supreme Court: A History of Our Constitutional Theory.* New Haven: Yale Univ. Press.

CORWIN, EDWARD S. (1936) 1962 *The Commerce Power Versus States Rights.* Gloucester, Mass.: Peter Smith.

CORWIN, EDWARD S. (1938) 1957 *Court Over Constitution: A Study of Judicial Review as an Instrument of Popular Government.* Gloucester, Mass.: Peter Smith.

CORWIN, EDWARD S. (1941) 1946 *Constitutional Revolution, Ltd.* Claremont, Calif.: Pomona College.

CUSHMAN, ROBERT E. 1941 *The Independent Regulatory Commissions.* New York: Oxford Univ. Press.

HAMILTON, ALEXANDER; MADISON, JAMES; and JAY, JOHN (1788) 1961 *The Federalist.* Edited with introduction and notes by Jacob E. Cooke. Middletown, Conn.: Wesleyan Univ. Press.

LEVY, LEONARD W. 1963 *Jefferson and Civil Liberties: The Darker Side.* Cambridge, Mass.: Harvard Univ. Press.

LOCKE, JOHN (1690) 1964 The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government. Pages 283–446 in John Locke, *Two Treatises of Government.* Cambridge Univ. Press.

MCLAUGHLIN, ANDREW C. 1932 *Foundations of American Constitutionalism.* New York Univ. Press. → A paperback edition was published in 1961 by Fawcett.

MACMAHON, ARTHUR W. (editor) (1955) 1962 *Federalism: Mature and Emergent.* New York: Russell.

MCWHINNEY, EDWARD 1962 *Comparative Federalism: States' Rights and National Power.* Univ. of Toronto Press.

MONTESQUIEU, CHARLES L. (1748) 1962 *The Spirit of the Laws.* 2 vols. New York: Hafner. → First published in French.

POLLOCK, FREDERICK; and MAITLAND, FREDERIC W. (1895) 1952 *The History of English Law Before the Time of Edward I.* 2 vols., 2d ed. Boston: Little.

RIKER, WILLIAM H. 1964 *Federalism: Origin, Operation, Significance.* Boston: Little.

ROCHE, JOHN P. (1952–1963) 1964 *Shadow and Substance: Essays on the Theory and Structure of Politics.* New York: Macmillan.

SHARP, MALCOLM P. 1935 The Classical American Doctrine of "the Separation of Powers." *University of Chicago Law Review* 2:385–436.

WHEARE, KENNETH C. (1946) 1964 *Federal Government.* 4th ed. New York: Oxford Univ. Press.

WRIGHT, BENJAMIN F. 1933 Origins of the Separation of Powers in America. *Economica* 13:169–185.

III
CIVIL LIBERTIES

"Civil liberties," as commonly used, is not a technical, precise term but a loose one denoting the personal rights and freedoms that are—or ought to be—respected by government. The phrase is not quite so broad as "liberty." It does not apply to the freedom of Robinson Crusoe on his island, where there was no government; it does not embrace those areas of private option where the law can play no part, as when a man freely chooses to be a fool, or a gentleman, or a knave; nor can the term be used very meaningfully in connection with such a concept as the "right of revolution," which is by nature a nonlegal privilege. But in its broadest usage the term is applicable to all those many claims of right that involve an actual or potential legal nexus between the individual and government. However, lately, especially in the United States, there has been some tendency to single out "civil rights" (the protection of minorities) as a separate category and to use "civil liberties" to describe all other claims of personal right. The distinction is not entirely stable, but it has the merit of subdividing an almost impossibly multifarious subject, and in the discussion that follows "civil liberties" is used in this somewhat narrower sense.

Even within these defined limitations the subject is very extensive, and further problems of definition and classification remain. It is evident that civil liberty can be thought of either negatively, as the individual's right *not* to have something done *to* him, or positively, as his right to have something done *for* him—for example, as the right against state interference with the publication of a political pamphlet or as the right to be provided with the facilities for publishing it. The negative category is the traditional one, and it will command the lion's share of attention in this article. But the truism that underlies the idea of positive liberty should not be overlooked: the freedom to read is meaningless if no books are available. Negative liberties can themselves be further subdivided into rights against interference by government and rights against interference by private individuals

or groups. Again the former category is the more traditional, but again the less orthodox view merits a word by way of emphasis. In order to be really free to speak, a street-corner orator may need not only the assurance that the police will leave him alone but also the assurance that they will protect him from the angry reactions of his audience, that the state will "hinder hindrances" to his freedom (see Table 1).

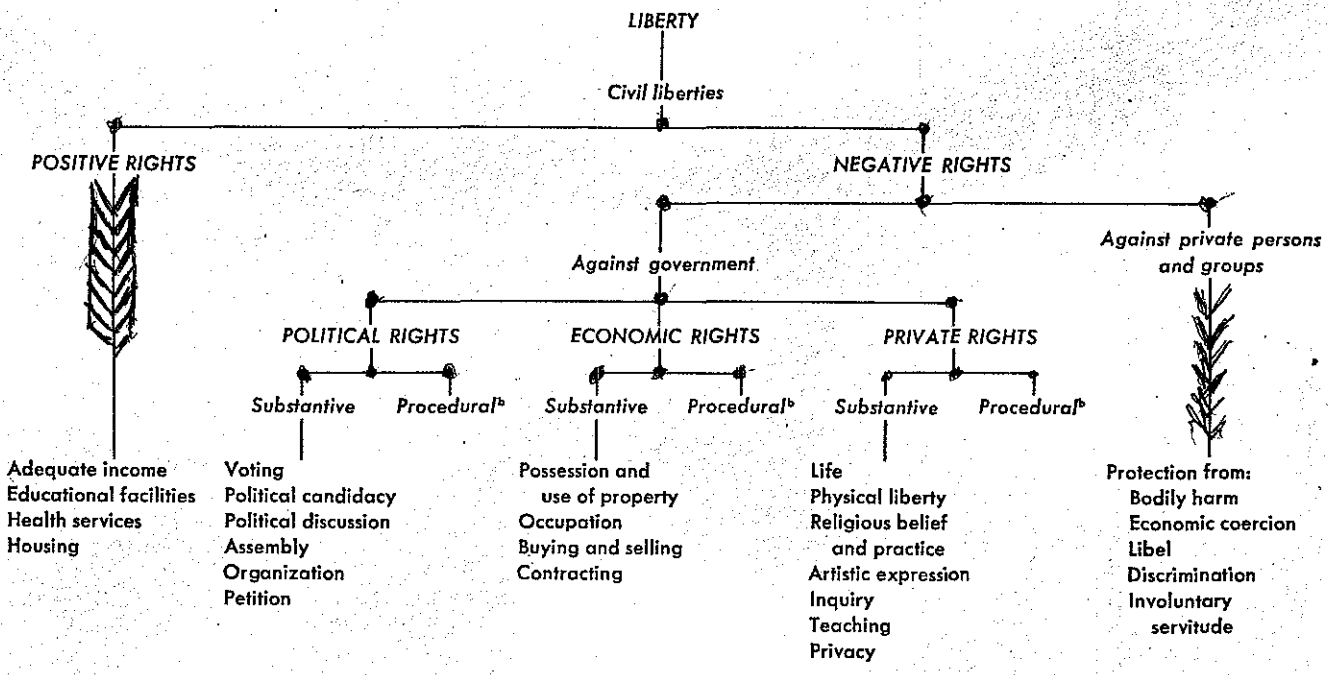
Rights against government are sometimes still further divided into three types: political rights (those bearing on the political process, such as the right to vote or to engage in political controversy), economic rights (such as entrepreneurial freedom or the right to practice a profession), and private rights (which is a catch-all term meant to cover all rights that are neither political nor economic). Obviously these are imperfect categories, since they are not always mutually exclusive (is freedom of artistic expression a private right, or can it be said to bear indirectly on the political process?), but they do represent distinctions that have been drawn in practice and in the literature, and they have, therefore, a loose pragmatic value.

Finally, each of these three classes of rights against government subsumes two kinds of rights, the "substantive" and the "procedural." The substantive civil liberties are those regarded, in some degree, as ends in themselves; procedural rights are those having to do with the way in which government must proceed in dealing with substantive liberties.

Rise of the modern concept

Some concept of civil liberty can be traced far back into European history. Athenians of the age of Pericles gloried in their freedom of discussion and in their right to participate in public decisions. In the Middle Ages the feudal order rested heavily on the idea of legal rights that even the greatest lord was bound to respect, always in theory and often in fact. The barons who wrung the Magna Charta from King John were not, as they saw it, claiming new privileges but demanding that traditional immunities be reconfirmed. Nevertheless, the modern concept, although related to these older forms, is different enough to be regarded as a new species. In the Greek city-state freedom was a matter not so much of private right as of public good: the individual's liberty was instrumental to and defined by the welfare of the city. And in both the Greek and the medieval understanding men held their rights by virtue of their status rather than by virtue of their manhood. The freedom of

Table 1 — A schematic description of civil liberties[a]



a. The enumeration of specific rights and liberties in this table is meant to be suggestive, rather than exhaustive.

b. The same procedural rights apply generally to the three categories of substantive rights: security against arbitrary administrative action (e.g., illegal detention, coerced confession, unreasonable search and seizure, confiscation of property), security against unfair trial procedures (e.g., inadequate notice and hearing, denial of counsel, compulsory self-incrimination, double jeopardy, cruel and unusual punishment), and security against vague statutory prohibitions, ex post facto laws, and bills of attainder.

the Greek citizen did not extend to noncitizens, and the feudal vassal enjoyed the rights associated with his rank and order and was obliged, of course, to perform reciprocal duties. The dominant modern idea acknowledges a realm of personal value that is a good in itself, quite apart from the welfare of the community, and with some exceptions it assumes that rights accrue to men because they are men and not because of their status or their performance.

This idea, indeed, also finds some antecedents in premodern times; it smacks of the viewpoint that penetrated Roman law by way of the Stoics and Cicero. But in modern history the idea was given a new and irresistible thrust by the Reformation, which fostered a belief in individualism, and by the rise of capitalism, which provided that belief with the indispensable support of the nascent bourgeoisie. At various times since the seventeenth century, historical forces have emphasized one or another of the classes of civil liberties described in the opening paragraphs above. At first the main thrust was for freedom from the private power of the nobles and others who monopolized trade and restrained its development; this antifeudal movement supported a strengthened monarchy and a unified nation-state. Then, as the stronger monarch himself became a threat, the partisans of freedom sought to curb the state authority he embodied, first by demanding that his agents, judicial and administrative, respect certain procedural limitations when enforcing his will, then by claiming political rights that challenged his monopoly of state powers. The latter movement gathered force in the seventeenth and eighteenth centuries and reached a climax in the American and French revolutions. Its full implications have not been realized even to the present day, but under its impetus governmental power in western Europe and in North America tended gradually to devolve from the monarch to an oligarchy and finally to the majority of the populace. As this development proceeded it became apparent that political rights, although vital, were not enough: the majority, like the monarch, might use state power for good or ill. One result of this realization was a re-emphasis of substantive rights, a re-emphasis that began in the nineteenth century with an increased demand for economic freedom and shifted in the twentieth century to a new concern for other rights against government. This shift was accelerated by the spectacle of the "totalitarian" systems that arose in Europe after World War I. Another result was the development of the concept of positive liberty—"freedom for" rather than "freedom from"—which in some modern systems is regarded as a supplement to, and in others as a substitute for, the negative view of civil liberty.

