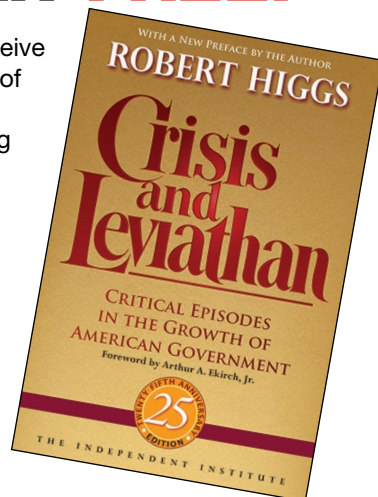


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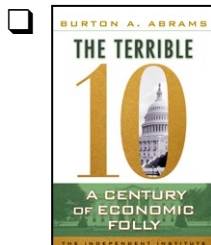
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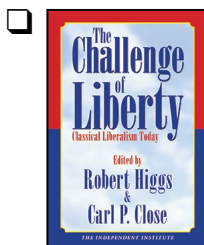
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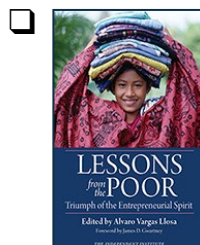
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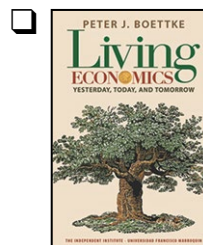
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REVIEW ESSAY

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# Pufendorf, Grotius, and Locke

## *Who Is the Real Father of America's Founding Political Ideas?*



HANS L. EICHOLZ

Scholars frequently initiate debates by offering bold claims for their proffered interpretations. The liberal and republican exchange in American political history was first cast as a choice of either/or, but not both. The former claimed all for John Locke and liberalism, whereas the latter asserted everything for republicanism and tradition (see, for example, the debate between Lance Banning [1986] and Joyce Appleby [1986] on the nature of Jefferson's ideological commitments and the proper interpretation of the politics of the early republic). Other controversies have witnessed much the same stances. Perry Miller long insisted on giving pride of place to New England in the shaping of the American mind (Zaki 1985). Jack Greene (1988) later proclaimed the southern colonial experience as primary, leaving little or nothing for the Puritans. John Philip Reid (1993) gave all glory to the common law in America and had little time for anything or anybody else. Debates often proceed in such fashion. Stating the extreme case can clarify the contours of an issue. Doing so aids, rather than impedes, the quest for truth so long as we take the next step: a considered application to the inevitable complexities of history.

The lasting influence of such debates has been a tempered, more richly variegated sense of the past. Now comes Mark Hulliung's *The Social Contract in America*:

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*From the Revolution to the Present Age* (2007). It is an ambitious title. From it, we might legitimately expect an attempt to grapple with the questions that these earlier works in the history of ideas have left to us and to provide guidance in fitting together the various pieces of the puzzle. Hulliung indeed claims that “theories, not a single *theory*, will be my concern, for the social contract was not one but several.” We quickly realize, however, that several means exactly three: “Mine is a study of the Americanization of Hugo Grotius and Samuel Pufendorf as well as of the more widely recognized John Locke” (p. vii, emphasis in original). Moreover, well before one reaches the end of the work, it becomes clear that even with the acknowledgment of Pufendorf and Grotius, primacy of place is to be accorded to Locke alone. That conclusion is not by itself a bad thing, but Hulliung, rather than giving us a wider perspective on the context of these ideas, treats us to an ever more streamlined trajectory of one particular vision of the social contract. I am not saying that the author should have written a different book, but that to write on the broader historical subject he staked out, he needed to take into account certain historical facts his predecessors unearthed that are essential to his topic.

