UTILITARIAN CONSTITUTIONALISM: A COMPARISON OF BENTHAM & MADISON

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ABSTRACT: Jeremy Bentham (1748–1832), the father of modern utilitarianism, had much in common, ideologically, with James Madison (1751–1836), the father of the U.S. Constitution. This Article is an attempt to bridge the literature on the two figures and to show that knowledge of Bentham’s constitutional theory is useful in understanding the intellectual environment that produced the U.S. Constitution. Although lawyers’ knowledge of Bentham might be limited to catchphrases such as, “nonsense upon stilts,” or concepts

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associated with modern surveillance technology like the Panopticon (his design for a prison), Bentham was a serious legal and political philosopher. His interests extended to the United States, so much so, that he engaged in serious analysis of the U.S. Constitution and communicated with leading American politicians, including Madison, Benjamin Franklin, John Jay, Aaron Burr, and John Quincy Adams. This Article demonstrates the similarities of thought between Bentham and Madison and argues that the Constitution is best viewed as a document inspired by, and compatible with, the rationalism represented by English utilitarianism.

In Benthamite terms, creating a federal command (federal common law) out of “international norms,” and then constructing a cause of action to enforce that command through the purely jurisdictional grant of [a statute], is nonsense upon stilts.¹ — Justice Antonin Scalia

If, as Jeremy Bentham once quipped, a fanciful argument may be dismissed as “nonsense upon stilts,” the court’s analysis in this case can best be described as delirium on a pogo stick.² — Judge Janice Rogers Brown

I will therefore assume that the Court means that the DNA search at issue here was useful to “identify” [the defendant] in the normal sense of that word — in the sense that would identify the author of Introduction to the Principles of Morals and Legislation as Jeremy Bentham. … Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of

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our liberties would have been so eager to open their mouths for royal inspection. — Justice Antonin Scalia

INTRODUCTION

Two months after the American colonists declared their independence from the British crown by proclaiming their unalienable rights to life, liberty, and the pursuit of happiness, Jeremy Bentham wrote of the revolutionaries, “In these tenets they have outdone the utmost extravagance of all former fanatics.”

However, Bentham did not have to wait long to see the French fanatics outdo the Americans by producing “nonsense upon stilts” in the Declaration of the Rights of Man. But the American Declaration of Independence produced on July 4, 1776, was still nonsensical enough for Bentham to contribute to a pamphlet condemning the actions of the American Congress. Nor in his later years did Bentham ever come to regret his criticisms of the claims set forth in that hallowed document. Yet oddly enough, Bentham came to admire the United States—or the Anglo-American United States

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5 For the history behind the phrase, see Philip Schofield, Jeremy Bentham’s ‘Nonsense upon Stilts’, 15 Utilitas 1, 11 (2003).
as he continually referred to the country — more than any other nation.

Bentham has been the subject of numerous law review articles ranging from his influence on specific historical-legal developments in the United States, to the influence of his philosophical jurisprudence on American law, to more creative and instrumental uses of his theories relevant to modern administrative law, evidence

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6 He never used the term, however, in direct correspondence with any American as far as I can tell; it only appears in his general works.


8 See, e.g., Melissa J. Luttrell, Bentham at the OMB: A Response to Professor Rowell, 64 ADMIN. L. REV. 1013 (2012).
law,¹⁰ criminal law,¹¹ and legal fictions.¹² In the present article, I do not intend to directly engage those uses of Bentham.¹³ Rather, I intend to present the history of Bentham’s relation to the creation of the United States as a nation. By doing so, I hope to provide legal scholars with the background necessary to better appreciate this unique lawyer-philosopher who was so fascinated with the creation of the new country. At the same time, this Article also brings to light a foreign perspective on the ever-popular debate over originalism.¹⁴ Bentham’s contemporaneous view of the founding of the nation should prove to be of good use in better understanding the concerns of the framers, especially James Madison.

Bentham’s historical thought in relation to the United States has been much neglected in the existing literature. H.L.A. Hart most

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¹³ I have previously engaged such scholarship, specifically examining the role of Bentham’s theories on the American jurisprudential philosophy of legal science. See STEVEN J. MACIAS, LEGAL SCIENCE IN THE EARLY REPUBLIC: THE ORIGINS OF AMERICAN LEGAL THOUGHT AND EDUCATION 39–61 (2016).

famously considered the subject in an essay in 1976. Hart traced Bentham’s change of heart, from his skepticism of American independence to his admiration of American democracy. Hart’s explanation is really a two-way road: over the course of the early nineteenth century, both Bentham and America moved closer towards each other in their political ideals. It is my intention to explore Bentham’s evolving views of the United States from the time of its creation as an independent nation to the end of Bentham’s life when Jacksonian Democracy was on the ascendant. Specifically, I am interested in understanding what lay behind Bentham’s evaluation of various aspects of America’s constitutional system. What caused Bentham’s initial distaste for American independence and why had he changed his tune within a matter of decades? Had Bentham’s political philosophy changed or had he witnessed the newly created nation become more utilitarian as the years went by?

To answer these questions, we are required to examine a large expanse of time, from 1776 to 1832, roughly fifty-six years. This requires great selectivity among the myriad ways one might trace the Bentham–America interaction. The two focal points of this article will shed much light on this fascinating interplay of political ideas. The first topic concerns the language of rights, especially as expressed in the Declaration of Independence, but also the language contained in the bills of rights of the federal and state constitutions. Here, we get the opportunity to hear Bentham’s early thoughts on natural rights, well before he wrote his famous attack on the French declaration. We will also attempt to understand how Bentham was able to reconcile the Americans’ pervasive use of rights talk with his budding admiration of American democracy in the late-eighteenth century.

The second focus of this essay, and the one that will consume most of our discussion, concerns the comparative constitutional thought of Bentham and James Madison. Although the similarity of substance of their thought and their epistolary exchanges might be motivation enough to study Bentham and Madison in comparative perspective, other reasons stand out. For Madison, unique among the American founders, was interested in the history of governments dating back to ancient Greece. Not only did Madison prepare for the constitutional convention of 1787 by reading trunk-loads of books,\textsuperscript{16} he also helped to explain what the convention had produced by composing various essays as part of the \textit{Federalist} series of newspaper tracts between late-1787 and early-1788. It is thus thanks in large part to Madison that we have a volume with instructive and ratiocinative\textsuperscript{17} material to aid our understanding of the American Constitution. It is through these writing that our comparison with Bentham’s many works is able to prove so enlightening.

In the end, what we find is that the American constitutional framers, Madison in particular, produced a document that was largely consistent with Bentham’s utilitarian theories. These philosophical commonalities led Bentham to believe that the United States was an ideal nation for full-blown utilitarian codification. Although Bentham’s efforts to engage various American statesmen were only partially successful, his intellectual engagement with the country proved fruitful for the subsequent development of his political and legal philosophy. Additionally, viewing the Constitution through Bentham’s eyes allows us to glimpse the


\textsuperscript{17} These terms are borrowed from Bentham’s \textit{Constitutional Code}. See \textsc{1 Jeremy Bentham}, \textit{Constitutional Code} (F. Rosen & J.H. Burns eds., 1983).
Founding ideas from a different, but at the same time familiar, perspective.

I. Bentham on America: The Story Told Thus Far

Before delving directly into Bentham’s writings, I first want to consider what other historians have understood Bentham’s stance on the U.S. to be. I mentioned above that Hart contributed to this topic but only a handful of other scholars have focused exclusively on the American relationship, although other works mention it in passing. Because the relevant literature is so small, and dated, I will set out here many of the former insights and refer back to them occasionally in my own analysis.

In 1955, Chilton Williamson declared that “neither American experience nor institutions played any part in the development of Jeremy Bentham’s utilitarianism in its initial and seminal phases.”\(^{18}\) “Conversely,” he explained, “it is difficult to place one’s finger upon the specific influences which he exerted upon American developments when he was at the height of his fame.”\(^{19}\) The first statement seems to be almost indisputable. Even though American and British tensions had been brewing for a number of years prior to 1776 when Bentham published his first statement on utilitarianism, it is unlikely that the American colonists’ constitutional quibbles figured into *A Fragment on Government*. At that time Bentham was more concerned with responding to English and European philosophical figures, as Williamson points out. Whether the second statement can be as easily accepted is a little more questionable. That is, it is not as clear that Bentham had no specific influence on America within his lifetime. It is true that Bentham does not figure prominently in the political or legal history of American


\(^{19}\) Id.
development because he was never a popular presence in the American mind. However, not enough research has been done on the American political figures with whom Bentham was intimate to determine that he did not influence their thinking on political matters, which translated into policy development back home. Certainly, I am not suggesting that historians have ignored a figure like John Quincy Adams, who while minister to Britain became quite friendly with Bentham. What I am suggesting is that Adams’s beliefs, policies, and political actions, have never been studied with the intention of finding any influence subsequent to his acquaintance with Bentham. The same concern could be raised for any of the other Americans whose paths crossed Bentham’s in the first three decades of the nineteenth century.

Williamson’s larger concern is with Bentham’s attempt to codify the laws for any number of constituent States in the U.S. While acknowledging that a primary motivating factor for offering such services was to help obliterate the English common law from the borders of the U.S. and replace it with rational utilitarian codes, Williamson contends that Bentham’s interest in codifying for America grew “as he entered his ‘democratic phase.’”20 This is an interesting thought because Bentham’s law reform proposals are usually considered a separate endeavor from his political reform efforts.21 After all, his critique of the common law began with his attack on Blackstone in the Fragment, and thus preceded his “democratic phase” by at least three decades. But perhaps Williamson is onto something and Bentham’s law reform proposals

20 Id. at 546.
for America had more to do with its political character, at least as Bentham understood it, than has been previously acknowledged.

Williamson’s other major concern is with the materials Bentham collected from America—newspapers, magazines, books, laws, etc.—in an attempt to better his knowledge of the country he admired. By so keeping his finger on the pulse of activity across the Atlantic, Bentham felt free to offer his thoughts and advice whenever the moment struck him, especially in matters of foreign affairs. Despite this back-and-forth Bentham had with America, Williamson concludes that Bentham “never commanded a precise, technical knowledge of the United States” and that this deficiency led to misunderstandings of the political process.22

Williamson ends his article by considering the praise Bentham heaped upon American political leaders, especially in his later years. “In so doing,” Williamson contends, Bentham “illustrated the truth of the statement that during much of the nineteenth century British radicalism looked to America as the working model for the future happiness of the British people.”23 Although the history of British radicalism is beyond this Article’s scope, Williamson’s point can be narrowed and made more relevant to present considerations by simply appreciating the fact that Bentham looked to America for much inspiration in the last two decades of his life. As Williamson makes clear, although Bentham was not uncritically enamored with the American system, he seemingly took greater advantage of his relationship with the country than it took from him.