Problems of conflicting liberties

Although, as has been said, different concepts of civil liberty have been emphasized at different times in the Western world, in general the development has also been cumulative—that is, the shift to a new emphasis has seldom led to an explicit repudiation of the old. The result is that most modern states at least profess to respect nearly the whole vast and sometimes bewildering congeries of civil liberties that has been described. Evidently this profession creates problems, not the least of which arises from the fact that these heterogeneous liberties may conflict with one another. If government undertakes to ensure positive rights—for example, the right to an adequately paid job—it must assume broad authority to control the economic order, and a government thus endowed with powers may use them to encroach not only on economic liberty but on liberty in general. In the communist world this dilemma has been more or less frankly resolved by the subordination of even such rights as free speech and fair trial to the cause of "strengthening the socialist system." In the West peoples have tried, with varying success, both to enjoy the "welfare state" and to maintain private and political freedom, although the range of economic freedom from public control has certainly contracted since the heyday of laissez-faire ideology in the nineteenth century. There is an old and still controversial question whether other rights can survive in a state where economic rights have been thus demoted. So far the evidence suggests a very tentative "yes." In the United States, for example, the increase in government economic control since 1930 has been accompanied by a growing (although still inadequate) concern for other personal freedoms. But a different answer might have seemed justified in the 1930s, when the twin phenomena of economic depression and fascism dominated the world landscape, and history has perhaps not yet provided enough data so that the book can be closed on this issue.

However, even if the problem of economic liberty is defined away or bypassed, potential conflict between other civil liberties remains a difficulty. The right to comment on public affairs is no doubt essential in any free society, yet if the comment concerns a pending court case, it may impair the right to fair trial, which is equally essential. The religious zealot must be allowed to urge his views, but he may in doing so encroach on the right of

others to be let alone, the "right to privacy." Most discussion of such perplexities has so far been limited to ritualistic advocacy of "freedom" or "order," categories of little analytic value in this context. There is need for more treatments that recognize and cope with both horns of the dilemma.

Much the same thing can be said about the overarching problem of drawing the line between personal rights and public authority in concrete instances. Because they were struggling against an outright state policy of repression, the historic spokesmen of freedom usually employed the language of exhortation: their declarations took the form of general and often absolutist propositions. Opposition to them, on the other hand, was equally unqualified: liberty was "license," which in turn was defined as anything the governors wished to proscribe. Such polarization was inevitable in a predominantly authoritarian system, and exhortation will always have its uses. But in states whose governments are committed to recognizing a range of legitimate civil liberty (and this is true today in most states in the noncommunist world), these uses are limited. The problem in such polities is to develop a just and workable reconciliation of two acknowledged goods—personal rights and community need. Hortatory, absolutist generalizations on either side can carry only part of the way to the problem's solution. Indeed, if depended on too much, they may hamper the solution by obscuring the fact that such a solution exists, that both the claims of the individual and the claims of authority must usually be weighed in the scales.

It is arguable that certain personal rights ought to be absolutely immune from state transgression: the "right to believe" has sometimes been so regarded; some procedural immunities, such as the right against forced confession, may fall in the same category. But all legal systems have recognized that at some point most freedoms may be restricted; the difficulty is where and how to set that point so as to admit valid community claims and yet ensure the maximum of personal liberty. The general principle is that government should inhibit freedom only as much as it has to in order to serve important community needs, and various attempts have been made to formulate a rule or a test that would implement this premise. The "clear and present danger" concept (that speech can be restricted only when it threatens an immediate and serious evil) represents one such attempt; the "balancing test" (that speech can be restricted when the state interest in suppression outweighs the private interest in freedom) represents another. But insofar as these "rules" are not merely tautological, they are shorthand phrases for a large number of alternatives that must be considered before a reasonable conclusion is reached—for example, the distinctions between "advocacy" and "incitement," between "prior restraint" and "subsequent punishment," between "state convenience" and "state necessity." It would be desirable to analyze these alternatives in terms of the issues posed by the conflict between various exertions of state power and various kinds of liberty (e.g., an outright prohibition of free speech may raise questions different from those raised by an ordinance that only regulates the time, place, and manner of such speech; freedom of religious utterance and freedom of political advocacy may stand on different grounds).

Although conceptual treatments of the kind discussed above would be useful, they would leave unanswered other very important questions that should not be overlooked. Even if analysis can provide formulas for the reasonable protection of civil liberties, there remain the issues of what conditions are most likely to secure that protection in practice and, more specifically, what constitutional arrangements are most useful in this regard.

Conditions for protection of civil liberties

The first question is really an aspect of a much broader one—what conditions make for a "democratic" or "competitive" political system—and this is an issue too large and complex to be adequately treated here. However, a few contingent suggestions can be ventured. As might be expected, economic abundance in a given society seems to enhance the likelihood that civil freedom will be tolerated: broadly speaking, the more highly developed the country, the less the chance of arbitrary, authoritarian government. Yet this correlation may not be entirely dependable: it has been argued that in the early stages of economic progress a country may be more, rather than less, prone to generate the tensions that lead to authoritarianism. Education is another factor that appears to produce a national milieu favorable to civil liberties. Indeed, studies have found that even within nations the most educated tend to be the most favorable to "democratic values." But it has been contended that the first steps toward widespread literacy may turn a nation in quite the opposite direction, and the case of Nazi Germany demonstrates that even a high educational level is not enough. Habit and custom also play a part: a well-established tradition of libertarianism tends to per-

petuate itself. It has been urged that "pluralism" with respect to economic and social interests conduces to a free polity; certainly a nation sharply divided into two camps (e.g., the rich and the poor) is not likely to be a free one. Scholars have also from time to time argued that such factors as "national character" and "consensus on fundamentals" are determinative, but empirical study so far has not fully confirmed these insights. Finally, it is worth noting that certain political characteristics may affect the matter. Heavy involvement in politics of the military or of religious groups is often unfavorable to civil freedom; a one-party state need not be tyrannical, but it is likely to be. With the proliferation of new nations in modern times, political scientists are finding examples of an almost endless variety of objective circumstances, and further progress can be expected toward systematic understanding of the environmental prerequisites for civil liberty.

Constitutional guarantees

The emergence of new nations should shed brighter light on the constitutional arrangements for civil liberties. The past offers several prescriptions, but two stand out: the British system of parliamentary supremacy, in which civil liberties are preserved by the tradition of governmental self-restraint, and the American system, with a written bill of rights interpreted and enforced by judicial review. The difference is not so sharp as this bare description suggests—in practice Parliament also feels committed to historic written documents, such as the Act of Settlement, and custom plays a part in determining the actual constitutional structure in the United States—but a difference it is nonetheless. In spite of Britain's impressive success in maintaining civil liberties, the device of a written, nominally binding bill of rights has been adopted very widely by modern nations (Israel and some of the states of the British Commonwealth are among the exceptions), and debates on this matter seem rather academic. But questions remain about the content and character of such a statement. What kinds of rights should be included? Should the declaration list "positive rights," such as the right to employment, which was formally secured by Germany's Weimar constitution and by the Soviet constitution of 1936? Should it include guarantees of rights against private action, such as the right against "abuse of economic power," which is specified in the constitution of modern West Germany? The difficulty is that such rights are not self-executing; they depend on the willingness of the government to take the positive steps that are necessary to make them real—e.g., to stimulate the economy, or to adopt adequate regulatory measures. It has been argued that such guarantees are useful as statements of aspiration and as admonitions to the governors. Contrariwise, it has been suggested that being legally unenforceable, such merely moral prescriptions may cheapen the whole concept of rights in the minds of both governors and governed.

Even if the bill of rights takes the traditional form of negative restrictions on government, should these restrictions be expressed in general terms ("due process of law," "freedom of religion") or should they be spelled out in detail? Should the rights be stated as absolutes ("Congress shall make no law . . . abridging the freedom of speech") or in qualified terms (as in the Nigerian provision that rights may be limited in ways that are reasonably justified in a democratic society)? Should the declaration list all negative rights that seem important (the Weimar constitution protected motherhood and forbade public instruction that hurt the feelings of nonconformist pupils); if not, which rights do merit explicit statement? Common sense and past experience suggest tentative answers to such questions; further observation and future experience should bring more enlightenment.

Finally, supposing a nation's cultural and political environment makes civil liberty plausible and the nature and content of the bill of rights has been determined, how can those rights be best enforced? Probably the primary, and surely an indispensable, agency is an independent judiciary. It is hard to see how civil liberty can be more than an empty promise unless there are courts free to handle claims between persons and to check the arbitrary acts of administrative officials. Whether the judiciary should also be granted the power to enforce the bill of rights against the legislature itself—that is, whether it should exercise the power of judicial review—is an important question discussed elsewhere [*see* JUDICIAL PROCESS, *article on* JUDICIAL REVIEW]. A few decades ago many scholars, even in the United States, were skeptical of judicial review, which they felt had been used by the Supreme Court to restrain economic reform rather than to protect the rights of man. Since then that court and, to a lesser extent, the judiciaries of some American states have done more to defend civil liberties than any other agency of American government, and the attitude of scholars has changed accordingly. During the same period there has been a tendency, although not an overwhelm-

ing one, for other countries (e.g., the German Federal Republic, Italy, India) to adopt judicial review in some form, and as history proceeds there will be a growing body of evidence on the relation between civil liberties and this once uniquely American institution.

ROBERT G. MCCLOSKEY

[*See also* CIVIL DISOBEDIENCE; DEMOCRACY; EQUALITY; FREEDOM; HUMAN RIGHTS.]

BIBLIOGRAPHY

CHAFEE, ZECHARIAH JR. 1941 *Free Speech in the United States.* Cambridge, Mass.: Harvard Univ. Press. → Supersedes Chafee's *Freedom of Speech,* 1920.

COMMAGER, HENRY STEELE et al. 1951 *Civil Liberties Under Attack.* Philadelphia: Univ. of Pennsylvania Press.

CORWIN, EDWARD S. 1948 *Liberty Against Government: The Rise, Flowering and Decline of a Famous Juridical Concept.* Baton Rouge: Louisiana State Univ. Press.

CUSHMAN, ROBERT E. 1956 *Civil Liberties in the United States: A Guide to Current Problems and Experience.* Cornell Studies in Civil Liberty. Ithaca, N.Y.: Cornell Univ. Press.

EMERSON, THOMAS I.; and HABER, DAVID (1952) 1958 *Political and Civil Rights in the United States: A Collection of Legal and Related Materials.* 2d ed., 2 vols. Buffalo, N.Y.: Dennis.

FELLMAN, DAVID 1958 *The Defendant's Rights.* New York: Holt.

HOBHOUSE, LEONARD T. 1911 *Social Evolution and Political Theory.* New York: Columbia Univ. Press.

KAUPER, PAUL G. 1962 *Civil Liberties and the Constitution.* Ann Arbor: Univ. of Michigan Press.

MEIKLEJOHN, ALEXANDER 1960 *Political Freedom: The Constitutional Powers of the People.* New York: Harper.

ROCHE, JOHN P. 1963 *The Quest for the Dream: The Development of Civil Rights and Human Relations in Modern America.* New York: Macmillan.

SCHUMPETER, JOSEPH A. (1942) 1950 *Capitalism, Socialism, and Democracy.* 3d ed. New York: Harper; London: Allen & Unwin. → A paperback edition was published by Harper in 1962.

STOUFFER, SAMUEL A. (1955) 1963 *Communism, Conformity, and Civil Liberties: A Cross-section of the Nation Speaks Its Mind.* Gloucester, Mass.: Smith.