Hulliung’s approach is all the more startling given that one of his primary readership targets is *historians*. He writes in large measure to convince them to get involved in the public arena. To many devoted scholars, this exhortation would be alarming in itself. Although I am not generally averse to getting involved in public debate, the instinct to maintain more distance would be correct in this case. Hulliung is making his appeal to historians of a particular political stripe, not to the profession in general. This focus makes his neglect of certain aspects of the subject more understandable, if still regrettable.

Hulliung asserts that current political debate generally sends historians running for the exits. Rather than suffer a litany of inaccuracies, scholars generally retreat to the security of their libraries. He would like them to linger a while, to correct the misapplication of the ideas of popular consent and social contract that pop up from time to time. Everyone seems to claim primacy for some social-contract theory, but all too frequently we are treated to a theoretical hodge-podge uninformed by an awareness of the ideas’ origin (p. viii). Unless we are deeply read in the history of political theory, we cannot know whether the ideas being invoked originated with John Locke, Samuel Pufendorf, or Hugo Grotius.

Aside from the scholarly interest in accuracy, it is not entirely clear at first why Hulliung is so concerned to tidy up the lines of argument, especially inasmuch as his own history shows that the invocation and mixing of the various strands of social-contract thinking have been going on from the beginning of the debate. For some reason, our author appears to be deeply offended by what he considers the admixture of philosophically inconsistent principles. Perhaps he is dismayed because we might be tricked into accepting one theory when we mean to act upon another?

Locke’s notion is the more radical viewpoint, as Hulliung notes, and Pufendorf’s and Grotius’s are more conservative. The Lockean contract is produced when the

people contract among themselves to form a state (p. 2). Pufendorf (p. 2) and Grotius (p. 16), writing somewhat earlier in the seventeenth century, produced a variation on Hobbes's thinking. For them, the people enter into a contract with their rulers, with government, as though it were a separate entity. In fact, Hulliung points out, this latter idea was the predominant theory adopted by the Old Whigs of the English Glorious Revolution, not Locke's idea, which apparently influenced no more than 10 percent of the pamphlets of that time. American Whigs initially took the same approach to resist Parliament, contending that they were merely defending their rights as English subjects, and they embraced Locke only when they finally decided to leave the empire. Later, these Old Whigs, as Anti-Federalists, would engage the American Lockean Federalists to produce some interesting anomalies in both theory and practice.

Among the most famous mixing of the different theories, of course, is the theoretical inconsistency embodied in the U.S. Constitution, specifically the request for a bill of rights from a government that is merely derivative of the rights of the people (p. 31). Powers and rights not explicitly relinquished to the government are supposed to be retained by the people. But the bill of rights is not necessarily a bad thing for liberty, considering that government officials, elected or not, will often abuse their power and act like a distinct ruling class set apart from the general mass of the people. This possibility was well understood at the time of the founding and explains why many Founders consciously approved the Bill of Rights over James Madison and Alexander Hamilton's theoretical objections.

This fastidious parsing of the theoretical arguments of the American Revolution and the earlier Glorious Revolution in England is an interesting exercise in philosophical analysis, but its historical significance to the American revolutionaries is of limited value. American patriots usually had in mind the whole panoply of Whig arguments against arbitrary government power, which included the more radical Whig ideas as well as the more conservative ideas based on tradition and law. They lumped together Locke, Sydney, and even Coke when referencing the Old or Real Whigs, much as Trenchard and Gordon's influential pamphlets and essays did in the 1720s. That the Old Whigs may have been predominantly of the more conservative variety rather than of the Lockean sort did not matter much. What mattered above all was that the Whig tradition in general held power to account for its exercise.

Another difficulty with Hulliung's quest to categorize American ideas along these three lines is that both reformers and reactionaries might invoke his three principal theorists in various historical moments. One might deploy Locke for conservative purposes, as the Loyalists did during the revolution (p. 18) and St. George Tucker did much later (pp. 54–55). One might even cite Grotius to make a claim for the redistribution of land, as the agrarian radicals of the 1840s did (pp. 85–86). Creative minds can bend any text to their purposes. At the very least, this possibility should indicate the need to broaden the context in which these ideas were played out, but Hulliung's focus actually becomes narrower.