22 Williamson, supra note 18, at 548.
23 Id. at 551. See J.R. Dinwiddy, Radicalism & Reform in Britain, 1780–1850 (1992) (examining Bentham’s role within the history of nineteenth-century British radicalism).
D.P. Crook took a more critical look at the United States in Bentham’s thought in a 1964 article.24 “To understand Bentham’s regard for America, his political philosophy must be examined,” explained Crook, “for that philosophy almost *predetermined* his admiration.”25 Turning to his political philosophy, Crook finds that Bentham came upon democracy via utilitarian premises, “independently of his awareness of American political experience.” However, not one to pass up a good example of the vindication of his ideas, Bentham used the U.S. to show how his political philosophy could be made to work in reality.

Like Williamson, Crook finds that deficiencies in Bentham’s understanding of America make his assessments of American institutions somewhat dubious. Crook describes a “deep schism between American liberalism . . . and Benthamite utilitarianism, a schism of which Bentham himself was only dimly aware.”26 Crook criticizes those scholars who, by counting Bentham as a liberal himself, have ignored this tension. Rather, Crook sees Bentham as “more inclined to accept anti-individualist arguments, to fix his gaze on the individual-in-society, the individual as a unit of the greatest number, than is respectable for a liberal.”27 Thus, Crook says of Bentham, “He is to be placed rather with the Jacksonian democrats than with the Fathers of the Constitution.”28

Although I do not dispute the claim that Bentham was no Lockean liberal, Crook’s description of the American founders cannot be left without remark. In 1964, Crook was writing in the

25 *Id.* at 197 (emphasis added).
26 *Id.* at 202.
27 *Id.*
28 *Id.*
waning days of the dominant American consensus historians who had described the American political scene as ruled by a liberal consensus from the Founding through Franklin Roosevelt’s New Deal. However, in 1967, Bernard Bailyn ushered in a new school of thought in American history based on civic republicanism. 29 Bailyn’s work was soon reinforced by his former student, Gordon Wood, in 1969 30 and republicanism became the new interpretive technique to describe the Founding and the Early Republic. Bailyn and Wood found that communitarian ideas were much more prominent in the lead-up to the American Revolution and in the creation of state governments soon thereafter than liberal individualism. Another student of Bailyn, Jack Rakove, has written more recently of the political pressures exerted on the drafters of the American Constitution, and how that document is more the result of pragmatic efforts than liberal ideology. 31 The point here is, that what Crook described in Bentham’s thought as “an antagonism to many basic political forms in America,” now needs correction in light of these subsequent histories. 32 So, while Bentham was critical of judicial review, bills of rights, and the separation of powers, only the last of those features could be considered as basic to the U.S. system. And for the American Founders, the separation of powers had nothing to do with liberal theory and everything to do with constitutional functionality—practical calculations as to how governors would use power and how that power could be checked—the same sort of calculations in which Bentham would later engage in drafting his

31 See Rakove, supra note 16.
32 Crook, supra note 24, at 202-03.
own constitutional code. When Crook says that “Bentham never acquired a deep understanding of the spirit of American politics, or indeed, a precise technical knowledge of the American political process,” this may be true, but it does not lead to the conclusion that “he never fully appreciated the schism between his style of thought and that of most American liberals,” for the simple reason that this schism is more imagined that real.

In his analysis of classical republicanism, J.B. Schneewind closes with some provocative remarks, making the claim that Bentham was cut from the same republican cloth just described. If such a thesis can be sustained, and the Bailyn-Wood thesis regarding American republicanism holds, then indeed Bentham had every reason to admire what the U.S. had accomplished without betraying any of his own fundamental beliefs. Schneewind tells us “the central assumption” of classical republicanism was “that conflict within society arises neither from deep and unalterable features of human nature, nor from error and ignorance, but from faulty social or political arrangements.” Thus, a virtuous action was one that was in accord with republican political arrangements, and hence classical virtue was developed through the political system, rather than

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33 Two recent essays in a collection on constitutional thought support this interpretation. See Philip Schofield, Jeremy Bentham, in CONSTITUTIONS & THE CLASSICS: PATTERNS OF CONSTITUTIONAL THOUGHT FROM FORTECUE TO BENTHAM 231, 235 (D.J. Galligan ed., 2014) (“For Bentham, the point of the constitution was to replace the natural opposition of interests which existed between rulers and subjects with an artificial identification of interests.”); Mark A. Graber, James Madison’s Republican Constitutionalism, in id. at 327 (describing Madison’s analysis of the separation of powers as motivated by the desire to “minimize the influence of public opinion on public policy”). See also RAKOVE, supra note 16, at 276–77 (explaining that the framers defended the separation of powers in functional, not theoretical, terms).
34 Crook, supra note 24, at 204.
acquired through birth or cultivated through formal education. Like the classical republicans, Schneewind tells us, “Bentham thinks society must be rightly ordered to enable its members to act virtuously.” Moreover, Schneewind’s theory helps us to recognize the place of the individual in this sort of political arrangement. As he concludes, “The classical republican holds that at least in an ideal society . . . conflict would be overcome by virtue, and the separateness of individuals would not matter. Perhaps that is a legacy which utilitarianism itself is not able, or does not wish to overcome.”

Thus, classical republicanism provides us with an additional lens through which we can comparatively view Bentham and the American Founders. In two particular areas—the effect of political organization on society and the role of the individual within society—do we most clearly see classical republicanism’s utilitarian features.

Finally, we come to H.L.A. Hart’s interpretation of Bentham’s relation to the United States. Hart finds two distinct phases in Bentham’s concern with America. First, there was “antipathy and rejection” of both the colonists’ legal and philosophical arguments in their break with Britain. Second, there “was a phase of enthusiasm and, in many ways, indiscriminate admiration of America after the Union and of its developing democracy.”

Indeed, Hart pinpoints the two most basic features of Bentham’s thought on America. The early phase concerns itself with the American colonists’ complaints that Parliament was legislating for them in unprecedented manners and that their homegrown political institutions were not being respected by the distant British government. If those were the legal arguments, the philosophical arguments came ultimately in the form

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36 Id. at 206–07. Schneewind makes clear that he does not consider John Stuart Mill or Henry Sidgwick to be classical utilitarians with respect to this particular understanding of the individual.

37 HART, supra note 15, at 54.
of the Declaration of Independence, passed by the American Congress. But if Bentham had an early phase, then so did America. The language of rights so prominent in Thomas Jefferson’s Declaration is certainly good theatrical flourish, but it also overshadows the substantive complaints contained in the body of that document. Likewise, the U.S. Bill of Rights, still as quotable today as it was in 1789, has been taken far more seriously since the mid-twentieth century than its author, James Madison, had ever imagined it should. Thus, I will argue that Bentham was on solid footing when he criticized the language of rights, not only on the philosophical and political grounds he did, but also because, in the case of the United States, the Americans themselves never really intended to take rights seriously in the eighteenth or nineteenth centuries despite the language of their organic documents to the contrary.

Bentham’s second phase is much more interesting for the reason that it is here that he is willing to engage in an exchange of ideas with America, whether or not she is similarly willing to respond. Hart says that “the story of Bentham’s concern with America is in fact a complex, and in the end, a rather sad one.” The sadness arises, one suspects, from Hart’s perception that Bentham’s admiration was indiscriminate and effusive, especially as the years went on. This is compounded by the fact that Bentham clearly did have what appeared to be major differences of opinion with respect to governmental organization, but nevertheless overlooked those disagreements to curry favor with the Americans. Yet in return, the American governments outwardly offered him so little in gratitude,

38 See RAKOVE, supra note 16, at 316 (“At the national level of government, Madison believed, a bill of rights would prove redundant or pointless.”). See also Graber, supra note 33, at 344–50 (describing Madison’s belief in “republican rights” as opposed to “democratic rights”).
39 HART, supra note 15, at 54.
praise, or acknowledgment of his ideas. This bleak picture is difficult to counter in this present account, but as I mentioned above, I do hope more work will be done on how Bentham’s thought influenced the individual American officials with whom Bentham was in steady contact.

Hart dates the beginning of Bentham’s second phase surprisingly early, to at least 1789. That year of course corresponds to the publication of Introduction to the Principles of Morals and Legislation (hereinafter IPML). \(^4\) Hart asserts, “What then about American democracy as distinct from American independence? Here the development of Bentham’s thought is more tortuous and less easy to trace with confidence.” \(^4\) As I have suggested and will in more detail spell out, I think there is a significant difference between the language of American independence and the republican philosophy and pragmatism surrounding the constitutional era. Moreover, it was a shift in governing tactics that someone like Bentham could quite easily take note of. Put another way, the U.S. Constitution is very much a utilitarian document, supported by practical reason laid out in The Federalist, (notably Jefferson contributed to neither), and its utilitarian structure resonated quite loudly.

By Hart’s reasoning, Bentham’s fondness for America overlaps with his so-called reactionary period, which Hart dates from 1793–1795, caused by the violence and turmoil of the French Revolution.

\(^4\) I say at least 1789, because IPML was completed nine years before it was finally published, yet the final section where the praise for the U.S. is located appears to have been written specifically for publication. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS & LEGISLATION 301 (J.H. Burns & H.L.A. Hart eds., 1970) (explaining that the original work was completed in 1780, but that the concluding note was written 1789).

\(^4\) HART, supra note 15, at 66.
During this reactionary period, Bentham turned away from thoughts of democracy, and thus had to square his fear of the people with America’s seeming prosperity. He did this by holding the U.S. out as an exception marked by its unique rural character. But Hart also credits America’s example with influencing Bentham’s transition to democracy in 1809.

Once Bentham was fully in line with democratic republicanism, he was able to consider critically more features of the U.S. system. Hart notes three vices that were troublesome to Bentham: slavery, the common law, and the federal Senate. We will recreate below the arguments Bentham and Madison deployed when defending their positions on the Senate. However, these features did not bother Bentham enough to let criticism overtake praise of the country. Indeed, Bentham tendered his continual offers to draw up legal codes for the U.S., which began in 1811 with a letter to President Madison and ended with an 1830 letter to President Jackson, not with the aim of changing any fundamental aspect of the U.S. government, but with the aim of strengthening its utilitarian foundations.

As Hart concludes, “all was in vain,” but Bentham’s admiration never waned.

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42 See Philip Schofield, Jeremy Bentham, the French Revolution and Political Radicalism, 30 Hist. Eur. Ideas 381, 397–98 (2004). Schofield argues, “Bentham did not accept the United States as an appropriate model of democratic government,” because it lacked the social problems inherent in large industrial centers. Id. See also Frederick Rosen, Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code 35 (1983), where he argues that Bentham justified excepting the U.S. as a model for democracy because its success was explained by its having been reared well by the mother country for self-government.