IV
CIVIL RIGHTS

Although the terms "civil rights" and "civil liberties" are often used interchangeably, when they are differentiated the latter generally denotes the rights of *individuals,* while the former refers to the constitutional and legal status and treatment of *minority groups* that are marked off from the majority by race, religion, or national origin. The following illustration will show the difference. In the United States since the end of slavery, there has never been any question about the Negro's equal rights to freedom of religion or freedom of the press—basic *civil liberties*; at the same time, he could be treated as a member of his race, and not as an individual, with respect to the schools he could attend and the public facilities he could enjoy—basic *civil rights.* The distinction between the person as an individual and the person as a member of a group has its roots in history, morality, and social psychology. Reinhold Niebuhr noted that

> It may be possible, though it is never easy, to establish just relations between individuals within a group purely by moral and rational suasion and accommodation. In inter-group relations this is practically an impossibility. The relations between groups must therefore always be predominantly political rather than ethical, that is, they will be determined by the proportion of power which each group possesses at least as much as by any rational and moral appraisal of the comparative needs and claims of each group. (1932, pp. xxii–xxiii)

While individual and group rights are to be differentiated, it is probably true that there is no chance for the emergence of the latter if the former are denied, so that the struggle for civil liberties must first be won and the fundamental human rights vindicated and secured before minority rights will be recognized. The struggle for civil rights cannot be conducted for those who are yet denied basic human rights.

In the broad sweep of history—though no doubt there have been numerous exceptions—the relations of a dominant majority toward a weak minority group, or of the conqueror toward the defeated enemy, first took the form of total annihilation or of cannibalism; then the form of slavery or total subjection; then the milder yet still severe form of assignment to an inferior caste; then cooperation and equality. Yet in modern times all forms have coexisted: in Nazi Germany the Jewish people were exterminated, in India the Untouchables still suffer because of the caste system, and in the United States the Negroes are moving into full equality. Even in the ancient world, while Aristotle was teaching that non-Hellenic peoples were fit only for slavery, his former pupil, Alexander of Macedon, acted on the principle that Greeks and Persians, victors and vanquished, could associate on the basis of equality and fraternity.

On one hand, one finds everywhere and at all times fear and hatred of the foreigner, the stranger, the man of different color or tongue or beliefs; on the other hand, there is evidence of an effort of the human consciousness to be aware of the universal in all men, of a common bond and a common destiny. "The universal in its true and inclusive sense is a thought," Hegel said, "that it has

HANDLIN, OSCAR 1957 *Race and Nationality in American Life*. Boston: Little.

HANDLIN, OSCAR 1959 *The Newcomers: Negroes and Puerto Ricans in a Changing Metropolis*. Cambridge, Mass.: Harvard Univ. Press.

HANDLIN, OSCAR 1964 *Fire-bell in the Night: The Crisis in Civil Rights*. Boston: Little.

HARRIS, ROBERT J. 1960 *The Quest for Equality: The Constitution, Congress, and the Supreme Court*. Baton Rouge: Louisiana State Univ. Press.

HEGEL, GEORG W. F. (1817) 1841 *Werke*. Volume 6: Encyklopädie der philosophischen Wissenschaften im Grundrisse. 2d ed. Berlin: Duncker. → Translation of extract in text provided by Milton R. Konvitz.

KALLEN, HORACE M. 1924 *Culture and Democracy in the United States: Studies in the Group Psychology of the American Peoples*. New York: Liveright.

KONVITZ, MILTON R. 1946 *The Alien and the Asiatic in American Law*. Ithaca, N.Y.: Cornell Univ. Press.

KONVITZ, MILTON R. 1947 *The Constitution and Civil Rights*. New York: Columbia Univ. Press.

KONVITZ, MILTON R. 1953 *Civil Rights in Immigration*. Ithaca, N.Y.: Cornell Univ. Press.

KONVITZ, MILTON R. (editor) (1954) 1965 *Bill of Rights Reader*. 3d ed. Ithaca, N.Y.: Cornell Univ. Press.

KONVITZ, MILTON R. 1961 *A Century of Civil Rights*. New York: Columbia Univ. Press.

KONVITZ, MILTON R. 1966 *Expanding Liberty: Freedom's Gains in Postwar America*. New York: Viking.

MONTAGU, ASHLEY (1951) 1952 *Statement on Race: An Extended Discussion in Plain Language of the UNESCO Statement by Experts on Race Problems*. 2d ed. New York: Schuman.

MOSKOWITZ, MOSES (1958) 1959 *Human Rights and World Order: The Struggle for Human Rights in the United Nations*. Dobbs Ferry, N.Y.: Oceana; London: Stevens.

MYRDAL, GUNNAR (1944) 1962 *An American Dilemma: The Negro Problem and Modern Democracy*. New York: Harper. → A paperback edition was published in 1964 by McGraw-Hill.

NIEBUHR, REINHOLD 1932 *Moral Man and Immoral Society: A Study in Ethics and Politics*. New York and London: Scribner. → A paperback edition was published in 1960.

ROBINSON, JACOB 1946 *Human Rights and Fundamental Freedoms in the Charter of the United Nations: A Commentary*. New York: Institute of Jewish Affairs.

ROSE, ARNOLD M. (editor) 1951 *Race Prejudice and Discrimination: Readings in Intergroup Relations in the United States*. New York: Knopf.

ROSE, ARNOLD M.; and ROSE, CAROLINE 1948 *America Divided: Minority Group Relations in the United States*. New York: Knopf.

SILBERMAN, CHARLES E. 1964 *Crisis in Black and White*. New York: Random House.

STAMPP, KENNETH M. 1956 *The Peculiar Institution: Slavery in the Ante-bellum South*. New York: Knopf.

TANNENBAUM, FRANK 1947 *Slave and Citizen: The Negro in the Americas*. New York: Knopf. → A paperback edition was published in 1963 by Random House.

TOYNBEE, ARNOLD J. 1934 *A Study of History*. Volume 1: Introduction: The Geneses of Civilizations. Oxford Univ. Press.

UNITED NATIONS CHARTER 1945 *Charter of the United Nations and Statute of the International Court of Justice*. New York: United Nations.

U.S. COMMISSION ON CIVIL RIGHTS 1959 [and subsequent years] *Report*. Washington: Government Printing Office.

U.S. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 1947 *To Secure These Rights*. Washington: Government Printing Office.

WESTIN, ALAN F. (editor) 1964 *Freedom Now! The Civil-rights Struggle in America*. New York: Basic Books.

WOODWARD, COMER V. 1955 *The Strange Career of Jim Crow*. New York: Oxford Univ. Press. → A revised edition was published in paperback in 1957.

Yearbook of the European Convention on Human Rights. → Published since 1955/1957.

Yearbook on Human Rights. → Published by the United Nations since 1946.

CONSTITUTIONAL PSYCHOLOGY

See under PSYCHOLOGY.

CONSTITUTIONS AND CONSTITUTIONALISM

Constitutionalism in its distinctive sense is a modern phenomenon which can be defined only by facing the complexities of defining a constitution. From Aristotle to the present day, many such definitions have been offered, and some of these will be discussed below in connection with the history of constitutionalism.

At the outset, however, the eighteenth-century and nineteenth-century concept of a constitution as a formal written document ought to be discarded. All such documents are subject to a steady evolution; and the living constitution, like all living law, is something transcending such formal enactment as well as preceding it. Furthermore, a constitution such as that of Britain or Israel is just as much "written" as the American or French constitution, that is to say, embodied in written documents of all kinds even though not codified and assembled in a single document. Although outmoded, this documentarian, or code, concept of a constitution played a significant role in the heyday of constitution-making after the French Revolution—as it does, in fact, even today in many of the emergent nations.

In addition to this documentarian concept, one finds several broad philosophical and legal concepts of constitutions which have been important, even though they lack the distinctiveness of the modern Western conception. Aristotle in a sense set the stage for the equivocation which has characterized the basic term throughout its history. When speaking of the *politeia*, he employed the term to refer both to a distinctive political order, the so-called mixed constitution of the "polity," and to political order or regime in general. In other

words, every regime, even a tyranny, was said to have its constitution or *politeia.*

Related to this Aristotelian notion is the more modern idea of a constitution as the organization of a government, its offices, and the relation of the offices. A variant is the conception which considers the actual power relations the "living" constitution (McBain 1927; Sternberger 1956). This, too, is a term that might be (and has been) applied to an absolute monarchy or a totalitarian dictatorship as readily as to a political order such as the United States or Great Britain.

Similar to these two conceptions, although distinct from them, is the notion that the constitution is the "basic law" in the sense of incorporating the basic legal rules and conceptions of a given community; it, too, would apply to an absolute monarchy or dictatorship as readily as to any other regime. In contemporary juristic works, however, a constitution is more commonly defined as a decision concerning the organization of government (Kägi 1945; Schmitt 1928), as a legal system of integration (Smend 1928), or as the basic norm (Kelsen 1945). Kelsen would trace any constitution to the one from which it is derived. "The document which embodies the first constitution is a real constitution, a binding norm, only on the condition that the basic norm is presupposed to be valid," he wrote (1945, p. 115), after having pointed out that "the validity of this first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends" (1945, p. 115). These and similar definitions clearly embody a genetic theory of law; they all derive from a positivist notion of law, according to which law has its origin in the power (usually seen as force) of a government. Still different are those definitions, embodying morphological theories, which describe a constitution in such terms as a system of divided powers (Loewenstein 1957), as a mixture of monarchy, aristocracy, and democracy, and similar indications of the pattern or design of a government. Definitions of this kind are usually given in more concrete terms and refer to a particular pattern or design, making it at times a paradigm or norm for all. Not only in popular parlance but also in advanced juristic thought do we find such statements. A sophisticated variant of morphological theorizing is represented by propositions alleging that the constitution, usually a particular one, is merely a *symbol* or a *myth.*

None of these generalized concepts of a constitution—whether philosophical, political, or legal (juristic)—are capable of providing the underpinning for the distinctive notion of constitutionalism as a kind of political order which contrasts sharply with nonconstitutional systems, such as a totalitarian dictatorship. In order to develop such a concept, a constitution must be defined in a way that indicates the features which make it contrast with other kinds of political order. These features come into view when we ask: What is the political function of a constitution? If that question is asked, the constitution is seen as a process by which certain political objectives are realized. What are these objectives?

The first and foremost objective is that of protecting the individual member of the political community against interference in his personal sphere of genuine autonomy. It is his *self* that each man presumably wishes to have safeguarded. The roots of this concern with the self are predominantly Judaic and Christian, although it must be recognized that self-concern is not completely lacking in Islam, Hinduism, Buddhism, and Confucianism. Such a self is first of all defined by a convictional core which is seen as "inviolable," if the self is to be maintained in its uniqueness and independence. It is seen as possessing the right (or freedom) of religion. Beyond this core, the individual's sphere is variable; constitutionalism has stressed different rights at different times, and the content of such rights has undergone significant changes. The seventeenth and eighteenth centuries liked to talk about such rights as "natural" and by that adjective to suggest that they inhere in human nature and hence are unalterable. Nowadays the term "human" rights is preferred, because comparative historical observation has shown that these rights are subject to differentiation in time and place and that their real significance must be seen in terms of a minimum sufficient to protect the individual's convictional core.

The basic objective of protecting the individual member of the political community is reinforced and institutionally safeguarded by the division of political power, both functionally and spatially. Such division may therefore be considered the second objective of a constitution. Typically, the "separation of powers" serves as the functional division, while federalism serves as the spatial. Both require a constitution for their effective operation. They operate as restraints on governmental power. In this perspective, then, a constitutional government is one in which effective restraints divide political power, or, to put it negatively, prevent the concentration of such power. Thus, constitutionalism is both the practice of politics according to "rules of the game," which insure effective restraints upon governmental and other political

action, and the theory—explanatory and justificatory—of this practice.