He clearly wants us to be attentive to when an “incorrect” argument about the nature of our government is being smuggled in through the back door. He takes special pains, for example, to focus on what he views as the peculiar ironies of Justice Clarence Thomas’s constitutional reasoning, especially Thomas’s making the case for federalism by observing that the people consented not as an undifferentiated mass, but in state conventions. In this connection, we get the first glimmer of the real source of Hulliung’s umbrage: he takes the strong nationalist view, as expressed, for example, by the later Daniel Webster and by some early Federalists, such as John Marshall. These men heard only the word *national* when Madison described the Constitution, whereas Madison himself had said “partly federal” and “partly national” (Federalist No. 39). According to Hulliung, to take Thomas’s position is to assert the Southern antebellum slaveholders’ version of the social contract rather than Locke’s. Hulliung correctly calls the Federalist essays a “quasi-nationalist position” (p. 5). But *quasi* means “almost but not quite,” rather than “essentially so,” as Hulliung seems to intend.

This position is a very odd one for a historian to take. As advocacy papers, the Federalist essays were written to appeal to the opposition and the undecided, to persuade them that the new government’s greater powers were not to be feared. They have usually been read as presenting a case for more energetic powers, but not for nationalist government per se. They leave considerable room for a consistent *federal* reading of the nature of the people in the Constitution. Indeed, some of the most powerful statements in favor of the states as checks to central authority were authored by none other than that “arch nationalist” himself, Alexander Hamilton (see, for example, Federalist No. 17 and No. 28).

Madison, far from being obviously inconsistent with the Federalist papers in later life when he authored the Virginia resolution against the Alien and Sedition Acts, as Hulliung asserts, can be seen as remaining within his earlier understanding of the partly federal nature of the Constitution. Hulliung more than implies that Federalist No. 39, from which Clarence Thomas draws much of his jurisprudential reasoning, ought simply to be ignored (p. 5). He apparently does not approve of how Madison himself later developed the argument or of how others carried it further, but he can hardly claim that Thomas’s position is not an “original understanding” or that it was peculiar to Southern slaveholders. Even if he disagrees with the idea that Madison remained consistent in his understanding of the Constitution, he ought to have given some consideration to that view. He disregards *The Sacred Fire of Liberty* (1995), in which Lance Banning argues for a consistent Madison. Moreover, other historians are not all that Hulliung leaves out.

He also neglects the fact that Daniel Webster, while a young representative from New Hampshire, called for interposition in opposition to the War of 1812. Most of the arguments that later antebellum Southern representatives would raise had been deployed initially by Federalists in the New England states to protest the interdiction

of trade or the war with England. Hulliung makes no mention of the Hartford Convention. Here then is the real problem with his analysis: much of the relevant history is simply missing.

The most glaring and egregious omission is the covenanting tradition of colonial times. Colonial notions of consent, whether in New England, the Middle Colonies, or the South, go unmentioned. The only suggestion that such ideas might have existed is the offhand manner in which Hulliung treats John Quincy Adams's belief in a Puritan tradition of popular consent; according to him, it set "the tone for all subsequent Whig misreadings of New England's past" (p. 72). Really? At the very least, a study of the idea of the social contract in America ought to consider the documentary evidence assembled by Donald Lutz (1998) that a tradition of popular consent predated Locke's treatise by "more than half a century." The reason for such omission may be Hulliung's conviction that "Americans had their own ideas, derived from the theory of the social contract, about political principles, their establishment and renewal." And yet we find that these principles are not so much their own: "the principles in question are Locke's revolutionary principles" (p. 33). Or even more boldly: "Constitutional conventions popularly ratified are direct outgrowths, intellectually, of social contract theory—or, rather, of one version of social contract theory: Locke's" (p. 47). Thus, Hulliung jettisons considerable context in favor of a very streamlined discussion of the influence of three major theorists of the social contract, with principle energy going to John Locke.