43 Hart might say, “Bentham’s return to democracy,” because he believes Bentham had already developed a utilitarian defense of democracy in 1790. See Hart, supra note 15, at 70.

44 See infra notes 142 & 155, for citations to Madison and Jackson letters.

45 Hart, supra note 15, at 77–78.
So how will my analysis fit into this historiographic discussion? I will agree with much of what Williamson had to say, but it is because I am looking in much the same direction he did, that is, with my focus mainly on Bentham’s writings. From this standpoint, the American influence on Bentham’s later constitutional analysis is clear. I will also agree with Crook and Hart that when Bentham looked to America he thought he was seeing utilitarianism in action. But I will differ with Crook significantly in suggesting that Bentham was correct in his assessment of what he was seeing. Hart’s description of Bentham’s two phases is useful, but I think the first phase, characterized by his suspicion of a liberal, rights-based regime, is based on the misleading rights talk of the Declaration of Independence and various bills of rights that were more precatory than binding, and the lack of a fully functioning national government until 1789, not a major change in anyone’s—Bentham’s or America’s—philosophy. The complexity of Bentham’s second phase will be fleshed out when we compare his constitutionalism with that of Madison. But ultimately, I think that Bentham provided useful critiques of American government, which remain valid today, and even though Bentham did not get as much acknowledgment from America as he might have wished, his writings benefited greatly from this relationship—a relationship that was sometimes personal and epistolary, but was mostly intellectual.

46 When I say that the language of rights was “precatory,” I mean that it was nothing more than “hortatory fluff,” to borrow an expression from an opinion of Justice O’Connor. See Kelo v. New London, 545 U.S. 469, 497 (2005) (O’Connor, J., dissenting). It is my contention that in eighteenth-century America, the language of rights was primarily meant to be heard in the political arena and was not thought of as justiciable. See Jack N. Rakove, The Madisonian Theory of Rights, 31 WM. & MARY L. REV. 245, 264 (1990) (“Madison seemed to ignore the possibility that a bill of rights might actually provide an independent judiciary with a ‘legal check’ against improper acts of legislation”).
II. THE NONSENSE OF JEFFERSON’S UNALIENABLE RIGHTS

That Bentham considered the language of natural rights nonsense is well enough known. However, what is less apparent from Bentham’s specific criticisms of rights-based documents is why natural, human, god-given—any non-positive—rights amounted to so much foolishness. The answer lies in two facets of Bentham’s thought, and it is difficult to say which is more foundational: his political morality, encapsulated in his utilitarianism, and his ontology, which was entirely contained in a sophisticated theory of language. According to Bentham, rights of this sort were absolutely meaningless. And because they were meaningless, they were unable to be of any use to the promotion of human happiness. To the contrary, any linguistic confusion the so-called rights produced only added to human unhappiness. Bentham’s moral and ontological theories will be demonstrated using the Declaration of Independence as an example.

One preliminary point is in order prior to considering Bentham’s objections to the Declaration of Independence: The American Revolution was entirely supportable on a utilitarian basis and Bentham realized this fact. That Bentham chose to focus all of his contemporary criticism on the parts of the Declaration with which he disagreed speaks more to his personality than his political philosophy.

Although Bentham was highly intelligent and a prolific writer, he was also intellectually self-confident and enjoyed pointing out the logical shortcomings of others. He began his career with a nit-picking attack on William Blackstone in *A Fragment on Government* and continued this style when he looked at the American and French declarations of rights. The word-by-word, line-by-line, thought-by-thought analysis was a hallmark of Bentham’s and served him well in terms of clarity of exposition. One might be tempted to say that this style was a result of his theory of language, but considering his personal outlook, I think it is just as much a result of his respect for ideas and contempt for those individuals who had not thought out
their own ideas to their logical extent. We will see a good example of this later when Bentham responds to a letter he received from James Madison. But in the meantime, let us look at how Bentham responded to Madison’s close friend Thomas Jefferson.

In September 1776, Bentham wrote a letter to his friend John Lind, at Lind’s request, analyzing the preamble to the Declaration of Independence. Unfortunately, only a fragment of the letter has survived. Lind, however, did publish a pamphlet, An Answer to the Declaration of the American Congress, in which he apparently used much of Bentham’s analysis and treated it as his own. As Bentham later recounted, when Lind “had made some little advance, my surprise was not small at finding that this page or two of scattered thoughts had been set in front of his work, and constituted the plan on which he was operating.” Some fifty-one years later in recalling that his “opinions were at that time opposite to the American side,” Bentham explained, “the turn they took was the result of the bad arguments by which I observed that side supported.”

The worst of those arguments are contained in these two lines from the preamble to the Declaration of Independence:

We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the Governed . . . .

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47 See infra text accompanying notes 153–54.
49 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
Bentham’s response was that the Americans “see not, or will not seem to see that nothing that was ever called government ever was or ever could be in any instance exercised save at the expense of one or other of those rights.” His point was, that regardless of the contents of the first sentence, the second sentence did not logically follow; whenever a government is instituted, “some one or other of these pretended inalienable rights is alienated.”

Regarding the substance of the supposed unalienable rights, Bentham enjoyed pointing out their actual alienability in American society. If the right to life was really unalienable, then why had the Americans destroyed Canadian lives in their invasion to the north? If the right to liberty was unalienable, then why were British loyalists being held “in durance” for simply disagreeing with the American cause? If the right to pursue happiness was unalienable, then why were “thieves restrained from pursuing it by theft, murderers by murder, and rebels by rebellion”? Likewise perplexing to Bentham was the sentiment that “all men are created equal.” He asked rhetorically, “Do they know of any other way in which they themselves were created, than by being born?” Then he asked whether they thought a child was equal to his parents, or to a magistrate. His underlying concern was “what inference would they draw from this equality?” And, indeed, a rationalist like Bentham is impelled by Jefferson’s high-sounding rhetoric to ask, so what? Nowhere does Jefferson tell us the consequences of all men being equal. Bentham did not raise the sitting-duck issue (at least to modern eyes) of slavery (at this early point), but certainly in a logical analysis of the type Bentham was conducting, it is fair to conclude that Jefferson was not a good logician.

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50 Letter from Jeremy Bentham to John Lind, supra note 4, at 342.
Bentham rounds out his criticism of the Americans by considering “their original and only grievance.” Was it “that they were taxed more than they could bear? No, but that they were liable to be so more than they could bear. Is there any where, can there be imagined any where that Government whose subjects are so liable to be so taxed more than they can bear?” 51 Here again Bentham focuses on the ultimate logic, not of the cause, but of the rhetoric used by the Americans. In noting the vastness of the realm of possible government action, Bentham was simply pointing out that the colonists’ arguments were not logically sound. So, what would a logically sound argument in the American Revolution have looked like? To answer that question, we need only turn to Bentham’s work that came out the same year as the Declaration of Independence, A Fragment on Government.

Perhaps it should not be surprising that American political leaders, wedded to Blackstone’s ideas as they were, would have missed the opportunity to revolt in a Benthamic fashion. 52 Instead they appeared to be following Blackstone’s lead in basing their arguments on “the Laws of Nature and Nature’s God.” 53 And it was the British Crown’s transgressions of those supreme laws that led to “the Course of human events” that required the Americans “to dissolve the political bands which [had] connected them with another.” 54 It appeared as though all the Declaration was doing was following Blackstone’s admonitions to a tee. For he said, “no human law should be suffered
to contradict” the law of Nature and the law of revelation.55 But if a human law so commanded, “we are bound to transgress that human law, or else we must offend both the natural and the divine.”56 Bentham foresaw the danger in such ideas when he responded, “I see no remedy but that the natural tendency of such a doctrine is to impel a man, by the force of conscience, to rise up in arms against any law whatever that he happens not to like.”57 Bentham thought it was the inevitable result because anytime a group of people was faced with a disagreeable law, they could easily claim it violated Nature’s law since there was no universally accepted authority on what exactly that law contained. Blackstone really only provided two extreme options for an aggrieved political community—obey the sovereign or revolt. The Americans chose the latter.

Bentham, however, had unraveled the mystery “to guide a man through these straits”—the principle of utility.58 As it stood in 1776, that principle provided that the greatest happiness of the greatest number is the measure of right and wrong. If particular laws or other government actions were the cause of human unhappiness, then the principle of utility had something to say about obedience and revolution. Yet what utility did say was much more logical and universal than Blackstone’s Nature and God ever could have been. Utility itself provided a “juncture for resistance” and it was this: A citizen should not obey the law “when, according to the best calculation he is able to make, the probable mischiefs of resistance (speaking with respect to the community in general) appear less to him than the probable mischiefs

55 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *42 (1765).
56 Id. at *43.
58 Id. at 96.
of submission.” What Bentham later saw, and what he thought was a missed opportunity to apply utility, was that the American colonies had reached the utilitarian juncture for resistance by 1776, if not sooner.

It appears as though Bentham might have recognized that the U.S. had indeed reached this juncture shortly after completion of An Introduction to the Principles of Morals and Legislation when he thought of sending a copy to Benjamin Franklin. He wrote, “This book (if ever it should reach your hands) was written for the use of leading men: nor to any but leading men has it been sent.” Bentham thought that in the hands of the right people, the work might make a difference. “My notion of you,” he said to Franklin, “is such that if there be any thing good in it, you will not fail making good use of it for the benefit of those for whom you act.” Even as the war between Britain and America was still ongoing, Bentham seemed to recognize the opportunity for promoting his ideas in a country that would have to make a fresh start. He said of his book, “If at this or any more distant period any [sic] of the ideas which are contained in it should be the means of adding to the prosperity of your country (since the unhappy

59 Id.
50 Letter from Jeremy Bentham to Benjamin Franklin (1780), in University College London Library, Bentham Manuscripts, Box clxix, fol. 18. Williamson, supra note 18, cites this document as a letter Bentham sent to Franklin, and this is the suggestion on the manuscript folder. However, the only identifying mark of the intended recipient is “A Fran,” and the suggested date of c. 1780 is made considering the accompanying letters contained in the folder. The contents of the letter are somewhat more reassuring that it is, in fact, to an American statesman. However, it appears to be nothing more than a draft of a letter never sent; it appears incomplete and the numbered paragraphs are out of order. Bentham’s style was to list alternate word choices in drafts, hence the “alt.” in my transcription. Moreover, Williamson suggests it was the Fragment Bentham contemplated sending to Franklin. However, by that time the Fragment was widely available to leading men and not-so-leading men alike. It was IPML that was printed in 1780 and that did not reach a wide audience until its release in 1789.
distinction is now made) it will be some compensation [alt: consolation] for the misfortunes [alt: miseries] you have been a means of bringing upon mine.” That statement, plus his closing, indicates that Bentham had at least some humor about the separation of the two countries. He signed off “with all respect that is due to a [alt: an eminent] benefactor of mankind and all the love [alt: regard] which is [alt: can be] [alt: consistent?] due to the [destroying?] of my country’s peace.” Whether Bentham actually sent Franklin a copy of IPML is unclear, but Bentham’s budding interest in the new country is abundantly clear, even before the war was at an end.