Historical development

Modern Western constitutionalism, with its emphasis upon the individual's rights, is not the only form in which constitutionalism, defined as a system of restraints upon governmental action, has historically been practiced. Not to go too far afield, the historical discussion will be limited here to Greek, Roman, and medieval constitutionalism, before turning to the history of English, French, and American constitutionalism. For Greek and Roman, as well as medieval, constitutional ideas have been so important in shaping modern constitutionalism that they greatly help us to understand it. At the same time, the failure to distinguish them clearly from modern constitutionalism has been the source of many confusions and misunderstandings.

Greek constitutionalism (as well as Roman) was largely practice, rather than theory, although Aristotle's doctrine of the *politeia* in the specific sense of the model regime constituted a significant first theory. Before we turn to it, Plato may be said to have pointed the way by making *nomos* the criterion by which to distinguish good from bad regimes. For the *nomos*, while not oriented toward the individual, embodied the prevalent communal notions about what is right and just, and provided a standard that transcended the particular system of rule. Plato was convinced, however, that the observance of *nomos* could be insured only by concentrating power in the hands of the wise. In his later years, especially in the *Laws*, he was inclined to concede that much of the *nomos* might be spelled out in *nomoi* that were observed by all. However, the mode of finding these *nomoi*—by means of a *nomothetes*, or legislator—as well as their ultimate enforcement through the Nocturnal Council, shows him to have retained his ultimate confidence in the wise man rather than in the safeguarding constitution—as do both Confucianism and Hinduism [*see* PLATO]. Aristotle, preoccupied with the general happiness, advanced further toward institutional safeguards. His notion of a mixed constitution which would be a mean between monarchy, aristocracy, and democracy was philosophically related to his preference for *mesotes*, the middle road, the mean between extremes. Historically, it constituted a rationalization of political practice in a number of Greek *poleis*, if we are to credit the few hints that survive [*see* ARISTOTLE].

Both the Aristotelian argument in favor of a mixed constitution and the corresponding practices in a *polis*, such as those which Solon sought to establish at Athens, rested upon a value preference very different from that of modern constitutionalism. The stress was upon stability and strength. Such was also the core objective of Roman constitutionalism. Slowly evolved over the centuries, the Roman constitution was a wonder of complicated and interrelated restraints. All the different offices, from that of the consuls down to those of the minor functionaries, were subject to carefully elaborated rules embodied in law supported by powerful religious beliefs. Polybius provided a celebrated analysis of this constitutional order, as it presumably worked around 200 B.C.; and Cicero, in the *Republic* and the *Laws*, added further touches of insight and rationale. What Polybius marveled at, however, was not how it protected the individual but how it provided the strength which made Rome great by giving the Roman political community a measure of internal stability and providing a balance of the different classes. It was this strength and stability which later inspired Machiavelli, Harrington, and Montesquieu. The problem which they and many others contemplated at length, and which each solved in terms of his own political convictions, was the problem of how this strong and stable system came to decline and eventually to be replaced by monarchical absolutism. John Dickinson added his own interpretation in *Death of a Republic* (1963), making an analogy between the process and the modern rise of totalitarian dictatorship. Like Montesquieu and others, he interpreted Roman constitutionalism in the perspective of contemporary problems of constitutionalism. The problem is basically simpler; Roman constitutionalism provided strength and stability for a city-state. It was unsuited to the larger territorial power which Rome became as the result of this strength and stability. Rome's decline was inherent in its rise—a built-in dialectic often observed in nature. As McIlwain has insisted, there can be no doubt that the theory of the Roman constitution was that "the people and the people alone are the source of all law" (1940, p. 48). This means, of course, that for an understanding of Roman constitutionalism a grasp of the nature of *lex* is vital. The distinction between private and public law is essential and is "a distinction that lies to this day behind the whole history of our legal safeguards of the rights of the individual against encroachment of government" (McIlwain 1940, p. 48). The Roman notion that law is the common solemn promise of the public became a vital ingredient of Western constitutionalism. Without such a concept of law, constitutionalism's political function as a system of restraints is greatly weakened.

Medieval constitutionalism built on the basis

thus laid. It sprang from the medieval idea that all legitimate government is government according to law. But that law was held to be largely in existence and merely in need of being made "public," although the idea of legislation was never entirely lost. How could it be to men who read the Old Testament and the corpus juris, which are filled with evidence of legislation as a matter of historical fact? But all this law was already at hand, as was the customary law by which men lived in their particular national communities. Medieval constitutionalism arose, as did Greek and Roman constitutionalism, from the struggle of an aristocracy seeking to restrain a monarchical ruler who threatened to become a tyrant. In this struggle, constitutionalism became associated with the church, which in some places and at certain times even played a leading role. The share of the bishops in the fighting preceding the issuance of Magna Charta certainly was considerable. King John's attempts to deal with this ecclesiastical opposition by enlisting the support of the pope miscarried; he misunderstood the position of the church. Vitally interested in the restraining of governments, and anxious to retain control over certain fields of law, such as family law, the church developed the doctrine of natural law as it had come down from the Stoics, more especially Cicero, and had been incorporated in the imperial code, the Corpus Juris Civilis. To determine whether particular laws were in keeping with the natural law—for only then could they be considered fully just laws—the church felt it ought to participate in the making of such laws as well as in the interpretation of established law and custom. In the Roman law, a *constitutio* was a law established by the emperor; in the medieval world, such collective bodies as the "king in parliament" were seen as the successors to the emperor. *Legem constituere* meant to establish the law by formal enactment. Ecclesiastics ought to participate—and fairly generally did participate—in this process. For example, the Golden Bull, which regulated the election of the Holy Roman emperor, was a *constitutio* in this classical sense. The archbishops of Cologne, Mainz, and Trier participated and were made electors under this "constitutional" charter. For many medieval thinkers, jurists, and philosophers, no distinct constitutional problem existed apart from the general proposition that all government should be according to and under the law. Had not the great Aquinas treated of government just incidentally within the context of a discussion of law and justice as part of the *Summa theologica*? [*See* AQUINAS.]

In England Bracton is perhaps most representative of this medieval stress on law and the legal restraints on government. But a more distinctive sense of the contrast between English and Continental practice is found in John Fortescue, who made the distinction between a *regimen regale* and a *regimen regale et politicum* the keynote of his discussion of English government. Here the word *politicum* appeared as representative of the Aristotelian *politeia* in its differentiating sense of a model government of mixed and restrained powers. As authority Fortescue cited Aquinas, thereby incidentally suggesting what has often since been overlooked or even denied, namely, that the great Scholastic was a constitutionalist. In the *Summa* he clearly states that a mixed government is the best (II, 1, 94, 4 and II, 1, 105, 1); similar statements can be found elsewhere. This view is in accord with the later part of *De regimine principum*, in which Ptolemy of Lucca elaborated the views of his master, albeit with some liberty. For both Aquinas and Fortescue, it was crucial that a government be subject to legal restraints; government was best when instituted by law. From here the road leads to English seventeenth-century constitutionalism, but before this development is traced, it is necessary to sketch the constitutionalism embodied in conciliarism.

Conciliarism is, in a sense, the application of medieval constitutionalism to the church itself. The ecclesiastical insistence upon the need for subjecting all authority to legal restraints was claimed to apply to the church. Effective participation of the lower ecclesiastical orders and even of the laity was demanded in the councils which were called upon to formulate the law. In this discussion, the constitutional aspect became increasingly explicit. From William of Ockham to Nicholas of Cusa, the idea of consent as a vital ingredient of law gained ground, and the question of how to organize the expression of such consent was faced. Church councils appeared in analogy to feudal representative assemblies, such as the English Parliament, and their traditional participation in establishing the law was claimed to be applicable to the government of the church.

Even though the conciliar movement failed, there can be little doubt that it spread some of the key ideas of constitutionalism. Thus reinforced, constitutionalism might have triumphed throughout Europe in a broader secular form, had it not been thwarted by the countervailing arguments arising from religious dissension and civil war. For against these divisive tendencies, the ineluctable demand arose for a concentration of power in the hands of a ruler—the famous doctrine of sovereignty as first enunciated by Jean Bodin [*see*

BODIN]. Although this doctrine was perfected and radicalized by Thomas Hobbes, England's insularity made the demand seem less urgent [*see* HOBBES]. The constitutionalist position had in the meantime been maintained in spite of Tudor "absolutism" and was developed in the sixteenth century by Sir Thomas Smith and Richard Hooker. In his *De republica Anglorum* (1583), Smith stressed the representative function of the "king in parliament" and delineated in functional terms the emergent notion of a mixed government through a separation of powers. Richard Hooker, in his celebrated *Laws of Ecclesiastical Polity* (1593–1597), developed a careful elaboration of Aquinas' philosophy of law and the need for general consent, if it is to hold. But the consensus in terms of which both Smith and Hooker wrote and argued gradually declined, and the more poignant issues of modern constitutionalism presented themselves in the course of the revolution and its aftermath which filled much of the seventeenth century.

Probably the most significant and certainly the most lasting legal contribution to the modernization of medieval constitutionalism was made by Edward Coke. With all the skill of a great lawyer and an extraordinary capacity for historical learning, combined with a striking lack of historical sense, he brought medieval precedent to bear upon the issues arising between the king and Parliament or, more realistically, between Puritans and Anglicans, between old wealth and new wealth, between landed property and trading interests. Coke, more than any other man, made Magna Charta the battle cry of those who insisted on man's rights [*see* COKE]. The Petition of Rights of 1628, while the first major official declaration of such rights, was still preoccupied with the rights of Englishmen, as prescriptively recognized since Magna Charta. As the revolutionary movement gained momentum after the calling of the Long Parliament in 1640, the historic and legal guarantees were reinforced by the idea that these rights derive from the very essence of man's nature. And while the Petition of Rights had been concerned with property rights, the right to a man's freedom of conscience—the right, that is, of freely confessing one's religious conviction—moved into the foreground. It was at the heart of Oliver Cromwell's outlook and was given eloquent expression in John Milton's *Areopagitica* (1644). The so-called Agreement of the People proposed by Cromwell's more radical following was the first of a series of attempts toward effectively institutionalizing these rights through the protection of a constitutional system. In a number of epoch-making statements, Cromwell proclaimed the idea that in any constitution there is "somewhat fundamental" which ought not to be subject to change by Parliament. Since Parliament insisted on violating such restraints upon its own exercise of power, Cromwell eventually had to rule arbitrarily, a *dictateur malgré lui*.

Cromwell's desperate efforts were accompanied by two striking theoretical efforts, each reflecting, in a sense, one horn of his dilemma. Thomas Hobbes, the philosopher, rejecting outright the idea of constitutionalism, pleaded in his *Leviathan* (1651) for a radical concentration of powers in the hands of the sovereign. Opposing him, James Harrington, the political theorist, in his *Oceana* (1656) recognized that the hoary doctrine of a mixed constitution implied a separation of the powers of governing and that a "government of laws and not of men" can be achieved only if those governing are "constrained to shake off this or that inclination." According to him, there are two ever-recurring orders, the "natural aristocracy" and the common people. They must concur in making laws, and together constitute the legislative power. A third power, the magistracy, must execute the laws. The balance between these three bodies is achieved in a constitution, and a commonwealth consists of "the senate proposing, the people resolving, and the magistracy executing." It is evident that Harrington's generalization was based upon Roman and English experience [*see* HARRINGTON].