Hulliung's concern with the application of these specific ideas replicates a thesis Arthur Schlesinger Jr. put forward many years ago: American history moves in cycles, swinging from moments of liberal reform to moments of conservative reaction. For Hulliung, however, the only history that matters is the invocation of specific theories; in particular, he portrays American intellectual history as swinging from radical invocations of Locke in one period to appeals based on conservative social-contract theorists such as Pufendorf and Grotius in another.

For Hulliung, however, the ultimate champion remains Locke. When I initially read, "What is needed, and what I shall provide, is a sustained effort to retrieve the history of the social contract in America" (p. 6), I thought that Hulliung would present a general history of the various ideas of the social contract. It quickly became apparent to me, however, that he would present a *particular* understanding of that philosophy in America. In his view, when Americans finally decided to break from England in 1776, they selected John Locke's political theory to justify their actions. When the Federalists wrote the Constitution, they drew from Locke's theory of the social contract. For Hulliung, these moments constitute America's social contract: "The Declaration of Independence and the Constitution of the United States are parts of one consistent whole, founded upon one and the same theory of government . . . expounded in the writings of Locke" (p. 149). Hulliung then moves this idea relentlessly forward to the conclusion he regards as its logical culmination.

According to Hulliung, Americans must try to reclaim the language of Locke to repair what he sees as a severe depreciation of our present moral and political language. In the absence of a unitary Lockean understanding, he asserts, “Labor is in disarray; the welfare state is imperiled, and the most shrill forms of religion threaten to intrude into all matters of public life” (p. 205). Locke provided the appropriate framework for speaking about *the People*, undifferentiated and singular; moreover, their rights and their national expression are the business of our national government. Hulliung examines Franklin D. Roosevelt and approves the early New Deal as “a great deal like the fully realized social contract theory of yesteryear.” He laments that to “pass Social Security, New Dealers had to sell it as something ‘earned,’ an insurance program, in contrast to color-coded welfare.” The consequence was “that his welfare program appeared to be exactly what he had originally wished to avoid, less a statement of ‘universal principles’ than the position of a political party” (p. 202).

It is fairly clear why some readers are drawn to Hulliung’s thesis. For many embattled defenders of Locke’s influence in America, *any* statement that gives him main billing is welcome. For others, a particular configuration of political ideas informs their interpretation of American institutions. Hulliung, it turns out, is really a political theorist who travels far with those who see a main line of argument running from Locke to Jefferson to Madison to Lincoln to the modern welfare state.

Here is the general outline. Locke conceived the necessity of the People and their consent to government. Jefferson birthed the People by applying Locke’s theoretical apparatus in the Declaration. Madison raised the infant to toddler status through the Constitution in the early republic, and Lincoln brought the People to full manhood through the right of passage called the Civil War. Hulliung adds a few additional heroes. FDR showed some promise, but political realities (read, conservatives on the bench or in Congress) kept him from doing what was needed. “Try as he might to confer constitutional invulnerability on social rights, Roosevelt could not elevate them above the unstable realm of party politics. Economic rights, despite his best efforts, remained far removed from the saving larger context of the social contract to which FDR had originally aspired” (p. 203). Martin Luther King was the last to invoke the Declaration’s ideals effectively, but, alas, no one else has paid much attention to it since (pp. 169–71).

The key document in Hulliung’s view really is the Declaration of Independence. References to it permeate his work. That focus in itself is not objectionable in the slightest. What is objectionable is the singularity of meaning imparted to the text. Hulliung decries the scholars who emphasize its structure as a legal brief protesting specific wrongs or its instrumentality in garnering foreign support for American independence, claiming that such attempts often serve to “demote the preamble” (p. 143). As one who has also defended the Declaration’s Lockean basis, I have much sympathy with Hulliung’s effort, but he goes too far when he asserts that this view entails a very particular reading of Locke and implications for American political order.