In 1827, Bentham lamented that no use had been made of the only good argument the Americans had on their side: “the impossibility of good government at such a distance, and the advantage of separation to the interest and happiness of both parties.” Between 1776 and 1827, Bentham had written at length about the disutility of the possession of colonies to both the mother country and the colonies themselves. But a similar argument, if made before 1776, would likely have captured Bentham’s attention. The Americans’ utilitarian argument would have emphasized that British colonial government violated the six requirements Bentham thought necessary for freedom in a community as set out in the Fragment. They would have explained that power was mal-distributed, that foreign governors were poor choices for established peoples, that distinction between the governors and the governed was too rigid, that governors did not publicly explain their actions, that liberty of the press

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61 Id.
62 10 BENTHAM, WORKS, supra note 48, at 63.
64 See BENTHAM, FRAGMENT, supra note 57, at 97–98.
was not respected, and neither was liberty of association. Likewise, American partisans in Britain, in addition to these six factors, would have pointed out the financial burden of colonial government to Britain’s economy and its potential future gains with a stable and free trading partner.65 By focusing on the underlying issues, and not on the artificial limits to sovereign power put in place by Nature, the parties would have been forced “to support their respective persuasions by the only evidence the nature of the case admits of.”66 Instead, “the whole of the case was founded on the assumption of natural rights, claimed without the slightest evidence for their existence, and supported by vague and declamatory generalities.”67 To Bentham’s mind, the Declaration of Independence “always continued to be, a hodge-podge of confusion and absurdity, in which the thing to be proved is all along taken for granted.”68 Bentham provided an even more convincing argument against natural rights in the Fragment, when he said, “it is the perplexity of ambiguous and sophistical discourse that, while it distracts and eludes the apprehension,

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65 Bentham believed that the benefits of free trade were not derivable when one country exercised dominion over the other. As proof, he noted in 1820: “The trade between Great Britain and the American United States is greater in a prodigious degree than it ever was before they shook off their dependence.” JEREMY BENTHAM, Summary of Emancipate your Colonies, in COLONIES, COMMERCE, AND CONSTITUTIONAL LAW: RID YOURSELVES OF ULTRAMARIA AND OTHER WRITINGS ON SPAIN AND SPANISH AMERICA 277, 281 (Philip Schofield ed., 1995). See also JEREMY BENTHAM, Emancipate Your Colonies!, in RIGHTS, REPRESENTATION, AND REFORM: NONSENSE UPON STILTS AND OTHER WRITINGS ON THE FRENCH REVOLUTION 289, 302 & n.1 (Philip Schofield et al. eds., 2002), (noting that the loss of a monopoly on American trade actually helped to increase British trade with the U.S. by 1790).
66 BENTHAM, FRAGMENT, supra note 57, at 105.
67 10 BENTHAM, WORKS, supra note 48, at 57.
68 Id. at 63.
stimulates and inflames the passions.” And of course, Jefferson’s ambiguous and sophistical document did just that.

Once we move beyond the revolutionary period, however, we see that the language of rights continues to appear in American governing documents, and these words did not fail to capture Bentham’s attention once again. Yet the reappearance of rights in the various constitutions did not overshadow the serious thought displayed in the heart of those documents. To show how far apart the new federal Constitution was from Jefferson’s metaphysical truths, one need only take note of Alexander Hamilton’s arguments against a bill of rights published in 1788 as part of the Federalist tracts he and James Madison produced in support of the proposed Constitution promulgated by the federal convention, in which they had both served as delegates from their respective states. In Federalist No. 84, Hamilton set out to answer objections to the Constitution from those who claimed the lack of a bill of rights was reason enough for its rejection. Hamilton referred historically to the Magna Charta, the Petition of Right of 1628, and the Bill of Rights of 1689, to explain that such

69 BENTHAM, FRAGMENT, supra note 57, at 105.
70 In his memoirs, Bentham noted that, although Jefferson took the Declaration of Independence “for the main foundation of his glory,” he nevertheless held Jefferson “in very high estimation” based primarily on his advancement of the liberty of the press. 10 BENTHAM, WORKS, supra note 48, at 63. Bentham, of course, was referring to the persecution that Jeffersonians faced at the hands of the Sedition Act of the Adams Administration. See JEREMY BENTHAM, ON THE LIBERTY OF THE PRESS, AND PUBLIC DISCUSSION AND OTHER LEGAL AND POLITICAL WRITINGS FOR SPAIN AND PORTUGAL 9 (Catherine Pease-Watkin & Philip Schofield eds., 2012) (warning Spain in 1820 about the difficulties the U.S. faced under the Sedition Act).
71 For example, Justice Brennan has noted that it was not until the mid- to late-twentieth century that state courts began to emphasize their own bills of rights as independent sources of individual rights protection. See William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 495 (1977). This suggests that the judicial enforcement of state constitutional rights is an even more recent phenomenon than the federal equivalent.
documents were not appropriate in a government in which none of its people were subjected to a monarch: “they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants.” Hamilton further distinguished citizenship from subjection as follows: “Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations.” For Hamilton, the fact that the people were sovereign, was amply expressed in the preamble to the Constitution, which stated, “‘WE THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.’ Here is a better recognition of popular rights,” explained Hamilton, “than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.”

Although coming from Hamilton’s hand, the above quotation sounds as though Bentham himself might have penned it because it clearly distinguished between legal powers and moral judgments. Sounding even more like Bentham, Hamilton noted that a bill of rights “would even be dangerous.” He thought the people could not rely on mere words listed in such a document to keep them safe from governmental abuse. Instead, Hamilton thought that security, “whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.”

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72 The Federalist No. 84, at 419 (Alexander Hamilton) (Terence Ball ed., 2003).
73 Id.
74 Id. at 420
75 Id.
Hamilton saw in 1788 what Bentham was later to make central to constitutional law, namely that public opinion is the only safeguard for good government.76

By 1789, the year Hart marks as the beginning of Bentham’s transition to an American sympathizer, Bentham published *IPML*, to which he added a concluding note where he discussed American bills of rights. It is clear that Bentham had some soft spot for the United States by this point, but his main emphasis was still on spelling out the uselessness of declarations of rights. Bentham came to refer to the U.S. in the course of discussing what elements a complete code of laws would include. Bentham decided that whatever was included in the constitutional portion of such a code, it would certainly not include a declaration of rights that limited a supreme representative legislature, which unfortunately had been included so frequently in the state constitutions “of that newly-created nation, one of the most enlightened, if not the most enlightened, at this day on the globe.”77 But even that flattery was not intended to conceal the criticism of the well-meaning rights proponents. Their difficulty lay in the fact that they did not fashion their laws as one complete, all-inclusive, code guided by a science of law ultimately grounded in utility. Had American legislators followed such a rational method, they would have understood, that “a perfect, or even a moderate insight into that science, would prevent their being couched in those loose and inadequate terms, in which they may be observed so frequently to be conceived; as a perfect acquaintance with the dictates of utility on that head would, in many, if not in most, of those instances, discounsel the attempt.”78


77 BENTHAM, IPML, supra note 40, at 309.

78 Id.
The substance of Bentham’s criticism of American bills of rights was basically the same as his criticism of the Declaration of Independence thirteen years earlier. In both instances, he complained of looseness of language and the idea of positive limitations on the sovereign legislature. But other elements of Bentham’s thought had clearly evolved. By 1789 we can tell that Bentham had at least a skeletal image of what would become his Pannomion, his complete body of laws, for he sketches this much out in the concluding note written in that year.79 The other new feature of Bentham’s thought was his expressly positive view of the United States, notwithstanding his distaste for their declarations of rights. But, to reiterate Hart’s question, what about the U.S. or Bentham himself had either changed or become elucidated by 1789 that would have led Bentham to describe the newly created nation as perhaps the most enlightened in the world? The American historian is tempted to say: it is quite obvious, the Constitution had just been written two years earlier and by 1789, America was finally the United States of America, rather than some unplanned, loose confederacy. Moreover, the Constitution had been deliberately constructed, and then publicized and debated in the most rational way one could possibly imagine for a rural, eighteenth-century country. The problem is that this explanation assumes that Bentham was aware of America’s internal reconstruction and followed at least some of the arguments made in favor of the new constitutional arrangement. While it is settled that Bentham later became aware of many of the constitutional features of the U.S. by the 1810s and 1820s, I want to suggest here, based upon the arguments of Madison and Hamilton, that the utilitarian ethos of the new Constitution was unmistakable and thus its enlightenment quite obvious. This

79 See DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 241, 257 (1989) (arguing that Bentham had a basic idea for the Pannomion as early as 1780, but that this idea was spawned from his earlier plan of a Digest of Law in the mid-1770s).
will further explain why Bentham thought the U.S. ripe for utilitarian codification long before he became a republican himself.

III. The Shared Constitutional Motivations of Madison and Bentham

James Madison wrote the most famous defense of republican government in the tenth paper of The Federalist on November 22, 1787. The most insightful part of that essay is Madison’s starting point—his understanding of human nature. It is most illuminating to compare Madison’s views with the understanding of human nature put forth by Bentham, who began IPML with his memorable observation, “Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do.”80 From this statement followed the notion that an individual would act so as to maximize his own pleasure and minimize his own pain. Madison likewise thought that mankind was self-interested and that a government would have to be designed accordingly.

Madison’s main concern in Federalist 10 was to explain why a republic, as opposed to a democracy, would lead to the general good, especially when it was filled with self-interested individuals who would combine to form factions presumably opposed to the community interest.81 Bentham warned, “It is vain to talk of the interest of the community, without understanding what is the interest of the individual.”82 Madison, however, understood this. He said of the citizen, “As long as the connection subsists between his reason and his

80 BENTHAM, IPML, supra note 40, at 11.
81 For Madison, the term democracy meant nothing more than universal participation in every public decision. A republic was a representative democracy, where representatives were democratically elected to make public decisions on the electorate’s behalf.
82 BENTHAM, IPML, supra note 40, at 12.
self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.” Madison concluded that “the latent causes of faction are thus sown in the nature of man.” This led Madison to the observation that “the causes of faction cannot be removed; and that relief is only to be sought in the means of controlling its effects.”