Soon after Cromwell's death, English sentiment swung back to its traditional constitution and in the course of the Restoration recaptured a measure of that consensus upon which it had rested. When James II threatened to disrupt this consensus, it powerfully reasserted itself in the so-called Glorious Revolution, a smoothly efficient *coup d'état* that replaced one king with another and reaffirmed the basic rights in a traditional declaration, the bill of rights, in 1689. John Locke was, of course, the theorist of these events, who skillfully summed up and generalized English constitutional thought. His *Two Treatises of Government* (1690), although they antedate the Glorious Revolution by nearly a decade, have long and rightly been taken to be a justification of this proceeding; for, especially in the second treatise, Locke plainly asserts a people's right to give itself its own constitution [*see* LOCKE]. This right, although first stated by John Milton, was part of a congeries of rights that Locke held to be natural and universal, and epitomized in the formula of the rights of life, liberty, and property. Property was, of course, dear to the rising bourgeoisie; but in Locke's understanding, it still was

very broadly construed to mean virtually the entire personal sphere of what is a man's own. It was the firm belief of Locke and succeeding generations that no government which failed to recognize these rights could possibly be considered legitimate, because no one could be held to have surrendered what "he has no power to part with." Hence, the "freedom" to choose a form of government really excluded the right to choose a nonconstitutional government. Constitutional government was a government in which the crucial power to make laws was divided between king, Lords, and Commons, while the other two powers, the executive and federative, distinguished by Locke from the legislative one, were attributed to the king along with his share of the legislative power. Only in the Act of Settlement in 1701 was the independence of the judiciary recognized, thus laying the basis for Montesquieu's interpretation of the separation of powers in more strictly functional terms.

In a celebrated chapter of *The Spirit of Laws* (1748) Montesquieu undertook to restate the doctrine of restraints in more nearly systematic and "logical" terms than Locke's tradition-derived view had offered. His formulation of the doctrine, distinguishing the legislative, executive, and judicial functions and attributing each to a separate individual or group, achieved universal acclaim, was institutionalized in the American and French revolutions, and became the basis of nineteenth-century constitution making. These three functions still revolved around the idea of law: the law-making function was contrasted with the law-administering (executive) and the law-interpreting (judicial) functions [*see* MONTESQUIEU]. Although he called these three functions "powers," Montesquieu pointed out that the judicial power was "in a sense nil" (*dans une façon nul*)—that is, no power at all. By this curious phrase, Montesquieu did not, of course, wish to suggest that the judiciary had no function but, rather, that this function depended for its implementation upon sanctions which ultimately required force. (It was precisely this "impotence" of the judicial power which recommended it to the American constitution makers as the "guardian" of the constitution.) The French revolutionary movement, which far transcended the governmental and constitutional sphere, did not stop to consider such niceties. Bent upon achieving the millennium, the successive constitutions were increasingly inspired by Rousseau's radicalism, which would "force men to be free" [*see* ROUSSEAU]. Between the Declaration of the Rights of Man and Citizen, issued in 1789, and the dictatorship of Napoleon, the French ranged through all the phases of revolutionary violence; and the truly constitutional beginnings, inspired by Montesquieu and Mirabeau, soon yielded to a concentration of powers in support of a program of social transformation and renewal carried out with religious zeal. Even so, the French more fully grasped the key notion of a constituent power than had previously been the case.

Very different and sharply contrasting was the evolution of constitutional thought in America. Starting from English precedent and utilizing the experience derived from colonial charters, the fathers of American constitutionalism were anything but revolutionary in outlook. Washington, Adams, Jefferson, Hamilton, and Madison—to mention only the most illustrious names—were all men who believed in order as well as progress. To them, the position which independence had occasioned required orderly resolution without delay. The two successive constitutions which they helped fashion were both inspired by the ideas of Locke and Montesquieu and of the entire constitutionalist tradition which they represented and embodied. But such inspiration as the American constitutionalists received was tempered by their knowledge that concrete and unprecedented problems were facing them. As a result, they discovered a number of highly significant institutional solutions which past constitutionalism had failed to resolve, notably federalism, judicial review of legislation, and the process of constitutional amendment. This achievement was theoretically reinforced by its skillful defense in *The Federalist*, in which Hamilton, with the help of Madison and Jay, expounded the doctrine of modern constitutionalism in such elaboration that it could become the basis of nineteenth-century constitution making. Along with the ideological stimulation of the French revolutions —for the great revolution of 1789 was followed by a series of *coup d'état*-like revolutions in 1833, 1848, 1851, and 1871—the American Revolution seemed to prove that a community's political order may be rationally constituted and that an act of political decision making can organize the government and make it legitimate.

In spite of lingering doubts which the notion of organic growth instilled in the minds of the more conservative elements, European nations undertook the task of constitution making. Belgium, the Netherlands, the Scandinavian kingdoms, the several German kingdoms, Switzerland, Spain, Austria-Hungary, and Italy all fashioned constitutions in the image of those of Britain and the United States. Constitutionalism became the battle cry of all progressive forces; and broadly based popular

movements, such as that of German unification, were conceived in terms of making a constitution. The unsuccessful attempt, in 1848, to achieve such a constitutional order on a broadly representative and liberal basis was, to be sure, replaced by an authoritarian solution in the *Reich* of Bismarck's creation; but even then a constitution crowned the newly won unity.

Indeed, many monarchical rulers sought added legitimacy during the post-1848 period by "giving a constitution" to their people. Such royal constitution making regarded the constitution as a grant from the "sovereign" and hence as an alternative to the democratic legitimacy of a popularly elected constituent assembly. While imperfect as a realization of constitution making, it was nonetheless a step in the direction of establishing restraint on government, through autolimitation. That it constituted progress may readily be surmised, if one considers the possibility of a totalitarian regime today believing itself to be bound by the "constitution" it has established, instead of treating it merely as a façade. Monarchical constitutionalism was, in the sense of autolimitation, government according to law. As the democratic forces gained ascendancy in the course of the nineteenth century, such monarchical constitution making became outmoded. It lacked the legitimacy of a constitution based upon popular approval. In Switzerland and other countries, democratically based procedures, similar to those used in the United States, were generally adopted.

Making constitutions of this democratic kind generally calls for a representative constituent assembly in which the constitution is debated and eventually adopted. The work of such an assembly may be reinforced by submitting the constitution to popular referendum, but such plebiscites are of doubtful value. Rejections have been few, the most striking recent instance being that of the first postwar constitution, submitted to the French electorate in April 1946. In the case of federal systems, there is also likely to be some procedure for securing the assent of a majority of the member units, through either legislative action or referenda. As constitutional experience has accumulated, the role of "experts" has become more and more important. Indeed, preparatory commissions have often been established to draft a constitutional proposal, as was done in the case of Puerto Rico in 1952 and the several German *Länder* under American occupation in 1946. Experts, whether jurists or political scientists, can be most effectively employed at this formative stage of constitution making. The problem confronting the modern constitution maker is that of fitting past experience with constitutional government to the particular circumstances of time and place. In the emergent nations, this task often involves complicated problems of cultural adaptation. But such adaptations apart, there is the more general problem of determining the components of a model constitution. Within a particular cultural context, such models have been laid out for municipalities and states in the United States. Whether it is possible to formulate a broadly conceived common denominator of universal validity is an open question.

Contemporary problems

It remains to delineate briefly some aspects of contemporary constitutionalism in Europe, the emergent nations, and the Soviet sphere. Since the second world war, constitutionalism in Europe has served the goal of giving expression to what have been called the "negative revolutions" in France, Italy, and Germany. By these revolutions a defunct and generally rejected totalitarian fascist past has been negated and replaced by a more or less conventional constitutional order. The constitutions of the Fourth Republic, of the Italian Republic, and of the Federal Republic of Germany closely resemble the orders which existed prior to the seizure of power by Mussolini, Hitler, and the Pétain–Laval group. There were and are significant differences, of course: the Fourth Republic attempted the federalization of France's colonial empire; Italy abolished the monarchy; and the Federal Republic is still only a torso, although it is stabilizing its executive and moving toward a two-party system. Moreover, the Fourth Republic has yielded to the Fifth, which is characterized by a vigorous presidential system with little more than the trappings of parliamentarism remaining. At the same time, its colonial empire has all but vanished. Both changes together constitute a more radical and revolutionary transformation than has occurred in either Italy or Germany. The constitution under which they have occurred did not envisage them, even though it has permitted them. It has proved a feeble restraint upon de Gaulle's determination to govern the country as he sees fit. While the Italian and German constitutions have more nearly achieved the functional purpose of restraint, they, too, have been bent and twisted in various ways. Thus all three constitutions serve to illustrate the weakening of constitutionalism in Europe. This decline is not to be wondered at when one observes the lack of interest in and support for constitutionalism among the citizenry.

Beyond the national borders, constitutionalism

has played a certain role in the broad movement for the unification of Europe. Within the European movement, there has been considerable discussion about the most suitable constitution, with federalism and parliamentarism as the key issues. Beyond the initial Council of Europe, the Community of the Six emerged. A draft constitution for this political community was fashioned by a constituent assembly, the Assemblée Ad Hoc, in 1952/1953; quite a few other drafts have been put forward by organizations and individuals. A radical group of European federalists has pleaded for a popularly elected constituent assembly—so far without any significant result. In the meantime the unification has gone forward slowly within the context of cultural and economic life, sanctioned by international treaties and enforced by international institutions. Even a European bill of rights has been agreed upon (within the broader and looser framework of the Council of Europe), and its enforcement machinery has been ratified by a number of states. The role of constitutionalism in all these developments has been limited. To some extent, the lingering conviction of its importance has actually been a hindrance rather than a help to progress, because of its tendency to formalize and institutionalize before the underlying political and social realities justify such actions.

Although constitutionalism is apparently weakening in its heartland, it has been a factor of considerable importance in the emergent nations. To most of them, the fashioning of a constitution for their political order has been significant as a symbol of their newly won freedom. Some of the constitutions are of extraordinary complexity and formal sophistication, notably that of India. Here the task of organizing a whole culture of continental dimensions presented problems never before solved by Western constitutionalism. Working with European and American precedents, India had to add totally new provisions. It is, however, widely felt that the Indian constitution does not really express political reality—a criticism which could, of course, also be applied to most other constitutional systems. Only those parts of politics which can be expressed in legal rules can be reflected in a constitution. Behind the formal organization, an informal one will always operate. It is an essential part of the living constitution, which could not function without it. Insight into this aspect of constitutionalism has often led and continues to lead to a cynicism which looks upon a constitution as merely a façade behind which the true reality of the political order is hidden. Such arguments usually overlook some of the most obvious counterarguments. Terms of office, modes of election, territorial divisions, and many other provisions in modern constitutions are descriptive of at least part of the political reality. Clearly they do not exhaust that description and may not even mention certain important political institutions—for example, parties. In many of the emergent nations constitutionalism cannot fulfill even this more modest function, and does not restrain the government because it is not the expression of a firm belief in the importance of doing so. More especially, bills of rights remain empty paper declarations because the ruling party or clique readily identifies itself and its power with the public interest. This tendency is enhanced by the practice in totalitarian communist states.