The Declaration's preamble provides the necessary basis for rights and the reasons for limited government based on popular consent and the rule of law. The grievances, however, provide a powerful reflection on the sort of government the Americans had in mind: a decentralized, federal structure, with checks and balances. The king was held to account precisely for his violation of what had been perceived as the just basis of the old imperial Constitution. This more inclusive view makes the history of the Declaration more richly textured and interesting and sets the antebellum debates in new relief. America's social contract is not one or two documents, but at the very least must also embrace the state constitutions, their preambles and declarations of rights, and the ideas of reserved powers. Such a reading goes a long way toward explaining why a number of abolitionists were initially willing to jettison the South rather than compel such bad company to remain in the Union and why Southerners, although decrying the passages proclaiming all men to be equal and endowed with certain unalienable rights, still felt confident that they would be allowed to leave. Hulliung does present a nice listing of the Declaration's many Southern detractors, which is useful to those interested in the antebellum Southern social thought, but he misses an opportunity to delve more deeply into the nature of this very peculiar intellectual development (pp. 53–64, 159–62).

Far from implying only one unified polity, one leviathan state, the Declaration provides in its very language and structure the ideal grounding of a federal polity with a national government that possesses only delegated powers. A fuller consideration of the history, both of the American experience prior to the revolution and of the manifestations of compact theory elsewhere in the states, would have gone a long way toward obviating these errors.

A review of Hulliung's sources reveals something else of interest. When he considers historians, it is almost always to chide them for their lack of attention to Locke, the one major exception being R. R. Palmer, whose monumental *Age of the Democratic Revolution* (1959) Hulliung much approves (pp. 5, 7–8). Fair enough. Most of his interpretation, however, comes not from history, but from theorists! Save for the Declaration and the Constitution, the reader will find little context in which to situate Hulliung's thesis.

The fourth chapter, on why Edmund Burke never found a welcome home in America, is an interesting read by itself, but it stands out as a peculiar speculative aside, and it tends further to underscore the theoretical nature of Hulliung's overall project.

A theoretical treatise about what America should be is not a full treatment of the history of the social contract in America, which Hulliung promised us at the outset. We have had many defenses of Locke's influence in America. We need now to situate his ideas in a context that includes the covenantal theories that preceded him and to take seriously the many ways in which Americans combined and recombined his views with their own ideas and experiences, taking care not to force those expressions into boxes marked "Pufendorf," "Grotius," and "Locke."



## References

- Appleby, Joyce. 1986. Republicanism in Old and New Contexts. *William and Mary Quarterly*, 3rd Series (January): 20–34.
- Banning, Lance. 1986. Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic. *William and Mary Quarterly*, 3rd Series (January): 4–19.
- . 1995. *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*. Ithaca, N.Y.: Cornell University Press.
- Greene, Jack P. 1988. *Pursuits of Happiness: The Social Development of Early Modern British Colonies and the Formation of American Culture*. Chapel Hill: University of North Carolina Press.
- Hullington, Mark. 2007. *The Social Contract in America: From the Revolution to the Present Age*. Lawrence: Kansas University Press.
- Lutz, Donald, ed. 1998. *Colonial Origins of the American Constitution*. Indianapolis, Ind.: Liberty Fund.
- Palmer, R. R. 1959. *The Age of the Democratic Revolution: A Political History of Europe and America, 1760–1800*. Princeton, N.J.: Princeton University Press.
- Reid, John Phillip. 1993. *The Constitutional History of the American Revolution*. 4 vols. Madison: University of Wisconsin Press.
- Zaki, Avihu. 1985. “Epiphany at Matadi”: Perry Miller’s Orthodoxy in Massachusetts and the Meaning of American History. *Reviews in American History* 13 (December): 627–41.