The extended republic was the solution for Madison for two reasons. First, a minority faction would be prevented from interfering with the community interest by the majority being enabled “to defeat its sinister views by regular vote.” Second, a majority faction would “be rendered, by their numbers and local situation, unable to concert and carry into effects schemes of oppression.” The interesting Madisonian point here is that the universal good was to be achieved through a deliberately designed government that yielded only utilitarian ends using calculations based upon self-interest. It should be noted that the second virtue—preventing majority factions—is entirely in keeping with a utilitarian government founded on popular sovereignty. At first blush, this feature might seem to question the theory that “right and power being both vested in the majority, are held to be synonymous.” Indeed, Madison pondered that very question. His conclusion was that the majority could well mistake its true interest for some factional delusion motivated by an irrational passion. Chief among Madison’s fears regarding a sinister majority delusion involved the propertyless interfering with the propertied. Bentham himself later thought this way when he developed four

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83 THE FEDERALIST NO. 10 (James Madison), supra note 72, at 41.
84 Id. at 43.
85 WOOD, supra note 30, at 410 (quoting Madison).
principles subordinate to utility, among them was security, and mainly security for property.  

If Federalist 10 mirrored Bentham’s understanding of human motivation, then Federalist 51 reflected his idea that a governor’s interest had to be linked with his duty according to utility. In this later paper, Madison explains why the checks and balances built into the Constitution are necessary to achieve good government. The simple explanation is that this feature prevents the harmful acquisition of power by one department of the government at the expense of another. In a sense, Federalist 51 gives a utilitarian justification of a division of governmental powers by arguing that without such a division the self-interest of the governors will naturally result in bad government.

The more detailed justification for checks and balances lies in an analysis of how human motivation interacts with governmental structure. “The great security against a gradual concentration of the several powers in the same department,” says Madison, “consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” Madison continues this analysis in a passage worth quoting at length:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights

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86 See infra text accompanying notes 123–133 (discussing Bentham’s view of obligations and the disappointment prevention principle). See also Michael Quinn, Popular Prejudice, Real Pains: What Is the Legislator to Do When the People Err in Assigning Mischief?, in BENTHAM’S THEORY OF LAW & PUBLIC OPINION, supra note 48, at 63.

87 Bentham’s earliest formulation of the identification of interests can be found in his 1778 View of the Hard-Labour Bill, in 4 BENTHAM, WORKS, supra note 48, at 12, where he says, “The means that are employed to connect the obvious interest of him whose conduct is in question, with his duty, are what every law has to depend on for its execution.”
of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.88

These “auxiliary precautions” amounted to the separation of powers inherent in the Constitution. As we will see, Bentham thought a separation of powers only worked to create intragovernmental strife that prevented recourse to the electorate. Madison, however, thought otherwise, especially because of what he viewed as the twin aims of a republic: the first was “to guard the society against the oppression of its rulers,” and the second was “to guard one part of the society against the injustice of the other part.”89 By fracturing a government into distinct parts, not only would the rulers’ self-interest not prevail to the detriment of the community, but neither would the whole community suffer unjust and oppressive laws because a faction would be unable to succeed in undermining the government.

That Madison and Bentham shared ideas regarding the use of human nature in constructing constitutional law should not come as much of a surprise once it is realized that they had similar influences.

88 THE FEDERALIST No. 51 (James Madison), supra note 72, at 252.
89 Id. at 254.
The place of David Hume’s thought in Madison’s writings is well documented.\(^90\) Douglass Adair found that one of the principal assumptions of the Scottish philosophers, stated by Hume, was exemplary of the thought that influenced Madison: “that there is a great uniformity among the actions of men, in all nations and ages, and that human nature remains still the same, in its principles and operations. The same motives always produce the same actions; the same events follow from the same causes.” So true was the constancy of human nature, that, according to Hume, “politics may be reduced to a science.”\(^91\) Bentham concurred in Hume’s account, and in praising his *Treatise of Human Nature* agreed “that the foundations of all *VIRTUE* are laid in *UTILITY*.”\(^92\) Moreover, Bentham thought “every virtue is a moral quality in contradistinction to an intellectual.” “By this move,” according to D.G. Long, “Bentham confined moral qualities to the volitional realm, thus establishing in place of Hume’s argument that virtue is what arouses in us a certain kind of natural admiration the ‘classical utilitarian’ position that the good is what is or ought to be desired.”\(^93\) However, it seems that the agreement of Bentham and Madison with Hume is more interesting and enlightening for our purposes than any disagreement. Long convincingly asserts that Bentham rejected Hume’s account that sympathy (not Bentham’s “sympathy”) is fundamental to human motivation, and I think from Madison’s work in the *Federalist* we must also conclude that angelic sentiments were few and far between in ordinary human


\(^91\) Adair, *supra* note 90, at 345–46 (quoting Hume).


\(^93\) Id. at 25.
motivation. Instead, it is the Enlightenment-type, scientifically oriented, notion of human nature that is important to see reflected in both Bentham and Madison. Simply put, the idea that there is a “true” human nature, first pondered in Hume’s *Treatise*, is essential for the shared classical republican thought, because only with a foundational human nature can political arrangements work their magic to create virtue.94

Looking to Hume, it is also easier to understand the root of Madison’s fear of factions—both minority and majority factions. Hume wrote, “men are generally more honest in their private than in their public capacity, and will go greater lengths to serve a party, than when their own private interest is alone concerned.”95 This could be put another way: men pursue their own pleasures, i.e., act rationally, when alone, but once members of an organized faction, the same men abandon their rationality and act as though the faction had a distinct interest of its own, apart from the individuals who compose it. Hume continued: “Honour is a great check upon mankind: But where a considerable body of men act together, this check is, in a great measure, removed; since a man is sure to be approved of by his own party . . . and he soon learns to despise the clamours of adversaries.”96 Again this can be translated: the popular sanction acts to keep men in check within society, but once men form a faction distinct from the general community, and an individual views himself as belonging to the faction, the popular sanction no longer has any effect on him, and

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94 It is important to note that it does not follow that a belief in a “true” human nature leads to republican beliefs about government. See Schneewind, supra note 35, where he claims that Hume did not come out of the classical republican mold. The point made above is unidirectional: republicanism requires a foundational human nature; the idea of a “true” human nature does not inevitably lead to republican views.

95 Adair, supra note 90, at 354 (quoting Hume).

96 Id.
instead a new factional sanction takes its place thus warping the individual’s sense of right (or the universal interest).

I purposely translated Hume into Benthamic language to show that Madison was following the dictates of utility in explaining the new Constitution. It is not clear that Bentham ever went this far, however, in attempting to understand how the people could be kept from being deluded as to what was in the community interest. Bentham’s answer, as has been alluded to, did not involve the fractionalizing of government in the American style. Instead, Bentham relied on what he called the public opinion tribunal, informed mostly by a free and flourishing press. More on the role of public opinion will be said later. At the moment, we should consider in more detail why Bentham’s utilitarianism and Madison’s republicanism overlapped in the sense that the public good was not coextensive with simple majority rule.

We already saw that Madison worried about factional delusion and specifically feared for property rights without the proper checks on the majority. Bentham also worried about the protection of property. Chief among his subordinate principles was that of security of expectations. Bentham, of course, made the case for security clearer than Madison had because it was expressed along utilitarian lines. According to Fred Rosen, the “disappointment prevention principle” formed “the basis of both the civil and penal branches of the law of property.” This principle can be explained with an example: One might think that a perfect utilitarian society would have equal property distribution, thus ensuring that every member of society was equally happy. But what was one to do when trying to follow the dictates of utility taking existing reality as it presented itself? The answer surely did not lie in a sudden, forced redistribution of property. If such an act occurred, then certainly the newly enriched would have

97 ROSEN, supra note 42, at 101–06.
had an increase in their overall happiness, but what about the newly deprived? Wouldn’t their increase in pain be equivalent to that increase in happiness that simultaneously occurred, thus maintaining the balance of pain and pleasure? Bentham conceded that on a small scale this might be true, and that the balance might even be tipped in favor of an increase in overall happiness. For example, if a multi-millionaire had only a few thousand dollars taken from him and redistributed to the most impoverished, the increased pain to the wealthy man would be far outweighed by the increased pleasure in the poor who received the money. But universally and completely, such a redistribution would cause more pain than pleasure because of the violation of security in existing expectations. If one day someone lost half, or more, of their property in the name of equality, then what was to stop a complete loss the next day? If a man’s family had been wealthy for three generations, then equality might be used to justify impoverishing the same family for three future generations and making a new family wealthy that had previously been impoverished for the same length of time. This sort of potential disruption of settled expectations only added to human pain. This is why Bentham, as well as Madison, thought that even the whims and caprices of a majority could miscalculate the requirements of utility and thus bring about misrule.

Recall that Madison’s solution to majority misrule of the type just described was to fracture governmental power so that no one faction could gain control of the whole government and enact its sinister designs. Instead there would always be checks by other branches of the government to assure a utilitarian balance resulted in governmental policy. Why, then, did Bentham not go along with the notions of separation of powers and bicameralism for legislatures? As Rosen explains, it was not because he thought those features interfered with the majority will—as we just said, even the majority could miscalculate the community interest—it was because Bentham thought he had found a better way of doing what Madison himself was doing, that is, preventing the governors from turning sinister interests into
official policy and ignoring general good. 98 Whereas Madison thought bad governing motives could be controlled though complicated governmental machinery, Bentham thought the sinister interests could be controlled by a watchful public eye, and thus required simplicity in government so that it could follow its every move.

It would be wise at this point to make some clarifying remarks as to the sources of potential bad governance both Bentham and Madison envisioned. It might appear as though each had a different idea about where sinister motives came from, but that would not be correct. It is true that Madison focused his discussion more on factions and Bentham focused his remarks more on the motives of government officials. However, it would be incorrect to conclude from this that Madison feared the people, while Bentham feared the governors, more than each feared the other. Each was simply taking into account the political realities that he had seen occur in his own backyard, and each was attempting to address those failures in governmental structure through his theorizing. Thus, Madison was particularly troubled by the agrarian financial policies of some of the New England and Southern States, where they had printed worthless paper money and abolished state debts through simple legislation. These policies favored the rural majorities but were bad for fostering a developing national economy. Bentham was troubled by the corruption that he saw embedded within an older, more established government, where officials pursued policies that promoted their own financial interests, and eschewed good ideas that would benefit society as a whole, like a panopticon penitentiary or reform of the common law. The troubles in both nations arose, however, because the legislators were not functioning within a constitutional system guided by utility. Hence, each constitutional drafter was addressing

98 See FREDERICK ROSEN, CLASSICAL UTILITARIANISM FROM HUME TO MILL (2003) (especially ch. 14).
slightly different concerns, but the importance of securing good governance—by constraining officials and relying on the public—through constitutional codes was paramount for Bentham and for Madison.