Within the Soviet sphere, and more particularly in the Soviet Union itself, the constitutions are largely façades. The purely formal character of such documents as the successive constitutions of the Soviet Union is revealed by the fact that they do not evolve. They remain what they are, on paper, until one day they are completely altered by the effective rulers of the dominant party. They embody essentially what the regime wishes the world outside and its own people to believe about the political order. They therefore invariably contain extended bills of rights devoid of all enforcement machinery or possibility of implementation. The bill of rights is seen as a declaration of principle, and its function was summed up in 1962 by the Soviet scholar A. I. Lepyoshkin as follows: ". . . every constitution . . . is a result of changes in the balance of class forces; it expresses the will and interest of the classes in power, guarantees the principles of such social and state order as is advantageous for and agreeable with the interests of these classes. . . . The Soviet constitution embodies the principles of socialist democracy, it is a genuinely democratic constitution." Surprisingly enough, Lepyoshkin did not hesitate to claim that the Soviet constitution "serves as the most important instrument of safeguarding the rights and interests of the Soviet citizens from any encroachment. . . ." No details were furnished, however, as to how such a constitution actually safeguards these rights; it might conceivably be "the most" important instrument without being an important one, since no other instruments exist.

The broad tradition of constitutionalism has in this century been projected onto the world plane. The Covenant of the League of Nations and the Charter of the United Nations are both embodiments of this international constitutionalism. Quite in keeping with the constitutionalist tradition, a

Universal Declaration of Human Rights was adopted after vigorous debate by the United Nations in December 1948; but no enforcement machinery has been set up, except for the weak supervisory machinery provided for dependent territories. Indeed, it is very doubtful that any such enforcement could at present be implemented. International constitutionalism is not a mere façade; but the very fact of the participation of totalitarian regimes makes it inevitable that this constitutionalism partakes to some extent of the character of totalitarian constitutionalism. That such constitutionalism is imperfect, that it does not restrain the governments operating under it to any significant degree, is obvious. That it may nevertheless become the basis for gradual implementation, and thus the starting point for the achievement of genuine constitutionalism, is the hope of many. Such hope may find some confirmation in the past history of constitutionalism.

CARL J. FRIEDRICH

[*See also* CONSTITUTIONAL LAW; DEMOCRACY. *Other relevant material may be found in* CRISIS GOVERNMENT; DELEGATION OF POWERS; ELECTIONS; FEDERALISM; MODERNIZATION; PARLIAMENTARY GOVERNMENT; PRESIDENTIAL GOVERNMENT; REPRESENTATION; *and in the biographies of* BAGEHOT; BEARD; DICEY; HARRINGTON.]

BIBLIOGRAPHY

Classical statements on constitutions and constitutionalism can be found in Aristotle's Politics; *Cicero's* Republic; *Thomas Aquinas'* Summa theologica 1265–1273; *Marsilius of Padua's* Defensor pacis 1324; *John Fortescue's* The Governance of England 1471; *Thomas Smith's* De republica Anglorum 1583; *Richard Hooker's* Laws of Ecclesiastical Polity 1593–1597; *John Milton's* Areopagitica 1644; *Thomas Hobbes's* Leviathan 1651; *John Harrington's* Oceana 1656; *John Locke's* Two Treatises of Government 1690; *Montesquieu's* The Spirit of Laws 1748; *Rousseau's* The Social Contract 1762; The Federalist 1787–1788; *Edmund Burke's* Reflections on the French Revolution 1790; *Immanuel Kant's* Rechtslehre 1797; *Benjamin Constant's* Cours de politique constitutionnelle 1818–1820; *Georg Hegel's* The Philosophy of Right 1821; *and John Stuart Mill's* Considerations on Representative Government 1861. *For contemporary treatments see the works listed below.*

BEARD, CHARLES A. 1943 *The Republic: Conversations on Fundamentals.* New York: Viking.

BRYCE, JAMES 1905 *Constitutions.* New York: Oxford Univ. Press.

BURDEAU, GEORGES 1959 *Droit constitutionnel et institutions politiques.* 8th ed. Paris: Librairie Générale de Droit et de Jurisprudence.

DICKINSON, JOHN 1963 *Death of a Republic: Politics and Political Thought at Rome 59–44 B.C.* Edited by George Lee Haskins. New York: Macmillan.

ESMEIN, ADHÉMAR (1896) 1927–1928 *Éléments de droit constitutionnel français et comparé.* 8th ed. 2 vols. Paris: Sirey.

FRIEDRICH, CARL J. (1937) 1950 *Constitutional Government and Democracy: Theory and Practice in Europe and America.* Rev. ed. Boston: Ginn. → Originally published as *Constitutional Government and Politics: Nature and Development.*

FRIEDRICH, CARL J. 1957 *Constitutional Reason of State: The Survival of the Constitutional Order.* Providence, R.I.: Brown Univ. Press.

KÄGI, WERNER 1945 *Die Verfassung als rechtliche Grundordnung des Staates: Untersuchungen über die Entwicklungstendenzen im modernen Verfassungsrecht.* Zurich: Polygraphischer Verlag.

KELSEN, HANS (1945) 1961 *General Theory of Law and State.* 20th Century Legal Philosophy Series, Vol. 1. New York: Russell & Russell. → First published in German.

LOEWENSTEIN, KARL 1957 *Political Power and the Governmental Process.* Univ. of Chicago Press.

MCBAIN, HOWARD LEE 1927 *The Living Constitution: A Consideration of the Realities and Legends of Our Fundamental Law.* New York: Workers Education Bureau.

MCILWAIN, CHARLES H. (1917–1937) 1939 *Constitutionalism and the Changing World.* Cambridge Univ. Press; New York: Macmillan.

MCILWAIN, CHARLES H. (1940) 1947 *Constitutionalism, Ancient and Modern.* Rev. ed. Ithaca, N.Y.: Cornell Univ. Press. → A paperback edition was published in 1958.

POCOCK, JOHN G. A. 1957 *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the 17th Century.* Cambridge Univ. Press.

SCHINDLER, DIETRICH 1932 *Verfassungsrecht und soziale Struktur.* Zurich: Schulthess.

SCHMITT, CARL 1928 *Verfassungslehre.* Munich: Duncker & Humblot.

SMEND, RUDOLF 1928 *Verfassung und Verfassungsrecht.* Munich: Duncker & Humblot.

STERNBERGER, ADOLF 1956 *Lebende Verfassung: Studien über Koalition und Opposition.* Meisenheim (Germany): Hain.

STUBBS, WILLIAM 1874–1878 *The Constitutional History of England, in Its Origins and Development.* 3 vols. Oxford: Clarendon.

WHEARE, KENNETH C. 1951 *Modern Constitutions.* Oxford Univ. Press.

WORMUTH, FRANCIS D. 1949 *The Origins of Modern Constitutionalism.* New York: Harper.

CONSTRUCTION

See HOUSING.

CONSUMER CHOICE

See UTILITY.

CONSUMER CREDIT

See INSTALLMENT CREDIT.

CONSUMER SOVEREIGNTY

"Consumer sovereignty" is one of those concepts that flourish and are widely influential long before they are explicitly recognized and named. (Their belated recognition is often concomitant with their decline.) Much of the substance of consumer sov-

DEPARTMENT OF ENERGY DISTRIBUTION POLICY ON COMPUTER SOFTWARE

SHOULD BE REVISED TO REFLECT

NATIONAL POLICY ON TECHNOLOGY TRANSFER

- Our national policy encourages technology transfer from the national and federal laboratories, with the ultimate goal of improving this Nation's economic competitiveness.

- Congress specifically made technology transfer of computer software a national laboratory goal in the the 1986 amendments to the Stevenson Wydler Act of 1980 (PL 99-502).

- Current DOE policy on the distribution of computer software developed under contract to DOE, and the negative effect of that policy on future copyright protection, runs counter to the intent of our national policy.

- A draft order currently under consideration in the Department, requiring that DOE's National Energy Software Center (NESC) be the sole release point for computer software developed at DOE facilities, will result in that policy becoming permanent. (Draft Order 1360.4A - dated August 13, 1986).

- NESC is primarily a cataloging warehouse. It does not prepare the software products for the commercial market and cannot provide the extensive support services needed for complex research computer software. Such added value can only be provided by private industry interested in marketing computer software.

- Without copyright protection, U.S. firms are unwilling to commercialize software in the public domain because of the high costs of readying the product for market -- documenting, preparing training materials, debugging, and establishing user support systems. DOE's draft order will obstruct such copyright protection.

- Foreign companies, competing in the domestic computer software market, receive significant benefits from the NESC.

  In early 1986, an informal sample of distribution by the NESC, of several of the most popular and valuable engineering software packages developed by one of the national laboratories, revealed that approximately 90% went to foreign entities.

- DOE should revise its policies on distribution of computer software developed at the national laboratories, and bring them into conformity with the national goal of facilitating the preferential transfer of technology to U.S. industry, thereby enhancing this nation's potential world market competitiveness in the area of research computer software.

What explains this entrepreneurial tradition? Let me theorize at least for high-technology entrepreneurship.

John Locke was a British philosopher and one of the earliest known supporters of constitutional government. He asserted that constitutional government could only be effective if it recognized the natural rights of man including the right to life liberty and property. The recognition of these rights appears to be the best way to assure prosperity and thus stable government. In Locke's view considered that a man has a right to himself and thus in respect to property his own labor. In fact he has a right to what he hath mixed his labor with and a right to property.

Locke's proposition is widely held to be the underpinning of the U.S. constitution. While it is unclear whether Locke intended to include intellectual property as part of man's natural right to property, the U.S. constitution gives the Congress the discretion or power to secure for limited times to inventors the exclusive rights to their discoveries. The Congress's action in enacting the patent laws The enactment

Congress's enactment of the patent laws evidences their belief that the right to own intellectual property is a natural right of man, and a necessary element for successful constitutional government and the prosperity envisioned by such governments. Similarly state law protects trade secrets.

INNOVATION SPEECH -- PRELIMINARY NOTES -- JULY 16

- John Locke -- "Man hath a right to what he hath mixed his labors with." Further, the work that he did in order to justify constitutional monarchy ultimately became the foundation of our Constitution.

As far as I can determine, the essence of his protection of constitutional monarchy was that in order for it to survive, individuals had to have the right to Life, Liberty, and Property. (I don't know where that Pursuit of Happiness stuff came from.)

Insert the letter from Madison to Jefferson here. It justified the special treatment for inventors in the Constitution.

The next step is that the Constitution itself gave Congress discretionary authority to take care of inventors by giving them exclusive right to their inventions for a limited period of time.

The Congress actually acted on that and created the Patent System.

Notwithstanding the Constitution, U.S. Common Law provides for assignment rights as a condition of employment.

The next step is the gradual growth of institutions and the capital content of research or invention. The Constitutional presumption of inventor ownership has been blurred and as a result, employed inventors have lost their identity in society.

(Belief) During the 1960's, the public perception of corporations became increasingly negative for a variety of reasons. One of them is that they became faceless institutions rather that the organizations built around key people that the public can recognize.

Enter statistics on the decrease of inventions per Research dollar, with a corresponding increase of U.S. patents going to foreign firms.

People count.
Bottom-up
Innovation/inventor
Management--provide the resources to creative people and get out of the way.

Paul A. Blanchard and Frank B. McDonald's article "Reviewing the Spirit of Enterprise: Role of the Federal Labs," is a timely, well done, ~~and~~ useful chronology and discussion of current issues confronting Federal laboratories. I am grateful for the author's acknowledgement of the Department of Commerce's contribution to the OSTP working group's recommendations on strengthening technology transfer from the Federal laboratories to the private sector. I believe it is important, however, to amplify on part of these recommendations in light of ~~the~~ Irwin Goodwin's ~~footnote identifying~~ editorial note describing the guarantee of at least 15% of any royalty to Government inventor(s) on any development licensed by the laboratory for commercial use as being "controversial."

While the specifics of this recommendation are clearly open to discussion and modification, the following analysis of the principles involved should help to conclude that the recommendation is more "necessary" than "controversial."

1) John Locke, the British philosopher who masterfully built the consensus for western constitutional government established as one of its principles that "every man ~~hath~~ has a right ~~in~~ to what he hath mixed his labors with." Certainly there can be no argument against extending that ~~that~~ right ~~should extend~~ to a person's ~~man's~~ own ideas and inventions.

2) The United States Constitution builds on Locke's thesis by giving Congress the ~~mandate~~ power to reserve to inventors the exclusive right to their ~~respective~~ inventions as

progress of science and useful

an encouragement to the arts ~~and sciences.~~ (2)

3) Public Laws 96-517 and 98-620, which guarantees ~~the~~ universities and small businesses the right to own~~ership of~~ inventions made by ~~its~~ THEIR inventors in the performance of Federally funded research, qualified university ownership and made it consistent with the constitutional mandate by requiring that royalties be shared with ~~its~~ THEIR inventors. (3)

This was done with university urging as they feared ~~management would funnel~~ WOULD BE FUNNELED these returns away for other purposes, ~~and would~~ thereby destroying the inventor's incentive to participate.

4) The explosion of industry-university collaboration accompanied by the transfer of technology triggered in part by P. L. 96-517 (8) suggested the need to establish similar incentives for technology transfer in the Federal laboratories since they, like universities, ~~were~~ ARE isolated from the private sector with no compelling need to bridge the gap.

5) The university-industry collaborative experience has not ~~evidenced~~ INDICATED either a desire or an ability ~~by~~ of industry to bias unversities away from basic research to any great extent. In fact, the relationship has no doubt given universities new frontiers to explore which would not have been otherwise addressed.

6) Public Laws 96-517 and 98-620 do not require royalty-sharing between small business and its THEIR inventors since

the goal of ~~such~~ THE business is ~~already~~ to make a profit through the delivery of new products, processes and services to the marketplace. This ~~primary~~ goal seemed to assure a need to share the fruits of commercialization with its inventors through whatever incentive system ~~was~~ IS deemed most appropriate, or face the prospect of ~~their possible loss~~ LOOSING KEY PEOPLE to competitors. New incentive systems to motivate industry employees are one of the key elements fueling the entrepreneurial revolution spreading through the country. It is clear that this kind of flexibility, ~~should not be interferred with~~ FEDERAL LAW SHOULD NOT INTERFERE WITH INDUSTRIAL but ~~will not~~ THIS SORT OF FLEXIBILITY CANNOT be developed in nonprofit or public institutions as their goals are not primarily aimed at delivering new products, processes or services to the marketplace ~~not will present~~ UNLESS laws permit them to do so. The Administration's commitment to strengthening third world intellectual property laws through negotiation is best centered on how they and their inventors can benefit. A failure to address the interests of Federally employed inventors is a dismissal of our heritage and could make our motives suspect in the context of these negotiations.

MOVE TO (A)

The need to address the incentives that are necessary to motivate Federally employed inventors to participate in the innovative process is one of the important issues of our day. Dismissing royalty-sharing which is an established policy in unversities as being "controversial" or presuming that government

boards that randomly and insufficiently, if ever, reward inventors ~~is a rejection of our great heritage and an effront to our creative people.~~ does not respond to the problem.

¶ MOREOVER, (A)

1)
2)
3)
4)

their Creator with certain unalienable rights", and "that to secure these rights, governments are instituted among men . . ."

Madison, the chief architect of the Constitution, did not end his interest in intellectual property with the Constitutional Convention. He made the following illuminating statements in support of the prospective Federal authority to award patents and copyrights:

In the Federalist on January 23, 1788:

> "The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress."

In a letter to Thomas Jefferson on October 17, 1788, he made a more important insight:

> "With regard to monopolies, they are justly classed among the greatest nuisances in Government, but is it clear that as encouragements to literary works and ingenious discoveries they are not too valuable to be wholly renounced? (These two sentences appear to be an attempt by Madison to distinguish between past monopolies

> of commodities granted as personal favors and the suggested monopoly for novel intellectual property.) Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it? (This appears to be the first reference to Government "march-in" rights!) Monopolies are sacrifices of the many to the few. Where the power is in the few, it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many, not in the few, the danger cannot be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many." (Parenthetical sentences and emphasis added.)

In this statement, and especially the last sentence, the answer to the need for specific protection of intellectual property, notwithstanding its generic inclusion in the fifth amendment, seems apparent. First, the use of the term "monopolies" suggests that Madison knew that the nature of an individual piece of intellectual property is such that it could be useful to all people and at the same time be susceptible of ownership by one person, while on the other hand, diversity of ownership of all other categories of property precluded the possibility of monopoly. The strong possible argument against an indefinite monopolization of valuable intellectual property and its end product under only the fifth amendment and his recognition that "The States cannot . . . make effectual provision", suggests that Madison knew that the rights of the creative few would be in danger without clarification in the Constitution. Thus, a compromise was

their Creator with certain unalienable rights", and "that to secure these rights, governments are instituted among men . . ."

Madison, the chief architect of the Constitution, did not end his interest in intellectual property with the Constitutional Convention. He made the following illuminating statements in support of the prospective Federal authority to award patents and copyrights:

In the Federalist on January 23, 1788:

> "The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress."

In a letter to Thomas Jefferson on October 17, 1788, he made a more important insight:

> "With regard to monopolies, they are justly classed among the greatest nuisances in Government, but is it clear that as encouragements to literary works and ingenious discoveries they are not too valuable to be wholly renounced? (These two sentences appear to be an attempt by Madison to distinguish between past monopolies

> of commodities granted as personal favors and the suggested monopoly for novel intellectual property.) Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it? (This appears to be the first reference to Government "march-in" rights!) Monopolies are sacrifices of the many to the few. Where the power is in the few, it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many, not in the few, the danger cannot be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many." (Parenthetical sentences and emphasis added.)

In this statement, and especially the last sentence, the answer to the need for specific protection of intellectual property, notwithstanding its generic inclusion in the fifth amendment, seems apparent. First, the use of the term "monopolies" suggests that Madison knew that the nature of an individual piece of intellectual property is such that it could be useful to all people and at the same time be susceptible of ownership by one person, while on the other hand, diversity of ownership of all other categories of property precluded the possibility of monopoly. The strong possible argument against an indefinite monopolization of valuable intellectual property and its end product under only the fifth amendment and his recognition that "The States cannot . . . make effectual provision", suggests that Madison knew that the rights of the creative few would be in danger without clarification in the Constitution. Thus, a compromise was

Paul A. Blanchard and Frank B. McDonald's article "Reviewing the Spirit of Enterprise: Role of the Federal Labs," is a timely, well done, useful chronology and discussion of current issues confronting Federal laboratories. I am grateful for the authors' acknowledgement of the Department of Commerce's contribution to the OSTP working group's recommendations on strengthening technology transfer from the Federal laboratories to the private sector. I believe it is important, however, to amplify on part of these recommendations in light of Irwin Goodwin's editorial note describing the guarantee of at least 15% of any royalty to government inventor(s) on any development licensed by the laboratory for commercial use as being "controversial."

While the specifics of this recommendation are clearly open to discussion and modification, the following analysis of the principles involved should help to conclude that the recommendation is more "necessary" than "controversial."

1) John Locke, the British philosopher who masterfully built the consensus for western constitutional government established as one of its principles that "a man has a right to what he hath mixed his labor with." (1) Certainly there can be no argument against extending that right to a person's own ideas and inventions.

2) The United States Constitution builds on Locke's thesis by giving Congress the power to reserve to inventors the exclusive right to their inventions as an

encouragement to the progress of science and useful arts. (2)

3) Public Laws 96-517 and 98-620, which guarantee universities and small businesses the right to inventions made by their inventors in the performance of Federally funded research, qualified university ownership and made it consistent with the constitutional mandate by requiring that royalties be shared with their inventors. (3) This was done with university urging as they feared these returns would be funneled away for other purposes, thereby destroying the inventors' incentive to participate.

4) The explosion of industry-university collaboration accompanied by the transfer of technology triggered in part by P. L. 96-517 (4) suggested the need to establish similar incentives for technology transfer in the Federal laboratories since they, like universities, are isolated from the private sector with no compelling need to bridge the gap.

5) The university-industry collaborative experience has not indicated either a desire or an ability of industry to bias unversities away from basic research to any great extent. In fact, the relationship has no doubt given universities new frontiers to explore which would not have been otherwise addressed.

6) Public Laws 96-517 and 98-620 do not require royalty-sharing between a small business and its inventors since

the goal of such business is to make a profit through the delivery of new products, processes and services to the marketplace. This goal seemed to assure a need to share the fruits of commercialization with its inventors through whatever incentive system is deemed most appropriate, or face the prospect of losing key people to competitors. New incentive systems to motivate industry employees are one of the key elements fueling the entrepreneurial revolution spreading through the country. It is clear that Federal law should not interfere with this kind of industrial flexibility. However, this sort of flexibility cannot be developed in nonprofit or public institutions as their goals are not primarily aimed at delivering new products, processes or services to the marketplace unless laws permit them to do so.

The need to address the incentives that are necessary to motivate Federally employed inventors to participate in the innovative process is one of the important issues of our day. Dismissing royalty-sharing which is an established policy in unversities as being "controversial" and time in relying on ~~or presuming that~~ government boards that randomly and insufficiently, if ever, reward inventors does not respond to the problem.

Moreover, the Administration's commitment to strengthening third world intellectual property laws through negotiation is best centered on how they and their inventors can benefit. A failure to address the interests of Federally employed inventors

is a dismissal of our heritage and could make our motives suspect in the context of these negotiations.

their Creator with certain unalienable rights", and "that to secure these rights, governments are instituted among men . . ."

Madison, the chief architect of the Constitution, did not end his interest in intellectual property with the Constitutional Convention. He made the following illuminating statements in support of the prospective Federal authority to award patents and copyrights:

In the Federalist on January 23, 1788:

> "The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress."

In a letter to Thomas Jefferson on October 17, 1788, he made a more important insight:

> "With regard to monopolies, they are justly classed among the greatest nuisances in Government, but is it clear that as encouragements to literary works and ingenious discoveries they are not too valuable to be wholly renounced? (These two sentences appear to be an attempt by Madison to distinguish between past monopolies

> of commodities granted as personal favors and the suggested monopoly for novel intellectual property.) Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it? (This appears to be the first reference to Government "march-in" rights!) Monopolies are sacrifices of the many to the few. Where the power is in the few, it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many, not in the few, the danger cannot be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many." (Parenthetical sentences and emphasis added.)

In this statement, and especially the last sentence, the answer to the need for specific protection of intellectual property, notwithstanding its generic inclusion in the fifth amendment, seems apparent. First, the use of the term "monopolies" suggests that Madison knew that the nature of an individual piece of intellectual property is such that it could be useful to all people and at the same time be susceptible of ownership by one person, while on the other hand, diversity of ownership of all other categories of property precluded the possibility of monopoly. The strong possible argument against an indefinite monopolization of valuable intellectual property and its end product under only the fifth amendment and his recognition that "The States cannot . . . make effectual provision", suggests that Madison knew that the rights of the creative few would be in danger without clarification in the Constitution. Thus, a compromise was

A Cheap Dollar Won't Cure the Deficit

By MICHAEL HUDSON

CURRENCY markets are in turmoil. Not only has the dollar declined by 40 percent against the Japanese yen and the German mark during the last year, but there is beginning to be a measure of suspicion that devaluation will not do much to improve America's balance of payments in the foreseeable future. Unlike the beggar-thy-neighbor currency devaluations of the 1930's, if the recent devaluation beggars anyone, it may be the United States itself.