One of the more interesting debates that we can reconstruct between Bentham and Madison, which illuminates their competing solutions to the problem of governmental checks and balances, concerns the value of the United States Senate as a second legislative chamber. Madison defended the design of the Senate in his *Federalist* essays in early 1788, whereas Bentham did not write his attacks on the chamber until 1822, some thirty-four years later. We know that Bentham read Madison’s writings on the Senate and gave them careful consideration. Bentham’s personal copy of *The Federalist* contains marginalia suggesting that he knew Madison was the author of the relevant essays and that he read closely those particular sections on the Senate.99 Unfortunately, we do not have any public engagement between the two on this particular issue.

Although Bentham did not openly criticize the Senate until 1822, he had previously condemned second legislative chambers in other writings. For example, he explained his preference for an omni-competent, single-house, legislature much earlier, most notably when he was writing for France in 1789.100 What is most striking about his

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100 See BENTHAM, Appendix A: Division of Power, in *Rights, Representation, and Reform*, supra note 65, at 405–18, where Bentham argues that the House of Lords “is more favourable to ignorance than to intelligence,” and that any benefit arising is
1822 attacks on the Senate is that just one year earlier he had written to Spain, urging that country to reject a House of Lords, and not once did he mention the Senate as an example of a useless mass of corruption that upper chambers tended to be in Bentham’s mind. Instead, his references to the United States are all laudatory, to an embarrassing degree. In the first tract of his Three Tracts on Spanish and Portuguese Affairs, first published in 1821 (although written in 1820), Bentham criticizes Spain’s proposed second chamber that would have contained members irremovable by the “subject many.” The entirety of his critique centers on the inherent conflict between the ruling few and the subject many. Surely this was an opportunity to point out that the Senate also contained members who were unable to be removed by the subject many in America. But rather, Bentham held the U.S. out as “that happy America, . . . which took from [Britain] all the good, leaving all the bad behind.” Even more inexplicable was his praise of “the truly matchless and unperishable government of the American United States,” which Bentham referred to as a “pure representative democracy.” If there was any institution that betrayed America’s commitment to representative democracy, it was the Senate, as we will see below. However, Bentham’s inconsistencies with regard to the Senate, if they can be called that, should not keep us from taking seriously his criticisms of that body.

Madison’s main argument, on which Bentham had plenty to say, was over the impediment to hasty legislation that the Senate would provide by serving as an additional hurdle in the lawmaking process. Madison reminded the American public, “It is a misfortune to republican government, though in a less degree than to other governments, purely accidental and better produced by other means. The date of 1789 is suggested by the Editorial Introduction, id. at liv.

101 8 BENTHAM, Three Tracts on Spanish and Portuguese Affairs, in WORKS, supra note 48, at 468.
102 Id. at 469.
that those who administer it, may forget their obligations to their constituents, and prove unfaithful to their important trust." The Senate addressed this problem in that “it doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one, would otherwise be sufficient.” Madison thought that this point was too obvious that it would be “superfluous to enlarge on it.” What Madison chose to expand on was why “the improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies [the House and Senate].”

It was the Senate’s dissimilarity from the popular house, the House of Representatives, which Madison thought made it less susceptible to succumbing to any sinister interest. The need for a Senate was “indicated by the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions.”

The Senate was more immune from this vice because its members were indirectly selected by the people, had six-year terms, and were generally more mature. Indeed, it seems as though Madison had made out a case for ensuring moral aptitude in at least one chamber of the legislature.

Bentham, aware of Madison’s lines of argument, rejected them outright. He asked this question: “The evil of precipitation (its degree of probability taken into account), does it seem to be of such a

103 THE FEDERALIST NO. 62 (James Madison), supra note 72, at 302.
104 Id.
105 Cf. ROSEN, supra note 42, at 60 (“There is no provision (except perhaps in the minimum age requirements) in the American constitution which positively provides for good government.”). Indeed, Bentham himself wrote, “Appropriate aptitude in branches,” across the top of his copy of Federalist 62. 2 THE FEDERALIST, supra note 99, at 100.
magnitude as to warrant the applications of such an institution in the character of a preventive remedy?” His answer: “Hardly. For: 1. the evil of additional delay is an evil that applies itself to every measure. 2. So does the evil of complication—in every individual case the existence of each one of them is certain.” Bentham’s point was that not only the intemperate and pernicious resolutions that Madison feared would be delayed, but also the beneficial ones. On balance, Bentham thought utility required risking the bad measures and allowing legislation to pass more readily and easily. For he explained: “If in consequence of precipitation, a measure the effect of which is upon the whole preponderantly evil receives the sanction of law, the evil is not incapable of being removed by a subsequent law:—whereas whatsoever is the sum of the delays produced in all measures without distinction by the dilatory system remains for ever uncompensated.” Here, Bentham explicitly uses the language of a utility calculation, and according to his arithmetic, delay and complication of good legislation was not compensated by the prevention of evil legislation. Of course, this was an educated guess—Bentham had not actually counted the number of good laws delayed and bad laws prevented in the United States—but it was not a guess made without reason. Bentham realized the continuing and compounding evil associated with the enactment of a bad law, but he further realized that if the law really “indebted for its existence to precipitation and nothing else . . . still more surely will the system be rid of it, now that the correctness of the general anticipative judgment has been demonstrated by experience.” That Bentham developed this argument principally for the case of the Senate cannot be

107 Id. at 107.
doubted because he wrote, “in no instance antecedent to the formation of the Constitution of the Anglo-American United States has the existence of a Second Chamber had for its cause any such consideration as the affording a security against precipitation.” 108 What is notably absent in Bentham’s writing on this topic, however, is a direct response to the problem of irrational passions temporarily infecting a single, popularly elected chamber. What is frustrating about this aspect of Bentham’s writing is that the absence is not explained in either his not having thought through it or in not understanding the basic workings of the Constitution. Instead the problem is either that Bentham assumed familiarity with his whole body of work—a false assumption in the case of American politicians—or he did not give much weight to the primary concerns of leading men like Madison and thus did not address them directly. Without a doubt Bentham worried about designing men with sinister interests being elected to legislate for a community, but he solved the problem with a highly detailed plan designed to eliminate men from the public’s consideration who did not have the appropriate aptitudes for the job.

Bentham continued to criticize the Senate for the benefit of Greece the following year in 1823. Elimination of the Senate would “render service even to the Constitution of the Anglo-American United States, matchless as it is as yet, and little short of the summit of absolute perfection as it is.” 109 He told the Greeks that the Senate was “a mass of useless, thence worse than useless, complication.” 110 This time, however, he accounted for that body as a facsimile of the

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108 Id. at 110.
110 Id.
House of Lords, in all probability to demonstrate to the new Greek
government the fallacy of blind imitation, even of a country as nearly
perfect as the U.S. was. He sent a similar message to France in 1830
when he wrote a tract called “On Houses of Peers and Senates.”111
He explained that the only cause of attachment to a second chamber
in the United States was the country’s acquaintance with the House
of Lords. The U.S. had established a Senate “without troubling
themselves to inquire into the particular use of it.”112 In this same
paper, however, Bentham was full of praise for American democracy
and urged France to follow suit.

One final word on American bicameralism from Madison will
show just how close his thought was to Bentham’s, yet how far apart
their applications of these principles led them. From what has been
said about Madison, a misinterpretation might follow that he really
did not trust the masses of people to decide for themselves what was
in their best interest, in contrast to Bentham who believed they would
come to their senses in due course. That nothing could be further
from the truth is illustrated by a telling statement made by Madison
while further explaining the value of the Senate: “The people can
never wilfully betray their own interests: But they may possibly be
betrayed by the representatives of the people; and the danger will be
evidently greater where the whole legislative trust is lodged in the
hands of one body of men, than where the concurrence of separate
and dissimilar bodies is required in every public act.”113 Bentham
entirely agreed with the first part of Madison’s sentiment; “the will
of the people would always coincide with the universal interest,” as

111 4 JEREMY BENTHAM, On Houses of Peers and Senates, in THE WORKS OF JEREMY
BENTHAM, supra note 48, at 419.
112 Id. at 448.
113 THE FEDERALIST NO. 63 (James Madison), supra note 72, at 308.
Philip Schofield has explained Bentham’s position.\textsuperscript{114} Bentham also agreed with the second part of Madison’s statement, which is why representative democracy was necessary: to keep the governors subject to the infallible will of the people thus reducing the risk of betrayal. The real sticking point here, however, is not directly over one body or two, but rather concerns what to do when the people mistakenly betray their own interests, either by electing the wrong men to office or supporting bad policy enactments.

According to both Bentham and Madison, the people could never \textit{willfully} mistake the universal interest, but if their understanding was faulty, then they could certainly betray themselves. In a way, the second body acted as insurance against this possibility as well as against internal corruption, and in that sense was quite undemocratic in purpose, despite its semi-democratic pedigree. Does this imply that Madison’s Senate would have had to be composed of Bentham clones, recognizing majority delusion when they saw it and stopping it in its tracks, to function properly?\textsuperscript{115} Although we cannot be certain, Madison likely would not have complained about a Senate full of Benthams, maybe even Benthamites. What we do know is that, privately, Madison was very dubious that minorities would receive protection from intemperate majorities under the newly devised federal system because the state governments were left with so much power to wreak havoc.\textsuperscript{116}


\textsuperscript{115} As Schofield explains, for Bentham, “delusion was the product of fallacy, and, therefore, like fallacy, had its source in sinister interest, interest-begotten prejudice, and authority-begotten prejudice.” SCHOFIELD, \textit{supra} note 76, at 264.

\textsuperscript{116} See RAKOVIĆ, ORIGINAL MEANINGS, \textit{supra} note 16, at 197 (discussing Madison’s letter to Jefferson wherein he laments that the recently drafted Constitution left too much power to the state governments).
IV. THE (IN)FALLIBLE PUBLIC: PROTO-POPULAR CONSTITUTIONALISM

Explaining the different conclusions at which Bentham and Madison arrived regarding the popular will and understanding requires a closer look at historical events that were fresh in the minds of both men. We will begin with Bentham’s conception of the Public Opinion Tribunal and from there we will be able to see why it did not entirely fit with American experience.