The dollar devaluation has provided a windfall to other industrial nations. Because raw materials are usually priced in dollars, when the dollar falls commodity costs as measured in yen and marks also fall. This windfall for our trading partners holds down the rates of inflation in those countries and allows their investment to be financed at lower rates of interest than ours — an important consideration in today's competitive world.

Nearly everyone agrees devaluation hurts the trade balance in the short run. This is because time is needed to change long-established trade patterns and purchasing habits. When oil became more expensive in 1974, Americans had little choice but to pay more because it takes years to design and build factories, buildings and cars that are more energy efficient.

As for our trade with Japan, Korea and West Germany, devaluation means we will end up paying more dollars for roughly the same volume of imports. But even if we cut back physical imports we lose. If physical imports are cut by 25 percent, a 40 percent devaluation still worsens our import bill by some 15 percent unless exports increase dramaticaly.

But the real question is whether devaluation will help over the long run. Policy makers who look at the world from a Chicago-school economics perspective believe devaluation will help the trade deficit. But businessmen and economists who look at what really happened in history have a different idea. Just consider how a series of devaluations failed to help England in 1949 and in the mid-1960's. Britain's economy continued to deindustrialize while its living standards fell to the one of the lowest levels in the European Economic Community.

The really important variables in the comparative trade advantages of countries are their labor costs, interest rates and tax obligations. And as production becomes more automated, it will depend more on capital and financing and less on the cost of labor. But most policy makers ignore these variables and concentrate instead on the value of the currency.

Devaluation is supposed to make the country poorer, relative to other countries, in such a way that imports fall off. This is why economic recessions help the trade balance: People earning less do not buy as many imports. Booms usually lead to trade deficits as higher incomes spill over into a demand for imported goods.

If the dollar falls by enough to raise import prices sharply, Americans will indeed have to cut back their purchases of imported automobiles and consumer electronics. Devaluation thus discourages consumption. But it does not really help exports unless the country redirects its resources into building export industries. As of today, however, we have no spare industrial capacity to speak of, and companies are not investing to boost that capacity. This means we simply will not be able to produce enough extra goods to turn our trade balance positive.

TRUE, we may now sell our Van Goghs and other art works to the Japanese for prices that seem enormous when denominated in dollars. This is what happened to Germany during its devaluations of the 1920's. It happened again to England after 1949. But neither England nor Depression-era Germany exported more industrial manufactured goods produced by their own workers.

Not only haven't our industrial corporations invested in new capacity, they do not intend to invest in the future — a sure sign that even our top business leaders do not believe in the devaluation policy. Instead, our companies busy themselves protecting against takeovers or spend their money taking over other existing companies, all at no net gain in export capacity.

There are two ways of examining exports. The first is by region: Against which countries is our trade balance supposed to improve, given the cheaper dollar? Certainly not third world debtors. Their raw-materials exports continue to be depressed, and they must use their scarce foreign exchange to pay their creditors for their own past trade deficits. This is why America's trade with Latin America has deteriorated from a $13 billion surplus in 1981 to an average annual deficit of $15 billion in recent years. As long as foreign countries must use their foreign exchange for debt-service, there is scant room to build markets for our products in those debtor countries.

The second way of examining exports is even more more critical. That is the problem of what products we have to export — and in what quantities. From this perspective, reversing the trade gap depends upon the cost of capital, the investment plans of our companies and the ability of American products to compete in world markets. From this standpoint, the value of the dollar is of secondary importance. ■

Michael Hudson, an economist, has consulted for the Canadian, Mexican and United States Governments and the United Nations.

University Science, Engineering
and Technology, Inc.
1465 Post Road East
P.O. Box 915
Westport, CT 06881
Tel: 203/259-7997 Fax: 203/255-15

FACSIMILE COVER SHEET

To FAX Number 703-821-~~2030~~ 2049

Date 12/15/88 No. of Pages(including cover) 10

Attention Norm Latker

Subject TIC Meeting

From Jack Karnowski

USET, Inc., Westport, CT FAX No. 203-255-1536

If you don't receive all pages of transmission, please call us at 203-259-7997.

Norm:

Please call me tomorrow in Westport with your comments.

Solutions Thru Technology

The proposed legislation sets up another bureaucracy to determine whether inventors should benefit from the commercialization of their discoveries. This is inconsistent with the Constitutional intent to award inventors through a guarantee of a proprietary position in those inventions they choose to bring into public light.

While it is correct that the common law permits employers to take the prospect of such a proprietary position from its employees as a condition of employment, there has been sufficient latitude in the private sector to devise incentive systems that assure continued involvement of inventors in the innovation process. This has not been true in public funded research projects conducted at federal laboratories. The taking of the inventor's rights as a condition of employment coupled with bureaucratic after-the-fact award systems has resulted in an invention delivery system that does not work. S. 65 speaks directly to this problem by setting up an understandable before-the-fact award system. The proposed bill merely

Congress is seeking to stimulate American innovation by creating greater commercialization of Federally-supported R&D. Presently the Government funds 50%-- or $55 billion annually-- of our R&D effort. Attention is focusing on the Federal laboratory system which now contributes little to our economic growth. Unfortunately, two trade associations are jeopardizing this effort to deflect attention from a few companies' internal management problems.

The object of this debate is legislation introduced in the House and Senate allowing federal laboratories to manage their inventions by licensing them and retaining royalty income. Because one-sixth of the U.S. scientists and engineers work in our federal laboratory system performing more than $17 billion of R&D annually it is important that this technology be successfully transfered to the economy. Universities have found that sharing royalties with their inventors is the catalyst making this technology transfer possible.

Intellectual Property Owners, Inc. and the National Association of Manufacturers, reflecting fears by a small segment of their big business constituents, are objecting to royalty sharing by federally employed inventors in legislation now under consideration by the Congress. These associations say that requiring royalty sharing for federal inventors (paralleling current law for university inventors) sets a precedent which will be applied to the private sector. Rather than a simple mechanism such as royalty sharing, these associations advocate a complex, bureaucratic "award system" under which federal inventors would meekly petition Washington for some compensation for their discoveries commercialized by the private sector. Experience has shown that agencies trying to implement award schemes create only more bureaucracy with meager rewards to inventors and great expense to the taxpayer.

Ironically, the handful of companies driving NAM and IPO objecting to royalty sharing are not even interested in working with the federal laboratories and have little, if any, experience collaborating with universities sharing royalties! Rather, these companies reflect a 1950's top-down management style that feels threatened by employee incentives. These middle level corporate managers fear that the university success sharing royalties will be duplicated in the federal laboratories creating unrest within their own companies. Companies who have revitalized their corporate structure to reward productive employed inventors, or who have entered into collaboration with universities are not afraid of incentive systems in public research.

The House Science and Technology Committee will soon take up this legislation which has been successfully reported from Subcommittee <u>minus royalty sharing for inventors at the insistence of IPO and NAM</u>. Unless changed, this could be a serious barrier to the federal laboratory system.

The Senate Commerce Committee will soon begin deliberations on a companion bill based on S. 65 introduced by Senate Majority Leader Robert Dole.

The Dole bill and similar legislation introduced by House Minority Leader Robert Michel (H.R. 695), provide federal inventors a share of royalties returned to the laboratory from patent licensing. The bills are modeled on a 1980 law (Public Law 96-517) giving universities and small businesses ownership of inventions made under federal grants and contracts. This Act requires universities to share royalties earned with university inventors. Congress enacted this provision because willing participation of inventors is the core of successful technology transfer. This requirement was not placed on small businesses because Congress recognized that nonprofit institutions have special needs not applicable to the private sector.

Congress recognized that nonprofit inventors are hired to expand the frontiers of knowledge and that technology transfer is an addition to their primary mission. This is not the case in the private sector. Prior to the enactment of the 1980 law many universties feared losing some of the best basic research scientists because academic salary structures are not intended to reward commercializing inventions. This is still true at Federally-operated laboratories. Royalty sharing has enabled many of the most creative minds to remain on campus performing basic research while being rewarded for their discoveries.

Losing the best researchers is still a problem at the federal labs according to the 1983 Report of the White House Science Council headed by David Packard. In the report to President Reagan the Council found that "almost all of the Federal laboratories, both government-operated and contractor-operated, suffer serious disadvantages in their inabilities to attract, retain, and motivate scientific and technical personnel required to fulfill their missions. The principal disadvantage is the inability of the Federal laboratories, particularly those under the Civil Service system, to provide scientists and engineers with competitive compensation at entry and top senior level (emphasis added). Royalty sharing is designed to meet this problem. With one-sixth of all of the research scientists and engineers employed at federally-operated labs, the U.S. simply cannot afford to waste these creative people.

Congress also recognizes that the needs of the nonprofit sector are unique. University and federal laboratory inventors are under great pressure to immediately publish the results of their research for professional recognition. Such pressures do not exist in the private sector. It was to counterbalance this need-- which can destroy proprietary rights needed for commercialization by the private sector-- that royalty sharing was devised. Thus, university and federal employee royalty sharing actually protects the interests of industry!

Universities are now able to persuade many inventors to file patent applications at the same time as publishing research results so that patent rights, especially abroad, are not destroyed. This happy balance not only fully protects academic freedom, and encourages the free exchange of information so important on campus; it also protects the interests of the private sector and discourages foreign competitors from freely pirating U.S. taxpayer sponsored R&D. The result is that more jobs and important discoveries are developed here.

Rather than setting a precedent for private industry, these differences were again recognized in 1984 when the law was amended to include university operated government laboratories. During the lengthy Senate and House debates over this measure no one suggested that the success of the university royalty sharing requirement was a precedent for the private sector. Indeed, legislation supported by the Administration sought to include big business government contractors under the provisions of the 1980 law and again no one, not even opponents of broadening the law saw university royalty sharing as a precedent for private industry!

After 5 years experience universities overwhelmingly cite royalty sharing as one of the cornerstones of their successes in working with the private sector. Because of this interaction the United States holds a commanding lead in the development of biotechnology which originated at the universities. Countries such as Japan are seeking to duplicate our success in linking universities and the private sector.

Schools such as the University of California and the University of Maryland are so convinced of the success of royalty sharing that they have raised the inventor's percentage to 50% of the receipts of licensing income! Many schools working on long range projects with big businesses, like that between Washington University in St. Louis and Monsanto, say that royalty sharing provisions have never been a problem in interactions with the private sector.

Experts in technology transfer from publically funded R&D to the private sector say that for this interaction to be successful certain incentives must be present. Every player involved in the interaction must benefit, the inventing organization, the government, and the private sector. But central to any success must be the individual whose creativity is the basis for the exchange. Indeed, rewarding individual inventors was the reason that the patent system was authorized in the Consitution under Article I, Section 8.

As the law now stands, inventors at universities and university operated Government labs share royalties while their counterparts in Federally run labs do not. Legislation must address this inequity or the flow of talented researchers at the Federal

laboratories will increase.

By excluding the inventor from federal lab legislation, a few big business patent counsels seek to turn the patent system on its head. The patent system thus becomes a bludgeon keeping inventors down rather than a stimulus lifting them up. This perversion must not be allowed to succeed. Indeed, individual creativity is the keystone of American creativity. Misguided special interests like Intellectual Property Owners and NAM are seeking to impose a Soviet management style on federal inventors.

We are on the brink of tapping into a tremendous source of basic and applied research unequalled in the world. The economic benefits will be staggering. Royalty sharing is the key for unlocking this tremendous resource or of frittering away a priceless asset. The choice is clear.