The Public Opinion Tribunal was a fictitious entity deployed by Bentham to describe the role and function of the people in his constitutional code. The term was intended to emphasize the sovereign capacity of the masses over the governing elite when it came to the ultimate judgment of what was in the universal interest. As such, the tribunal itself consisted of “potentially everyone.” 117 Bentham’s main concern was that the people be well informed and thus, “the members of this tribunal being among the inhabitants not only of the territory of the political state in question, but of every other territory on the earth’s surface, all such as to the power add the will of taking cognizance of the subject in question.” So, in Schofield’s words, “To belong to the Public Opinion Tribunal one simply needed to form an opinion on the subject in question: the decision thus made by each member of the Public Opinion Tribunal Bentham termed his suffrage.” 118

Bentham’s discussion of the Public Opinion Tribunal in “Economy as Applied to Office” came under the chapter concerned with “maximizing moral responsibility.” 119 Recall that we are

119 BENTHAM, FIRST PRINCIPLES, supra note 106, at 56 (The full chapter heading is “Maximizing moral responsibility—i.e. subjection to reproach at the hands of the
looking for a way that Bentham might have assuaged an American’s, like Madison’s, fears that the public would too often be misled away from the universal interest. It is clear from Bentham’s writings that public opinion is the superior moral force in political society and thus he does have an answer for Madison, but not a uniquely American one. In one of his question and answer sections, Bentham asks directly, “What are the evidences in favour of the rectitude of the decision of the tribunal of public opinion in the case in question?”

Bentham’s answer is equally direct, if not altogether satisfying: “In the nature of [the case, that is to say consistently with the nature of man, rectitude can not be positive: it can be no other than comparative: in other words, of rectitude there can not be a certainty: nothing more than a greater or less degree of probability: taking for the subjects of comparison any such other decisions as the nature of the case can be supposed to admitt of.” Once again Bentham asks us to do the math, and if we do we will see that it is more probable than not that deferring to public opinion is the utilitarian thing to do. It is Bentham’s proof of this proposition, however, that is most enlightening.

The Public Opinion Tribunal was composed of two sections: the Democratical and the Aristocratical. The Democratical Section consisted of “the interest of the subject many,” while the Aristocratical Section was “composed of the ruling and otherwise influential few.” Bentham, like Madison before him, realized that the interests of these two sections were opposite each other. Both men also realized what the cause of that divergence was. For Bentham, it

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120 Id. at 57.
121 Id.
122 Id. at 68–69.
was “the matter of wealth in all its several forms”; for Madison unequal distribution of property was the “insuperable obstacle to a uniformity of interests.” Bentham also realized Madison’s fears, but only in the abstract. Bentham knew that each section would want to enjoy “the largest portion possible” of wealth and the other section to enjoy “in the smallest proportion possible, or what is best of all that it should not be enjoyed in any proportion at all: and by this community of interest is produce a community of sympathy.”

To fully understand the problem that sympathy with a societal section—a faction—can cause, we must realize that it is one of the principles adverse to utility because in acting on such a motive one approves or disapproves of an act “disclaiming the necessity of looking out for any extrinsic ground.” The trouble is potentially compounded when the Democratical Section of the Public Opinion Tribunal is motivated by sympathy with each other because in a representative democracy they have the power to act on this principle and thereby bring about an anti-utilitarian outcome. We have already seen Madison express this fear using Humean philosophy, and we have also seen how Bentham used the disappointment prevention principle to quell a similar fear. In this case, we will see why Bentham thinks the people themselves will come to see the rightness of utility over the wrongness of sympathy.

Bentham responds to Madisonian fears in a discussion of obligations. “In regard to obligations,” Bentham writes, “it is the interest of the subject many that they be fulfilled in as large a

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123 Id. at 71.
124 THE FEDERALIST NO. 10 (James Madison), supra note 83, at 41.
125 BENTHAM, FIRST PRINCIPLES, supra note 106, at 71.
126 BENTHAM, IPML, supra note 40, at 25.
127 See supra text accompanying notes 90–97.
proportion as possible.”128 This does not mean that men would not shake off burdensome obligations but for the force of law; we know that on occasion, an individual might calculate his immediate pleasure to be quite great if he were able to ignore an obligation without being sued in contract, for example. “But forasmuch as in the general fulfilment of the aggregate of the obligations he always has more or less enjoyment to hope for,” Bentham explains, “and from the general non-fulfilment of them nothing at all—and so, whatsoever be the proportion in question, more to hope from the fulfilment of it than from the non-fulfilment of it.”129 Here, Bentham is saying that an individual must consider obligations in the aggregate to realize that the short-term pleasure he might gain from breaking a contract or promise will, in the long run, bring about more pain than pleasure to himself. It is important to emphasize that considering the aggregate of obligations does not mean that one has to consider the public good at the expense of self-interest, because that is precisely not what utilitarianism calls for. Bentham is saying that an individual should consider the long-term view personally, and realize that if he breaks a promise, he might be the next one who is unexpectedly left unfulfilled. As Bentham puts it, “the class to which he belongs he can not find for the claiming of any preference for himself in this particular any pretence which other men of that same section or of the other sections would be disposed to be in any degree influenced by.”130 In other words, if obligations are not honored as a matter of course, and each individual accepts that there is nothing special about him that would enforce an obligation favorable to him, then all will conclude that the universal interest is

128 BENTHAM, FIRST PRINCIPLES, supra note 106, at 72.
129 Id.
130 Id.
promoted by honoring obligations. Bentham concludes, “thus it is that in this class [the subject many] the interest and desire of each are in pretty uniform accordance with the interest and desire of all.”

Bentham then explained why the subject many would never enact a law canceling their obligations to the rich and powerful: “In regard to oppression in its several other shapes, and that of depredation in particular, it is in like manner the interest of every member of the subject many that it should not at any time or place be committed by any person in any of its shapes.” Accordingly, it followed that if it were proposed to be made impossible by law to break obligations with impunity, to oppress the subject many, or to commit other depredations against the wealthy, then an individual asked to cast a vote on such a proposal “would be of course in favour of it.”

Bentham recognized a possible exception to such action by the subject many to which we will turn next. But Bentham also determined that in no existing government, “the Anglo-American United States excepted,” did the Aristocratical Section’s interests accord with the universal interest. This explained why it was only the opinion of the Democratical Section that was to receive a place of prominence within Bentham’s constitutional theory.

The exception Bentham noted to a member of the subject many recognizing the universal interest was where “the excitation [of] some extraordinary violent appetite, accompanied with an apparent chance of its finding in his instance a gratification by his means, he were for the moment so blinded to the aggregate interest of his whole life, as to sacrifice it to the interest of the moment in respect of the

131 Id. Indeed, Bentham reaches new syntactical heights in some of the quotations in this paragraph.
132 Id.
133 Id.
134 Id. at 73.
affording a gratification to such his appetite.” Madison put the concern this way: “So strong is the propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts.” It is interesting to note the commonality of sentiment between Bentham and Madison in discussing the subject many: they have a tendency toward violence, motivated by unreasoned passion, which ignores the aggregate interest, or “common good.” The difference between them is that Bentham relegated his concern to a footnote, while Madison made it the subject of his most famous essay. Bentham did explain a bit further his complaisance with the subject many. He admitted that “the judgment of the Democratical Section has many errors in it . . . But in proportion as it becomes more and more mature, it becomes more and more conformable to the universal interest: whereas the judgment of the Aristocratical Section as it becomes more and more mature, becomes more and more adverse and prejudicial to the universal interest.” Bentham’s conclusion, while undoubtedly based on experience, is clearly tinged with a good deal of faith. Likewise, Madison’s lack of faith might similarly be traced to his experience, or lack thereof, with mature governments.

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135 Id. at 72.
136 THE FEDERALIST NO. 10 (James Madison), supra note 72, at 42.
137 BENTHAM, FIRST PRINCIPLES, supra note 106, at 76.
138 Cf. Schneewind, supra note 35, at 189 (discussing James Harrington as a classical republican: “He thinks that once people are rightly organized they will acquire the virtue of good citizens”).
V. WOULD-BE LEGISLATOR OF THE UNITED STATES

About fifteen years after Bentham wrote (or thought of writing) to Franklin urging him to use IPML to bring prosperity to the new country, he sent a letter to John Jay, the first Chief Justice of the United States, asking Jay to make use of another work of his, this one on the judiciary. Bentham “could not resist the opportunity of putting it into the hands of the most competent Judges America can afford.” He also indicated in his short message to Jay that had he not exhausted his stock of Tactics of Political Assemblies, he would have sent that as well. It is clear, however, that Bentham considered America in 1795 a fit polity to receive and make good use of his work. He went so far as to ask Jay if he thought some American booksellers might be interested in having copies of his works, for which purpose he was willing to have more printed. Since we know this letter actually made its way to Jay, we can trace Bentham’s serious interest in influencing the United States to at least the late-eighteenth century. However, it was not until the second decade of the nineteenth century that Bentham devoted his full energies to persuading Americans to accept his codification efforts.

In October 1811, Bentham wrote a lengthy letter to the President of the United States, who at that time happened to be none other than James Madison. The correspondence contained an official offer from Bentham to draw up “a compleat body of proposed law, in the form of Statute law: say, in one word, a Pannomion.” The purpose of the proposed code was to supersede “that mass of foreign law, the yoke of which, in the wordless, as well as boundless, and shapeless shape

140 Published as JEREMY BENTHAM, POLITICAL TACTICS (Michael James et al. eds., 1999).
141 Letter from Jeremy Bentham to John Jay, supra note 139.
of common, alias unwritten law.” Although Bentham claimed that the offer was submitted for consideration “not to the person but to the Office” of President, internal evidence suggests that Bentham knew well his intended addressee.\footnote{Letter from Jeremy Bentham to James Madison (Oct. 1811), in ‘Legislator of the World’: Writings on Codification, Law, and Education 5 (Philip Schofield & Jonathan Harris eds., 1998).}

Bentham began by laying out the form his code would take, then discussing the advantages promised the recipient country, and finally he pre-empted several objections with lengthy rebuttals. The details of Bentham’s Pannomion are well set out elsewhere,\footnote{See Philip Schofield, Jeremy Bentham: Legislator of the World, 51 Current Legal Probs. 115, 120 (1998).} and it should come as no surprise that his plan was not unique to the United States. Since \textit{A Fragment on Government}, he had been making the claim, “That which is Law, is, in different countries, widely different: while that which ought to be, is in all countries to a great degree the same.”\footnote{BENTHAM, FRAGMENT, supra note 57, at 8.} What was unique in his 1811 letter to Madison was his mode of argument, including his set of answers to supposed objections, which he presumably thought would resonate with an American audience, and Madison in particular.

The first objection Bentham answered concerned a very Madisonian preoccupation, “Disturbance to property, and other existing rights.”\footnote{Letter from Jeremy Bentham to James Madison, supra note 142, at 18.} “So far as the objection confines itself to the law of private rights,”\footnote{Id.} Bentham responded, “when these and any other number of declamatory generalities in the same strain have been expended, the only real mischief which they hold up to view, is, that which is reducible to this one expression—to existing expectations, disappointment, productive of the painful sense of loss.”\footnote{Id.} This answer

\begin{footnotes}
\item[144] BENTHAM, FRAGMENT, supra note 57, at 8.
\item[145] Letter from Jeremy Bentham to James Madison, supra note 142, at 18.
\item[146] Id.
\item[147] Id.
\end{footnotes}
was utilitarian to be sure, and emphasized how protecting expectations and preventing disappointment was conducive to happiness. Yet again, we see Bentham employing the disappointment prevention principle as the basis for private property protections. He further detailed how unwritten law could only lead to uncertainty and thus did more to harm private rights than was realized. The point here, however, is that Bentham was focusing on a very explicit concern of Madison’s, expressed rather strongly in the *Federalist*.

The second objection Bentham predicted was this: “*Foreign Yoke. — It was to free ourselves from the yoke of foreign law, that we took up arms against the Monarch of England; and shall an obscure subject of the same nation fasten another such yoke upon our necks?*” Bentham’s answer to this objection was in part that a foreigner could provide the objectivity and rational distance necessary to successfully undertake such a project. However, Bentham raised the specter of “local, as well as personal, enmities and partialities,” i.e., factions, as otherwise hampering acceptance of a code composed by any American. “Discussions of this sort do not, it must be confessed, shed any very brilliant lustre upon human nature,” Bentham lamented, “but so it is, that we are constituted: and, being thus constituted, it is impossible for us to act either prudently or beneficially, any further than as we know ourselves for what we are.” On the other hand, Bentham acknowledged that falling in with a faction “depends not altogether upon [a man’s] will,” rather it might be the result of what passes before his eyes, in other words, something that misleads his understanding. If this scientific description of human nature was not Madisonian enough, Bentham then remarked on two specific factions faced by the United States: the divisions between “northern and southern” and “democrat and federalist.” Were a member of one of

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148 *Id.* at 22.
these sides to author such a code of laws, the opposing side would repel it based, not on utility or the universal interest, but on the factional interest, or in sympathy with the faction. Bentham tried to assure Madison that this was not a criticism of the U.S., but merely a recognition of the case “wherever there have been parties: — wherever there has been either liberty, or the appearance of it. If to this rule the land of the United States afford an exception, it is a land — not of men, but angels.”

149 It is difficult to know what to say of these sections of Bentham’s letter to Madison, which not so subtly echo Federalist 51. It might be that Bentham was attempting to use Madison’s language to show his admiration for his thought and to show their common foundational beliefs. However, it also sounds as though there is a slight mocking of the author of The Federalist, using the arguments found there to confine its author into acceptance of Bentham’s arguments. Because it is unlikely that Bentham would have been deliberately trying to affront the very person on whose help he was depending, the latter interpretation is unlikely. However, it does show that Bentham’s sense of self-assuredness did not always translate the way he might have liked. If indeed this was a case where he had read The Federalist and correctly attributed it to Madison, then the roundabout way of arguing was not well suited to gaining acceptance. It seems a straightforward recognition of, and agreement with, Madison’s works would have served him better, at least rhetorically.150

149 Id. at 25.
150 This language is uncannily similar to Madison’s language in Federalist 51. See supra text accompanying note 88. We know that Bentham eventually did read this very section of Federalist 51. See 2 THE FEDERALIST, supra note 99, at 27–28 (underlining this section of the essay). However, Bentham did not receive this copy of The Federalist until 1812, the year after he initially wrote to Madison.
In the same letter to Madison, Bentham noted that he had already made many advances on several codes, including penal, civil, judicial, procedural, evidence, but not yet a constitutional code. Bentham only raised the issue of constitutional law “to shew that it has not been overlooked.” However, he was satisfied that “no demand for alteration has presented itself to my view, nor should I myself be disposed to look out for any.” It would seem that Bentham wanted to show his admiration and respect for the U.S. Constitution as it stood. Thus, in his Pannomion it would be “transcribed without the alteration of an iota.”151 When Bentham wrote a series of letters to the American public six years later in 1817 urging on them the same Pannomion, he also praised the Constitution: “To the values of this Constitutional Law of yours, you are none of you insensible. You hug it to your hearts, as the main source of, and security for, whatsoever you enjoy.”152 Well then, Bentham thought, the same affection could be shown for statute law and Americans would be none the more insensible for it.

One of the reasons Bentham wrote the series of letters to “the Citizens of the several American United States” in 1817 was because Madison had responded the previous year in a less than encouraging way. Nearly five years after Bentham had written to the President, Madison wrote back in May 1816. The delay is partially explained by the intervening War of 1812 between the U.S. and Great Britain, which was not concluded until 1814–1815. Madison’s letter is rather terse and amounts to a “thanks, but no thanks” response. He praised Bentham’s scheme, admired the idea of a digest of American laws, but ultimately doubted that the entirety of the nation’s laws could

151 Letter from Jeremy Bentham to James Madison, supra note 142, at 32.
really be reduced to a written code. Moreover, Madison reminded Bentham that much of the common law's jurisdiction was essentially the concern of the states and not the federal government.\footnote{See Letter from James Madison to Jeremy Bentham (May 8, 1816), in id. at 36.} However, this was precisely the type of response that provoked Bentham into his hyper-rationalist mode as can be seen from his response.

Bentham responded to Madison over a year later when Madison was no longer president. Thus, it seems that this letter can be read in no other way than as a personal response to James Madison and not just to a former occupant of the White House. It did not take Bentham long to begin quoting Madison's letter back to him, explaining why he had misjudged Bentham's proposal, and specifying each sentence that he felt Madison had wrong. Along with the 1817 response, Bentham sent to Madison copies of favorable responses he had received in the intervening years from various state governors, apparently to prove to Madison that at least some Americans believed in him.\footnote{See Letter from Jeremy Bentham to James Madison (Sept. 1817), in id. at 173.}

Never short on ambition, even at age 82, Bentham wrote in 1830 to another American President, Andrew Jackson.\footnote{Letter from Jeremy Bentham to Andrew Jackson (Apr. 26, 1830), in 11 BENTHAM, WORKS, supra note 48, at 39.} After listing his credentials concerning his relations with past American officials, Bentham noted that he enclosed his codification proposal and then summarized some of his suggestions he thought might be favored by Jackson based upon his reading of Jackson's inaugural address. Unfortunately, Bentham made a number of errors in his final attempt at getting American attention, and these miscalculations had nothing to do with a lack of understanding of the constitutional system; rather Bentham proved his ignorance of petty partisan politics. He began by telling Jackson of his “acquaintance which ripened into an
intimacy” with his predecessor John Quincy Adams. He then expressed his disappointment upon “learning of [Adams’s] failing to receive the customary additions to his term of service.” 156 Writing these words to a man who thought Adams had stolen the presidency from him four years earlier was unwise to say the least. 157 What must have been downright scandalous for Jackson to read was this: “upon reading your Presidential Message, I found that, upon the whole, your sentiments were not only as fully in accordance with mine as his [Adams’s] had been . . . but that they were so, and I trust remain so, in a still more extensive degree, embracing several topics which, between him and me, had never been touched upon.” 158 One wonders what Jackson thought upon reading an Englishman 159 telling him he and his enemy, John Quincy Adams, had similar thoughts in politics and legislation. If that were not enough to sour Jackson, who had begun his political career as a U.S. Senator from Tennessee, Bentham went on to explain why the Senate was “much

156 Id. As the sixth president, J.Q. Adams was only the second president not to receive a second term in office, his father being the first.
157 Even though Jackson received more popular votes than Adams in the 1824 presidential election, no candidate achieved the required majority of electoral votes and thus the House of Representatives selected the president, in this case, Adams. Jackson and his supporters accused Adams of a “corrupt bargain” to secure the presidency. Jackson then spent the next four years campaigning against Adams. See DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 275 (2007) (“The campaign for the presidential election of 1828 lasted the whole four years of John Quincy Adams’s administration.”).
158 Letter from Jeremy Bentham to Andrew Jackson, supra note 155, at 40. The message to which Bentham referred was Jackson’s 1829 inaugural speech. See Andrew Jackson, First Inaugural Address, THE AVALON PROJECT (Mar. 4, 1829), http://avalon.law.yale.edu/19th_century/jackson1.asp.
159 Jackson was a war hero because of his leadership in the decisive victory over the British at the Battle of New Orleans on January 8, 1815.
worse than useless.” 160 So ended Bentham’s formal attempts at legislating for the Anglo-American United States.

CONCLUSION

Even though Jeremy Bentham always claimed the American arguments in favor of independence from Britain were poorly set out, he clearly came around to the idea of American independence, even if on his own terms. From a modern perspective, enamored by rights talk as we are, 161 it is difficult to understand how someone as opposed to natural rights as Bentham could have come to admire a country organized around documents proclaiming “inalienable rights” and adorned with bills of rights. Even in the early to mid-twentieth century it was difficult for historians to see past the language of rights as it was becoming increasingly important in the legal context and thus in the lives of ordinary citizens. However, at least through the mid-nineteenth century, the type of liberal individualism we now associate with rights was nowhere to be seen in America. Instead a tradition of civic republicanism ruled the day, taking the organization of the community as its most central concern. It is within this republican tradition that Bentham was able to see beyond the rhetoric down to the core of American government, in which democracy was gradually gaining acceptance as Andrew Jackson’s election demonstrates. Thus, Bentham was most certainly correct that his own ideas were nearer Jackson’s than Adams’s. But as Bentham saw, perhaps even more clearly than many American historians, there was no fundamental tension between the arguments made in 1787 in favor of the Constitution and the rise of democratic

160 Letter from Jeremy Bentham to Andrew Jackson (Jan. 10, 1830), supra note 155, at 41.
government exemplified in Jackson’s Inaugural Address that so pleased Bentham. That is why Bentham could write to Franklin, Jay, Burr, Madison, Adams, and Jackson, and legitimately expect that all would take his ideas seriously.

Madison’s delayed and half-hearted response to Bentham was certainly the most disappointing exchange Bentham had with an American. Madison alone among the American founders came nearest to Bentham in expounding a utilitarian rationale for his chosen form of government. While they disagreed about specifics, they both understood the centrality of government in producing virtuous citizens and rulers. Their shared Enlightenment assumptions about human nature resulted in texts that are remarkably compatible, but it seems that only Bentham came to this realization. To the extent Madison’s words still have relevance to the continuous reshaping of American government,162 then Bentham’s criticisms and commentaries on the same must be considered equally useful in achieving a more perfect—or at least more utilitarian—union.